ARBITRATION

the international journal of arbitration, mediation and dispute management

Volume 75, No. 2

May 2009

ISSN 00037877

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Contents

Volume 75 Number 2 **May 2009**

Contributors iv

Editorial 147

Articles

Sanctity of Foreign Awards: Recent Developments in India *Raghav Sharma* 148

US Discovery in Aid of Foreign or International Proceedings: Recent Developments Relating to 28 U.S.C. section 1782 *Jane Wessel and Peter J. Eyre* 158

Discussion

International Arbitration: How Can it Deliver on its Promise?

Michael Davison and Lucja Nowak 163

Lectures, Addresses and Conference Papers

East Asia Branch, Chartered Institute of Arbitrators, Hong Kong 2008

Mediation in Arbitration in the Pursuit of Justice *Lord Woolf* 169

Association of Independent Construction Adjudicators, Annual Conference, London 2008

Forget ADR! Think A or D? *Sir Anthony Evans* 177

CIArb International Dispute Resolution Conference, Kuala Lumpur 2008

Past, Present and Future Perspectives of Arbitration *Karl-Heinz Böckstiegel* 181

Dealing with Multi-Tiered Dispute Resolution Process *Doug Jones* 188

Arbitrating with Different Legal Traditions: Civil Law *Richard H. Kreindler* 199

Arbitration of Investment Disputes: a Malaysian Perspective *Dato' Cecil Abraham* 206

Specific Issues in Islamic Dispute Resolution *Mohamed Ismail Mohamed Shariff* 213

Specific Issues in Islamic Dispute Resolution *Mark Hoyle* 219

Is Adjudication Killing Arbitration? *Rashda Rana* 223

Maritime Disputes: Now and in the Future *Bruce Harris* 231

Adjudication and Arbitration: The When and Why in Construction Disputes *John Tackaberry* 235

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Conference Overview *Anthony Connerty* 244

The Changing Political Environment for Investment Agreements *Andrew W.A. Berkeley* 248

Can Good Offices Assist in Relation to Resource Nationalism *Don McKinnon* 254

The Potential Role of Good Offices *Thomas A. Mensah* 256

Do Established International Dispute Resolution Bodies Have a Role? *David Branson* 258

Talking Points *John L. Hardiman* 262

Resolving Disputes Between Resource-Rich and Consuming Countries *Johan Gernandt* 264

Closing Address: The Institute of Advanced Legal Studies, the IDR Group and the Relation of Theory to Practice *Derek Roebuck* 268

Cases

The Enforcement of Adjudicators' Awards under the Housing Grants Construction and Regeneration Act 1996: Part 31 *Kenneth T. Salmon* 271

Metropolitan Property Realizations Ltd v Atmore Investments Ltd: When is an Irregularity neither Irregular nor Serious? *Hew R. Dundas* 284

Indtel Technical Services Pvt Ltd v W.S. Atkins Plc *Aakash Prasad* 289

Book Reviews

Lawrence W. Newman and Richard D. Hill eds, *The Leading Arbitrators' Guide to International Arbitration* *Chan Leng Sun* 292

Donald Raistrick *Index to Legal Citations and Abbreviations* *The Editor* 293

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Editorial

One of the most important functions of this journal is to help the Institute fulfil the duties of a learned society. That is no sideline. It is a responsibility directly and centrally placed upon us by our charter and therefore a condition of our existence. A learned society has many functions but two of them are to encourage debate and to foster the development of younger colleagues. This number again provides evidence of both.

Through no process of editorial selection but arising from the reality of our readership, our international coverage is shown again by the diversity of the authors, from Australia, England, Germany, Ghana, India, Malaysia, New Zealand, Scotland, Sweden and the United States.

Raghav Sharma's article analyses the problems that the Indian Supreme Court has exacerbated through its inconsistent enforcement of foreign awards. Jane Wessel and Peter Eyre show similar inconsistency in the way US courts have ordered discovery of documents in international arbitrations.

Greater emphasis than usual has been placed on the exchange of ideas at conferences, with Lord Woolf and Sir Anthony Evans leading the way. Papers are included from four, held in Hong Kong, Kuala Lumpur and two in London, sponsored by the Chartered Institute of Arbitrators, the East Asia Branch, the Association of Independent Construction Adjudicators and a joint meeting of the IDR Group and the Institute of Advanced Legal Studies. I hope this will encourage other organisations to suggest that papers from their meetings be published here. I would also welcome readers' comments. Again the emphasis in this number has not been artificially created but arose naturally from material submitted. There is no intention to reduce the space given to articles in future numbers. Those for August (with a Middle Eastern and Islamic theme) and November 2009 (with some emphasis on Scotland) are now so far advanced that I can safely say that.

Michael Davison and Lucja Nowak continue the discussion of the problems of users of arbitration, showing that this journal can play an increasing role in fostering and disseminating the results of this dialogue. Ken Salmon continues to cover adjudication. Hew Dundas provides his regular case-note. Aakash Prasad warns us of conflict of laws dangers created by the Supreme Court of India.

In my last editorial I expressed my pleasure that we are publishing the work of students. The next number will include the two prize essays from the 2008 Three Faiths Forum competition, advertised here. The advertisement in the last number was pulled from the printers' bottom drawer rather than the corrected proofs and gave a closing date long since past. I hope that will not deter students and teachers all over the world from ensuring that the judges have a wealth of submissions as good as last year's winners by the closing date, now extended to June 30, 2009.

Derek Roebuck
Editor

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Articles

Sanctity of Foreign Awards: Recent Developments in India

by RAGHAV SHARMA

1. INTRODUCTION

This article critically examines the rulings of the Indian Supreme Court in *Centrotrade Metals and Minerals Inc v Hindustan Copper Ltd* (*Centrotrade*)[1] and *Venture Global Engineering v Satyam Computer Services Ltd* (*Venture*).[2] The former vindicates the pro-enforcement stance of the New York Convention 1958 (NYC), by holding that an award from international commercial arbitration conducted in any Convention country would be a foreign award irrespective of the proper law of contract; the latter has frustrated that objective by ruling that Indian courts can set aside foreign awards on the same grounds as apply to domestic awards.

In 1996, India enacted the Arbitration and Conciliation Act (the Act) with the professed objective of facilitating the recognition and enforcement of foreign awards covered under the NYC.[3] Part II of the Act was specifically designed as a sign of positive reassurance to foreign investors that the "enforcement mechanism for foreign arbitral awards will be comparatively quicker and clearer and more in line with the New York Convention".[4] One of the major controversies has been spun around the definition of a foreign award, as two sets of divergent opinions have been adopted by the high courts on the nature of an award arising out of international commercial arbitration held outside India. The matter has been settled by *Centrotrade*. This article presents both strands of opinion on the issue and argues that the Supreme Court's ruling is in consonance with the legitimate expectations of the international commercial community regarding the quick enforcement of NYC awards.

In contrast, the Supreme Court has rendered a highly problematic ruling in *Venture*, that Indian courts have the power to set aside foreign awards under s.34 of the Act. This article demonstrates the erroneous nature of this ruling and argues that it should soon be overruled as a bizarre deviation in a future case.

2. *CENTROTRADE*: AN IDEAL RULING

Under the Act, any award made under Pt I is regarded as a "domestic award".[5] Section 2(2) makes Pt I compulsorily applicable to all arbitrations held in India, which includes a purely domestic arbitration between Indian parties, as also every international commercial arbitration irrespective of the law applicable to the substance of the dispute.[6] On the other hand, a foreign award is defined by s.44 as an award made in a reciprocating territory

[1] *Centrotrade Metals and Minerals Inc v Hindustan Copper Ltd* [2006] 5 S.C.A.L.E. 535.
[2] *Venture Global Engineering v Satyam Computer Services Ltd* AIR [2008] SC 1061.
[3] Statement of Objects and Reasons to the Arbitration and Conciliation Bill 1995 para.4(ix).
[4] T.T. Arvind and Zia Mody, "*Bombay Gas Company Ltd v Mark Victor Mascarenhas*—Challenge to a Foreign Award" (1998) 1 Int. A.L.R. 180.
[5] Arbitration and Conciliation Act s.2(7).
[6] According to Arbitration and Conciliation Act s.28(1)(b), the parties have freedom to choose the law applicable to the substance of the dispute in an international commercial arbitration held in India.

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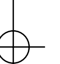
notified by the Indian Government for application of the NYC. Thus, an award resulting from a purely foreign arbitration held outside India between two foreign nationals would clearly be a foreign award. However, the case of an award in an international commercial arbitration held outside India became debatable in view of the Supreme Court's rulings in *National Thermal Power Corp v Singer Co* (*NTPC*)[7] and *Bhatia International v Bulk Trading SA* (*Bhatia International*).[8] The divergent views of the High Courts on the nature of such an award are canvassed below.

Loyalty to old law: it's a domestic award

Prior to the Act, the recognition and enforcement of foreign awards were governed by the Foreign Awards (Recognition and Enforcement) Act 1961 (FARE). FARE was not applicable to "any award made on an arbitration agreement governed by the law of India" although made in another Convention country.[9] In *NTPC*, the Supreme Court held that when the proper law governing the arbitration agreement is Indian law, the award made under it would be a domestic award even though made in a Convention country.[10]

Section 9(b) was specifically omitted during the framing of the Act. Despite that change, the Calcutta High Court ruled in *Hindustan Copper Ltd v Centrotrade Metals and Minerals Inc* (*Hindustan Copper*)[11] that the law has remained the same under the Act. In support of this view, the court offered the following reasoning:

- The finding regarding the nature of award resulting from an international commercial arbitration outside India but governed by Indian law in *NTPC* was arrived at independently of s.9 (b) and would not be affected by the omission of that provision.[12]
- Mere territorial nexus, i.e. the place where the award is made, is not determinative of the nature of the award.



- The words "unless the context otherwise requires" appearing at the opening of s.44 indicate that territorial nexus is not conclusive.
- Therefore, the true test is whether an Indian court would be competent to entertain a challenge to the award under s.34.[13]
- The omission of s.9(b) merely compels the court to determine whether Indian courts retain jurisdiction over such an award. Even in such cases, if the parties confer exclusive jurisdiction on a foreign court, the award will be a foreign award.[14]
- Section 9(b) was a proper interpretation of the Convention. Since the Convention has not changed, there could not have been any change in the Indian law.[15]
- In *Bhatia International*, the Supreme Court has ruled that general provisions of Pt I continue to apply to international commercial arbitrations outside India. Thus, the award from such arbitration would be a domestic award in terms of s.2(7). The proper law of

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[7] *National Thermal Power Corp v Singer Co* AIR [1993] SC 998.
[8] *Bhatia International v Bulk Trading SA* AIR [2002] SC 1432.
[9] Foreign Awards (Recognition and Enforcement) Act 1961 s.9(b).
[10] *National Thermal* AIR [1993] SC 998 at [38], [42].
[11] *Hindustan Copper Ltd v Centrotrade Metals and Minerals Inc* AIR [2005] Cal. 133. All these paragraphs are distinct reasons provided by the Calcutta High Court. The current presentation does not portray them in such a manner.
[12] *Hindustan Copper* AIR [2005] Cal. 133 at [55]–[56].
[13] *Hindustan Copper* AIR [2005] Cal. 133 at [47].
[14] *Hindustan Copper* AIR [2005] Cal. 133 at [60].
[15] *Hindustan Copper* AIR [2005] Cal. 133 at [64].

the contract, not the venue of arbitration, determines the nature of such an award under Indian law.[16]

In *Nirma v Lurgi Energie und Entsorgung GMBH* (*Nirma*) the Gujarat High Court came to the same conclusion applying the ratio of *Bhatia International*.[17] That court also reasoned that omission of the words “an arbitral award made in the territory of the State” or “under this law” in art.34 of the UNCITRAL Model Law from s.34 indicates a conscious legislative choice and decision to allow recourse to an Indian court against any award, whether made in the territory of India or made under the Act.[18] The decisive factor for an award to be considered as a “domestic award” is not the venue of arbitration but the fact of it being made under Pt I.[19]

Change in law: it’s a foreign award

In *Bharti Televentures Ltd v DSS Enterprises P. Ltd*,[20] the Delhi High Court ruled that an award from an international commercial arbitration held outside India is a foreign award irrespective of the proper law. Adopting a literal interpretation, the court reasoned that territorial nexus is the only relevant criterion under s.44. Also, domestic awards and foreign awards are subject to distinct legal regimes and the ratio of *Bhatia International* is limited to the applicability of s.9 in cases where the arbitral proceedings are held outside India but the properties are situated in India. The Bombay High Court has taken the same stand on this issue.[21] However, the reasoning in this strand of decisions is not elaborate.

Centrotrade: a whiff of fresh air

The decision of the Calcutta High Court has been overruled by the Supreme Court in *Centrotrade* on appeal. The court has clearly ruled that an award from an international commercial arbitration held outside India is a foreign award as territoriality is the only criterion under s.44.[22] The deletion of s.9(b) is a material omission[23] and *NTPC* is distinguishable on the ground that it was based on that provision.[24] Further, the words “unless the context otherwise requires” in s.44 would apply only where the parties have an arbitration agreement governed by Indian law, and conduct the arbitration proceedings in another country but stipulate that the arbitration will be deemed to have been conducted in India and governed by the curial law of India. In such a case, the award would not be a foreign award though made in a Convention country.[25] Though the decision has been referred to a larger bench for reconsideration on another point of permissibility of two-tier arbitration

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16 *Hindustan Copper* AIR [2005] Cal. 133 at [66].
17 *Nirma v Lurgi Energie und Entsorgung GMBH* AIR [2003] Guj. 145.
18 *Nirma* AIR [2003] Guj. 145 at [9].
19 *Nirma* AIR [2003] Guj. 145 at [10].
20 *Bharti Televentures Ltd v DSS Enterprises P. Ltd* [2005] 2 A.R.B.L.R. 561.
21 *Jindal Drugs Ltd v Noy Vallesina Engineering SPA, Italy* [2002] 3 Bom. C.R. 554; *Inventa Fischer GmbH & Co v Polygenta Technologies Ltd* [2005] 2 Bom. C.R. 364.
22 *Centrotrade* [2006] 5 S.C.A.L.E. 535 at [37], per S.B. Sinha J. and at [159], per Tarun Chatterjee J.
23 *Centrotrade* [2006] 5 S.C.A.L.E. 535 at [159]. See Lawrence F. Ebb, “New Law of Arbitration ADR & Contract in India” (1997) 8 *American Review of International Arbitration* 203, 204; Sandeep B. Dave, “Enforcing Foreign Judgments and Arbitration Awards in India: The Prevailing Law” (1996) 7 *International Company and Commercial Law Review* 335.
24 *Centrotrade* [2006] 5 S.C.A.L.E. 535 at [159].
25 *Centrotrade* [2006] 5 S.C.A.L.E. 535 at [162].

under the Act, the controversy on this issue is finally settled as the bench was not divided on this issue,[26] as it was in respect of two-tier arbitration.

It is to be noted that the court has not dealt with the effect of *Bhatia International* on this question. The argument stemming from *Bhatia International* is important because that case held Pt I to be applicable to international commercial arbitration outside India irrespective of the law applicable to the arbitration agreement.[27] As a consequence, it may be argued in a future case that all awards arising out of international commercial arbitration whether made in India or outside India are domestic awards. This reasoning is a misinterpretation of the ruling in *Bhatia International* where it was specifically declared:

> "To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards."[28]

Thus, the definition of foreign awards is a special provision under Pt II which makes the definition in s.2(7) of Pt I inapplicable. Only the general provisions in Pt I governing matters for which no specific provision is made in Pt II would apply to international commercial arbitration held outside India. This clear reasoning cannot be distorted to reason that, since the general provisions of Pt I apply to such an award, it would be a domestic award. The non-consideration of this point in *Centrotrade* is not material.

It is relevant to point out that the decision in *NTPC* has been internationally criticised for its anachronistic approach. As a reaction to that ruling, Jan Paulsson, the then Vice-President of the London Court of International Arbitration, remarked that:

> "[T]he courts of India have revealed an alarming propensity to exercise authority in a manner contrary to the legitimate expectations of the international community."[29]

The UNCITRAL Model Law, on which the Act is based, also aims to, "protect the arbitral process from unpredictable or disruptive court interference" as this is, "essential to parties who choose arbitration (in particular foreign parties)".[30] *Centrotrade* aligns Indian law with the needs and expectations of the international commercial community in this respect.

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3. *VENTURE*: VENTURING ON BIZARRE TERRITORIES

Venture sets a bizarre new precedent by rendering foreign awards vulnerable to be set aside by Indian courts under s.34. However, it is based on incorrect reasoning and likely to be overruled soon.

[26] *Centrotrade* [2006] 5 S.C.A.L.E. 535 at [104], per S.B. Sinha J. and at [164], per Tarun Chatterjee J.

[27] In *Bhatia International* AIR [2002] SC 1432 at [32], the court declared that: "To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

[28] *Bhatia International* AIR [2002] SC 1432 at [26].

[29] Javed Gaya, "Judicial Ambush of Arbitration in India" (2004) 120 *Law Quarterly Review* 571, 571; W. Laurence Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration" (1995) 30 *Texas International Law Journal* 1.

[30] Text of Model Law (amended in 2006)—Explanatory Note para.17 p.27, available at *http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf* [Accessed March 10, 2009].

Facts and contentions

Venture involved a shareholders' agreement between the appellant and respondent for a joint venture company (JVC) in India. Respondent alleged that appellant had committed an event of default under the agreement and sought to exercise its option to buy appellant's shareholding in the JVC. Pursuant to the arbitration agreement, an award was made in favour of respondent in arbitration proceedings conducted at the London Court of International Arbitration. While respondent filed the award for recognition and enforcement before the US District Court in Michigan, appellant filed a suit in India for setting aside the award. In a related appeal arising from this suit, the High Court held that the award, being a foreign award, could not be set aside by the Indian courts under s.34. Thus, the matter was presented for the consideration before the Supreme Court.

Appellant contended that Pt I of the Act applied to foreign awards, as held in *Bhatia International*. Arguments were canvassed about the interpretation of [26] of the judgment in that case. Appellant submitted that that case found only that Pt I applies to awards made under Pt II unless it is expressly or impliedly excluded by the agreement of the parties.[31] Respondent submitted that the court had held that:

> "To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, provisions of Part I dealing with these aspects will not apply to such foreign awards."[32]

Further, appellant argued that the application of s.34 would not be inconsistent with s.48. The denial of an application under s.34 would mean that even in respect of properties situated in India, an award invalid as against the public policy of India would be enforced merely because the other party resides abroad.[33] Respondent contended that all the High Courts,[34] except the Gujarat High Court in *Nirma*, have concluded that the scheme of the Act is different for domestic and foreign awards and an application under Pt I to set aside a foreign award is not contemplated.

Decision of the court

The court agreed with the appellant that the matter had been concluded by *Bhatia International*, whereby Pt I applies to foreign awards arising out of international commercial arbitration held outside India.[35] It held that the finding in *Bhatia International* is limited to the last one sentence at [26] to the effect that general provisions of Pt I will apply to international commercial arbitrations under Pt II unless expressly or impliedly excluded by the parties.[36] It agreed with appellant that both ss.34 and 48 can be applied in such a situation and there was no inconsistency.[37] Further, the court opined that such an interpretation is necessary so that the extended definition of public policy is not bypassed by taking the award for enforcement in another country.[38] Thus, it was held that Indian courts have the power to set aside foreign awards arising out of international commercial arbitration held outside India.

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[31] *Venture* AIR [2008] SC 1061 at [13].
[32] *Venture* AIR [2008] SC 1061 at [12].
[33] *Venture* AIR [2008] SC 1061 at [13].
[34] *Bombay Gas Co Ltd v Mark Victor Mascarenhas* [1998] 1 L.J. 977; *Trusuns Chemical Industry Ltd v Tata International Ltd* AIR [2004] Guj. 274; *Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Services Inc* AIR [2005] Chh. 21; *Inventa Fischer Gmbh & Co K.G. v Polygenta Technologies Ltd* [2005] 2 Bom. C.R. 364; *Bulk Trading S.A. v Dalmia Cement (Bharat) Ltd* [2006] 1 A.R.B.L.R. 38.
[35] *Venture* AIR [2008] SC 1061 at [17].
[36] *Venture* AIR [2008] SC 1061 at [18].
[37] *Venture* AIR [2008] SC 1061 at [19].
[38] *Venture* AIR [2008] SC 1061 at [19].

Why Venture is bad law

The ruling in *Venture* frustrates the fundamental objective of the Model Law, i.e. to delimit the interference of courts in the arbitral process.[39] The objective becomes more significant in cross border trade and investment.[40] The decision is erroneous on the following grounds:

Misreading of Bhatia International

The ruling patently misconstrues the law declared by *Bhatia International.* To establish this, it is necessary to quote all of the relevant paragraph:

> "Mr Sen had also submitted that Part II, which deals with enforcement of foreign awards, does not contain any provision similar to Section 9 or Section 17. As indicated earlier Mr Sen had submitted that this indicated the intention of Legislature not to apply Sections 9 and 17 to arbitrations, like the present, which are taking place in a foreign country. The said Act is one consolidated and integrated Act. General provisions applicable to all arbitrations will not be repeated in all chapters or parts. The general provisions will apply to all chapters or parts unless the statute expressly states that they are not to apply or where, in respect of a matter, there is a separate provision in a separate Chapter or Part. Part II deals with enforcement of foreign awards. Thus, Sections 44 (in Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of 'foreign awards' which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to 'foreign awards'. The opening words of Sections 45 and 54, which are in Part II, read 'notwithstanding anything contained in Part I.' Such a non-obstante clause had to be put in because the provisions of Part I apply to Part II."[41]

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Venture limits the finding of the court to the sentence: "It must be immediately clarified that. . .the provisions of Part I apply to Part II." However, a fair reading of the paragraph quoted above shows that the finding begins from, "[t]he said Act is one consolidated and integrated Act". Mr Sen, the counsel in that case, was arguing that Pt I and Pt II were complete codes in themselves and that the presence of certain provisions in Pt I and their absence from Pt II implied that they were not intended to be applied to awards governed by Pt II. The court in *Bhatia International* rejected this argument by reasoning that the Act is not strictly compartmentalised and its integrated scheme implies that general provisions in Pt I will apply to Pt II. However, the provisions in Pt I will not apply to the extent Pt II makes specific provisions on certain subject matters viz definition of arbitral awards and enforcement of foreign awards.

It is fallacious to consider this as the argument of Mr Sen after he had already contended the contrary, i.e. that general provisions like s.9 should not apply to awards under Pt II. Quite logically, it was a finding of the court in *Bhatia International* that the special provisions in Pt II will exclude general provisions in Pt I. Further, the finding extracted from *Venture* reads:

[39] Model Law para.15.
[40] Model Law para.17.
[41] *Bhatia International* AIR [2002] SC 1432 at [26].

> "It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties."

The use of expression "also" is a significant pointer to the fact that the court was continuing its finding about applicability of Pt I. Thus, the correct interpretation of this paragraph is that the court in *Bhatia International* held that Pt I will not apply where special provisions are made in Pt II, more specifically regarding definition of an award and enforcement of foreign awards, and an international commercial arbitration outside India, Pt I may also be excluded by implied or express agreement of the parties. The view taken in *Venture* is clearly erroneous.

Special provisions of Part II prevail

Bhatia International ruled that special provisions in Pt II would prevail over provisions on the same matters in Pt I and the court specifically included enforcement of foreign awards.[42] Thus, s.48 not s.34 applies. Sections 48 and 49 correspond with ss.34 and 36 in Pt I and provide identical grounds for challenge to an award.[43] The Model Law has adopted NYC art.V in framing art.34[44] which corresponds to s.48 and s.34 respectively. Thus, s.48 is a special provision for foreign awards as opposed to s.34 and, in view of *Bhatia International*, the latter is inapplicable to foreign awards.

Secondly, if the interpretation in *Venture* is accepted, a contradiction would result between ss.36 and 49. Section 36 specifies that, once the period for filing an application to set aside an award under s.34 is over, or if such an application is refused, the award shall be enforceable as a decree of the court. Thus, a foreign award would become an enforceable decree once the challenge under s.34 failed. However, s.49 specifies that a foreign award becomes a decree only when the court is satisfied that it is enforceable under Ch.I of Pt II. This would happen only when an enforcement application is filed and the court is satisfied that none of the conditions contemplated under s.48 are applicable for refusing enforcement. If a foreign award has become a decree under s.36, s.49 will not operate. Also, in almost all cases foreign awards would be challenged under s.34 after *Venture*. This would make the scheme of ss.48 and 49 redundant, as they would never apply if the award were set aside and, even if it were not, it would become an enforceable decree by virtue of s.36 and not s.49.

Thirdly, it may be argued that even if s.36 does not apply because of s.49, s.34 can still apply. However, such an argument is misplaced to the extent it does not take into account the integrated scheme of the two provisions. Suppose Y obtains a foreign award against X to be enforced against X's properties in India. X files an application for setting aside the award under s.34 which is refused by the court. If s.36 were held inoperative, it would mean that the award would not become a decree at this stage. When Y filed for enforcement under Pt II, X would have another opportunity to raise objections under s.48. The general principles of res judicata would not come to the aid of Y, because certain grounds under ss.34 and 48 are different, e.g. a challenge to the award on the ground of the composition of the tribunal would be under s.34 with respect to provisions of Pt I, while under s.48 it would be considered in accordance with the law of the country where arbitration takes place. If the award would have been a domestic award, the successful party would be entitled to have the award converted into a decree after failure of the challenge under s.34. However, Y would

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[42] *Bhatia International* AIR [2002] SC 1432 at [26].

[43] *Jindal Drugs Ltd Mumbai v Noy Vallesina Engineering SPA, Italy* [2002] 3 Bom. C.R. 554; *Force Shipping v Ashapura Minechem Ltd* [2003] 6 Bom. C.R. 328; *Inventa Fischer GmbH & Co v Polygenta Technologies Ltd* [2005] 2 Bom. C.R. 364.

[44] Model Law para.46.

suffer a double penalty of challenge to the award.[45] An interpretation which results in such injustice and inequity should be rejected.[46]

Lastly, under s.48 the party taking an objection on grounds relating to the law of another country has the burden of proof of the foreign law as fact before the Indian court.[47] In contrast, the challenge under s.34 would be on a wider perspective with respect to the Indian law of which the court takes judicial notice under the Indian Evidence Act 1872 s.57. Thus, one party is relieved of its burden of proof by getting the award set aside under s.34. Such an inequitable and unjust interpretation should not be adopted.

Implication from section 48

Section 48(1)(e) specifies that the enforcement of a foreign award may be refused if the:

> "[A]ward has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

Centrotrade held that the expression, "under the law of which, that award was made" refers to the law of the country in which arbitration had its seat.[48] Doesn't this imply a differentiation of competences between Indian and foreign courts? That is, while the competence to set aside would be within the authority of the country in which, or under the law of which, the award was made, the power of enforcement would be with the Indian court.

The accepted interpretation of art.V is that it recognises two kinds of jurisdiction in relation to foreign awards.[49] The primary jurisdiction to set aside a foreign award is vested only in the courts of the country where the award is made or under the law of which it is made. The expression "under the law" refers to the curial law governing the arbitration proceedings which will mostly be the law at the seat of arbitration. The secondary jurisdiction is vested in the courts of all other Convention countries and is limited to deciding whether or not to enforce the award in that jurisdiction. While the setting aside of a foreign award in the primary jurisdiction has the international effect of rendering the award unenforceable in all Convention countries, the refusal to enforce in a secondary jurisdiction has an effect limited to only that country.[50] This interpretation has been endorsed by courts in the United States[51] and it evidently reinforces predictability and efficiency in the regime of international arbitration.[52]

In transnational disputes, international arbitration is preferred over litigation owing to the global enforceability regime for foreign awards under the Convention.[53] Its pro-enforcement stance has been vindicated by judicial forums globally narrowly interpreting the grounds for

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[45] *Golderest Exports v Swissgen N.V.* [2005] 2 Bom. C.R. 590.

[46] P. St. J. Langan (ed.), *Maxwell on the Interpretation of Statutes*, 12th edn (London: Sweet & Maxwell, 2003), p.159.

[47] *Hari Shankar Jain v Sonia Gandhi* AIR [2001] SC 3689.

[48] *Centrotrade* [2006] 5 S.C.A.L.E. 535 at [160], per Tarun Chatterjee J.

[49] E.R. Hellbeck and C.B. Lamm, "The Enforcement of Foreign Arbitral Awards under the New York Convention: Recent Developments" (2002) 5 Int. A.L.R. 137.

[50] Hellbeck and Lamm, "The Enforcement of Foreign Arbitral Awards under the New York Convention" (2002) 5 Int. A.L.R. 137.

[51] *International Standard Electric Corp v Bridas Sociedad Anonima Petrolera* 745 F.Supp 172; *M & C Corp v Erwin Behr GmbH & Co* 87 F.3d 844; *Yusuf Ahmed Alghanim & Sons v Toys "R" Us Inc Thr. (HK) Ltd* 126 F.3d 15; *Karaha Bodas Co L.L.C. v Perusahaan Pertambangan Minyakdan Gas Bumi Negara* 364 F.3d 274.

[52] C.A. Giambastiani, "Recent Development: *Lex Loci Arbitri* and Annulment of Foreign Arbitral Awards in U.S. Courts" (2005) 20 *American University International Law Review* 1101, 1112.

[53] Hellbeck and Lamm, "The Enforcement of Foreign Arbitral Awards under the New York Convention" (2002) 5 Int. A.L.Rev. 137.

refusal of enforcement of foreign awards.[54] The usurpation of the primary jurisdiction by the courts of secondary jurisdiction, as has happened in *Venture*, would produce "dramatically disagreeable results in an international context" and this would, "inevitably invite reactions that jeopardise the stability of cross-border arbitration".[55]

Thus, if the other court sets aside the foreign award, the Indian court may refuse enforcement. However, if such a challenge fails before the competent authority, how can the Indian courts look into the issue again and set aside the award. The interpretation in *Venture* runs against the objectives of the NYC and such an interpretation which is in conflict with India's international obligations should not be adopted.[56]

Moreover, s.48 is exhaustive of the grounds of refusal, as it uses the words "only if" in the opening part.[57] If the Indian court sets aside a foreign award and the other party files an application for enforcement of the same award, it will have to be refused on the ground that it has been set aside by an Indian court. As already pointed out, in an international commercial arbitration outside India, s.48(1)(e) will not contain a reference to India or its law unless so designated by the parties. Therefore, the enforcement of the foreign award would be refused on a ground other than those listed under s.48, which is impermissible.

Different test of public policy

Oil and Natural Gas Co Ltd v Saw Pipes Ltd (*ONGC*)[58] held that, when dealing with enforcement of a foreign award after it has attained finality, the jurisdiction of the court on the ground of "public policy" under s.48 is limited and "patent illegality" would not be a ground for judicial review.[59] However, a domestic award can be set aside under s.34 on the ground of "patent illegality".[60] Thus, the scope of these two provisions is different with respect to the ground of public policy.

Venture subjects foreign awards to challenge on a wider ground of public policy[61] which was not contemplated under s.48. The concern of the court is that parties may try to avoid India's public policy as a ground under s.48 by bringing enforcement proceedings elsewhere. It is difficult to understand how, when the properties are situated in India, any party would enforce a foreign award without filing it for execution in India. Moreover, the conclusion of the court that the application of s.34 to foreign awards would not be inconsistent with s.48 is incorrect as their scopes are quite different as noticed above.

Parliament's intent to change the law

Before the Act, domestic awards were governed by the Arbitration Act 1940 and foreign awards by the FARE Act 1961. The Act was passed to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of

[54] Hellbeck and Lamm, "The Enforcement of Foreign Arbitral Awards under the New York Convention" (2002) 5 Int. A.L.Rev. 137.

[55] W.W. Park, "Amending the Federal Arbitration Act" (2002) 13 *American Review of International Arbitration* 75, 125.

[56] G.P. Singh, *Principle of Statutory Interpretation*, 9th edn (Nagpur: Wadhwa & Wadhwa, 2005), pp.529–534.

[57] Report of the Committee on the Enforcement of International Arbitral Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention), March 18, 1955, para.34, p.9, available at *http://www.uncitral.org/pdf/english/travaux/arbitration/NY-conv/e-ac/eac424r1-N5508097.pdf* [Accessed March 10, 2009].

[58] *Oil and Natural Gas Co Ltd v Saw Pipes Ltd* AIR [2003] SC 2629.

[59] *ONGC* AIR [2003] SC 2629 at [20], [21], [22].

[60] *ONGC* AIR [2003] SC 2629 at [31]–[32].

[61] *Venture* AIR [2008] SC 1061 at [19].

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foreign arbitral awards while keeping in view the UNCITRAL Model Law.[62] The golden thread of legislative intent underpinning the Act is the minimisation of intervention by courts in the arbitral process.[63] The extent of court intervention was significant under the 1940 Act and even the Supreme Court accepted that the way in which the arbitral proceedings were concluded under it and without exception challenged in courts had made, "lawyers laugh and legal philosophers weep".[64]

Under the previous statutes, a foreign award could not have been set aside by the Indian courts. It is inconceivable that the legislature would bring about such a drastic change in law when its intent was to minimise judicial interference and modernise the law in light of international developments. The legislature could not have intended to confer new jurisdiction on the courts which would delay the process of enforcement of foreign awards and thus defeat its own object. The Explanatory Notes appended to the UNCITRAL Model Law clearly specify the scope of art.34 and art.36 on which ss.34 and 48 are respectively based:

> "Although the grounds for setting aside as set out in article 34(2) are almost identical to those for refusing recognition or enforcement as set out in article 36(1), a practical difference should be noted. An application for setting aside under article 34(2) may only be made to a court in the State where the award was rendered, whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement)."[65]

Thus, the interpretation taken in *Venture* frustrates the most fundamental principle of interpretation which calls for the words of a statute to be construed to give effect to the true intention of the legislature.[66]

4. CONCLUSION

Centrotrade is a progressive development which buries the ghost of *NTPC* in India and gives effect to the legislative intent to modernise the law of arbitration. On the other hand, *Venture* is legally erroneous and commercially unwarranted, because it takes Indian law back to the pre-Convention period of extensive interference of courts in foreign awards. The Indian Supreme Court needs to take note of the malaise of *Venture* and overrule it soon to restore the confidence of the international commercial community. The simple lesson to be learnt is contained in the following words of great wisdom enunciated by the US Supreme Court[67]:

> "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

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[62] *SBP & Co v Patel Engineering Ltd* AIR [2006] SC 450.
[63] Arbitration and Conciliation Act 1996 s.5; *Konkan Railway Corp Ltd v Mehul Construction Co* AIR [2000] SC 2821; *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd* AIR [2005] SC 3766.
[64] *Guru Nanak Foundation v Rattan Singh & Sons* AIR [1981] SC 2075.
[65] Model Law para.48.
[66] Singh, *Principle of Statutory Interpretation*, 2005, pp.2–3.
[67] *M/S Bremen v Zapata Off-Shore Co* 407 U.S. 1, 9.

US Discovery in Aid of Foreign or International Proceedings: Recent Developments Relating to Title 28 US Code Section 1782

by JANE WESSEL and PETER J. EYRE

1. INTRODUCTION

Section 1782 of Title 28 of the US Code (USC) allows parties involved in disputes outside the United States to obtain documents and oral evidence from companies and individuals within the United States. In 2004, the US Supreme Court rendered a judgment in *Intel Corp v Advanced Micro Devices Inc*,[1] which led to a revival in the use of this powerful statutory tool. In the post-*Intel* world, discovery under s.1782 is easier to obtain and this, combined with the growth of international disputes, has led to heightened interest in this statutory provision. This article briefly summarises the key analytic framework of s.1782 and explores the applicability of the provision in the particular context of international commercial and investment arbitration.

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2. THE STATUTE

Section 1782, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals", is a tool for obtaining assistance from US federal courts in gathering evidence from US entities and individuals for use in proceedings before foreign (i.e. non-US) and international tribunals. It provides:

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person. . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure."[2]

3. *INTEL*'S ANALYTIC FRAMEWORK

Intel set forth an analytic framework for the US courts to follow when considering applications under s.1782. There are two basic inquiries. The first is whether the textual prerequisites of the statute have been met. The second concerns the extent and manner of assistance the court should provide if the statutory requirements have been satisfied. To satisfy the threshold requirements an applicant must show:

- The person from whom discovery is sought "resides" (or is found) in the district of the district court to which the application is made. As long as the target of the discovery request is located in the district of the court where the application is filed, this requirement

[1] *Intel Corp v Advanced Micro Devices Inc* 542 U.S. 241 (2004).
[2] Title 28 USC s.1782.

will be satisfied.[3] There is no requirement that presence in the district be permanent or continuous.[4]

- The application is made by a foreign or international tribunal or "any interested person". Any party to a foreign or international proceeding meets this requirement.
- The discovery is "for use" in a foreign or international proceeding. Courts have generally interpreted the "for use" requirement quite broadly, using a number of formulations such as "relevant to the claim or defense of any party, or for a good cause" and relating to "any matter relevant to the subject matter involved in the foreign action".[5]
- The proceeding is before a foreign or international "tribunal". The definition of "tribunal" has attracted the recent attention of courts, litigants, practitioners, and commentators—and it is that issue which is the subject of detailed treatment below.

If a federal court concludes that the applicant meets the threshold requirements, it must then determine whether or not it should exercise its discretion to order discovery.[6] The Supreme Court in *Intel* noted that courts should be guided by the overriding purposes of s.1782—"providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts"—and set forth three considerations to guide courts in making their determinations:

- Whether or not the person from whom discovery is sought is a participant in the foreign proceeding. Courts have noted that:

  > "[T]he need for [s.1782] aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad."[7]

  This is because the foreign tribunal generally has the ability to order the parties to the foreign proceeding to produce documents and make individuals available for depositions. But even where discovery is sought from a party to the foreign proceedings, courts have still granted relief pursuant to s.1782 if other factors indicate that this would be appropriate.[8]
- The nature of the foreign tribunal and whether the foreign tribunal would be receptive to US federal court judicial assistance.[9] Among federal courts, the consensus is that s.1782 relief is appropriate unless the party opposing discovery presents authoritative and affirmative proof that the "foreign tribunal would reject evidence obtained with the aid of [s.1782]".[10]

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[3] e.g. *Matter of the Application of Oxus Gold Plc, Re* Misc. No.06-82, 2007 WL 1037387 at * 3–4 (D.N.J. April 2, 2007); *Application of the Procter & Gamble Co, Re* 334 F. Supp. 2d 1112 (E.D. Wis. 2004); *Intel* 542 U.S. 241.

[4] e.g. *Edelman v Taittinger* 295 F.3d 171, 180 (2d. Cir 2002).

[5] e.g. *Fleischmann v McDonald's Corp* 466 F. Supp. 2d 1020, 1029 (N.D. Ill. 2006).

[6] This discretion is built into the first sentence of the statute: "The district court of the district in which a person resides or is found *may* order."

[7] *Intel* 542 U.S. 241 at [264]; also *Application of Grupo Qumma S.A., Re* No. Misc.8-85; 2005 WL 937486 (S.D.N.Y. April 22, 2005).

[8] e.g. *Procter & Gamble* 334 F. Supp. 2d at [1114]–[1115].

[9] *Application of Imanagement Serv. Ltd, Re* No. Misc.05-89, 2005 WL 1959702 at *3 (E.D.N.Y. August 16, 2005); see also *Grupo Qumma* 2005 WL 937486 at *3; *Application of Servicio Pan Americano de Proteccion, Re* 354 F. Supp. 2d 269, 275 (S.D.N.Y. 2004).

[10] e.g. *Imanagement Serv. Ltd* 2005 WL 1959702 at *3; *Application of Guy, Re* No. M.19-96; 2004 WL 1857580 at *2 (S.D.N.Y. August 19, 2004).

- Whether the document request is unduly intrusive or burdensome.[11] Standing alone, this consideration has not typically served as a basis for rejecting a s.1782 application, but rather courts have ordered parties to modify discovery requests to make them less burdensome.[12]

Courts have been faced with numerous other issues, which are generally analysed under the discretionary leg of the *Intel* framework. Issues have included the location of the documents sought by the applicant,[13] the timing of the application in relation to the foreign proceeding,[14] and which party should bear the cost of discovery.[15]

4. DEFINITION OF TRIBUNAL

Pursuant to the terms of the statute, an applicant for relief under s.1782 must show that the proceeding is before (or will be before) a foreign or international "tribunal"; s.1782 does not specify what is meant by "tribunal". Many courts and practitioners have asked what it means. Although it is undisputed that foreign courts are "tribunals" for purposes of s.1782,[16] courts have struggled with how international arbitration tribunals fit within the definition.

In 1999, the influential US Court of Appeals for the Second Circuit held that it included only governmental bodies (including courts, other state tribunals, and investigative authorities acting under the direct authority of a state) and not private commercial arbitration tribunals.[17] In the same year, the Fifth Circuit followed similar logic and reached the same conclusion in *Republic of Kazakhstan v Biedermann International*.[18] However, even these two judgments made clear that arbitral tribunals established by government entities are "tribunals" within the meaning of s.1782.

In *Intel*, the Supreme Court ruled that the Directorate-General for Competition of the EU Commission qualified as a "tribunal" under the statute.[19] It reached this conclusion based on: (1) the plain meaning of the term; (2) the lack of any indication that Congress intended to limit the term in any way; and (3) a functional analysis of the Directorate-General as the initial decision-maker, subject to court review and appeal.

In a recent series of cases, federal courts have had occasion to consider this question in the light of *Intel*. In *Matter of the Application of Oxus Gold Plc, Re*, a New Jersey federal district court held that an arbitration tribunal convened pursuant to the dispute resolution provisions of a bilateral investment treaty under UNCITRAL rules is a "tribunal" under s.1782.[20] Although this foreign arbitration involved private litigants and a private arbitration, it was

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[11] *Intel* 542 U.S. 241 at [265].

[12] e.g. *Matter of the Application of Oxus Gold Plc, Re* Misc. No. 06-82, 2006 WL 2927615 (D.N.J. October 10, 2006).

[13] e.g. *Application of Gemeinschaftspraxis Dr Med. Schottdorf, Re* No.M19-88, 2006 WL 3844464 (S.D.N.Y. December 29, 2006); *Norex Petroleum Ltd v Chubb Ins. Co of Canada* 384 F. Supp. 2d 45, 46 (D.D.C. 2005).

[14] *Intel* 542 U.S. 241 at [258]–[259].

[15] *Wilson & Partners Ltd, Re* C.A. No 06-2575, 2007 WL 3268574 (D. Colo. October 30, 2007).

[16] e.g. *Imanagement Services Ltd* 2006 WL 547949 at *2.

[17] *Nat'l Broad. Co Inc v Bear Stearns & Co Inc* 165 F.3d 184 (2d Cir. 1999). District courts within that Circuit had earlier reached the opposite conclusion, e.g. *Application of Technostroyexport, Re* 853 F. Supp. 695, 697 (S.D.N.Y. 1994) ("an arbitrator or arbitration panel is a 'tribunal' under §1782").

[18] *Republic of Kazakhstan v Biedermann International* 168 F.3d 880 (5th Cir. 1999).

[19] *Intel* 542 U.S. 241 at [258]. See also *Application of Microsoft Corp, Re* 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006) (following *Intel* and concluding that the European Commission is a tribunal).

[20] *Oxus Gold Plc* 2007 WL 1037387 at *4–5.

conducted within the context of a treaty set up by two governments; therefore, the court did not squarely address whether a purely private commercial arbitration was a "tribunal".

In 2006, in *Application of Roz Trading Ltd, Re*, the US District Court for the Northern District of Georgia ruled that a private commercial arbitration tribunal at the International Arbitration Centre for the Austrian Federal Economic Chamber in Vienna qualified as a "tribunal" for purposes of s.1782.[21] The court concluded that *Intel* had rejected categorical limitations on the scope of s.1782 and recognised the breadth of the term "tribunal" as including private commercial panels.[22] The court further found that the plain meaning of the term was "unambiguous"; therefore, the court had no difficulty in holding that a private commercial arbitration tribunal was encompassed by "tribunal" in s.1782.

Relying extensively on *Roz Trading* and noting that *Intel* "implicitly countered" some of the objections to "extending the reach of Section 1782 to private arbitrations", a federal district court in Minnesota held that a private commercial arbitration panel in Israel was a "tribunal".[23] A federal district court in Massachusetts has also adopted the same approach, holding that the ICC is a "tribunal".[24] The court followed the modern trend towards an inclusive reading of the provision, and found that the precise language of s.1782 authorises assistance in connection with an ICC arbitration (although it found that it was authorised to do so, the court exercised its discretion to deny the discovery request, because it desired proof that the tribunal would be receptive to the documents).

In two related cases, federal courts in Delaware and Texas reached opposite conclusions about whether a private commercial arbitration tribunal sitting in Geneva under UNCITRAL rules qualified as a tribunal under s.1782.[25] The federal district court in the District of Delaware concluded that it was authorised to grant an application from La Comision Ejecutiva Hidroelectrica del Rio Lempa, because s.1782 does not differentiate between private commercial arbitration and other types of tribunals.[26] The federal district court for the Southern District of Texas (which sits within the Fifth Circuit Court of Appeals) reached a different conclusion on the respondent's motion for reconsideration. The court found that the Supreme Court in *Intel* was silent on the question of whether a private arbitration tribunal constituted a tribunal under s.1782. Accordingly, the court held that it was obliged to follow the judgment of the Fifth Circuit Court of Appeals in *Republic of Kazakhstan v Biedermann International*, which expressly excluded private arbitral tribunals from the scope of s.1782.[27]

5. CONCLUSION

Many of the issues that have arisen under s.1782 were resolved by the Supreme Court's seminal judgment in *Intel*. The approach that the Court took to those issues has led the majority of the lower courts that have addressed the question to rule that an international

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[21] *Application of Roz Trading Ltd, Re* 469 F. Supp. 2d 1221 (N.D. Ga. 2006). The authors of this article, with other Crowell & Moring attorneys, represented the successful applicant in *Roz Trading*.

[22] *Intel* 542 U.S. 241 at [1224]–[1228].

[23] *Hallmark Capital Corp, Re* 534 F. Supp. 2d. 951, 956 (D. Minn. 2007).

[24] *Application of Babcock Borsig AG, Re* C.A. No.08-misc-10128; 2008 WL 4748208 (D. Mass. October 30, 2008).

[25] *La Comision Ejecutiva Hidroelectrica del Rio Lempa v Nejapa Power Co LLC* C.A. No.08-135; 2008 WL 4809035 (D. Del. October 14, 2008); *La Comision Ejecutiva Hidroelectrica del Rio Lempa v El Paso Corp* M.A. H-08-335; 2008 WL 5070119 (S.D. Tex. November 20, 2008).

[26] *La Comision Ejecutiva Hidroelectrica del Rio Lempa* 2008 WL 4809035 (D. Del. October 14, 2008). This has been appealed to the Third Circuit Court of Appeals following the district court's denial of a motion for reconsideration.

[27] *La Comision Ejecutiva Hidroelectrica del Rio Lempa* 2008 WL 5070119 (S.D. Tex. November 20, 2008).

arbitration tribunal is a “tribunal” for the purposes of s.1782. But this view is far from unanimously held and the issue remains one of some controversy in certain federal districts.

From a practical perspective, a party to an arbitration may be able to use s.1782 to its benefit if its opponent or a third party holds relevant documents or other evidence within the United States. For the person holding such relevant evidence in the United States who wishes to resist such an application, the critical question may be to determine whether the evidence is held in a district which is likely to look favourably on a s.1782 application. At root, some may consider s.1782 to be just another tool in the investigatory toolbox of the arbitration practitioner. Others may think it inappropriate to have such involvement by the US courts in the private arbitration process. This balance is one that the US Supreme Court may eventually be called upon to decide.

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(2009) 75 ARBITRATION 2

Discussion

International Arbitration: How Can it Deliver on its Promise?*

by MICHAEL DAVISON and LUCJA NOWAK

> "There are no permanent solutions to the problems of commercial dispute resolution and each generation must think again."[1]

1. INTRODUCTION

There are no, and never will be any, "permanent" solutions to "problems" in international commercial arbitrations. Yet, international arbitration seems to suffer from some permanent and recurring problems. One of these is how to make arbitration proceedings more efficient, especially in terms of time and cost. It is not a new problem. Complaints about the lack of efficiency of arbitration can be found in arbitration-related literature in the 1980s and even 1960s. As international arbitration solves some of the problems which it encounters on its path (such as the perceived lack of international regulations or problems with finding an arbitration-friendly forum) and, as international arbitrations continue to attract more users and cases, greater attention is being focused on the problem of "efficiency". It is even more so because, as the years pass, users become more sophisticated and the cases more complex and their demands become greater.

It is sometimes claimed that arbitration is speedy and not expensive when compared to traditional litigation. Therefore, arbitration is advertised as faster and less costly than litigation. However, even this assumption is often purely theoretical. Arbitration "merely" has the potential to be time and cost efficient. So, how does it make good on this promise? Arbitration's potential is the result of the flexibility which is built into the procedure. Few would disagree. Flexibility enables the creation of tailor-made procedures, fitted to the greatest extent possible to the needs of a given case and parties. This feature does not depend on whether the parties opt for ad hoc or institutional arbitration; both these systems are based on the flexibility of the arbitration procedure.

What is time and cost efficient also depends on the circumstances of a particular case. The circumstances of the case include not only the obvious factors: the subject matter of the dispute or amount in dispute. There are also psychological factors: who the parties are and what they want to achieve in the process. Some of the parties want to "leave no stone unturned" and are, therefore, ready and willing to engage in lengthy proceedings with long and elaborate written submissions, huge documentary discovery and witnesses. Others will be more interested in a quick and informal resolution of their business dispute. The goals and interests of the parties often conflict and result in the promise of efficiency being lost in an effort to square a circle.

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* Based on a paper delivered at a conference held by *The Lawyer*, London, October 2008.

[1] Arthur L. Marriot, *Pros and Cons of More Detailed Arbitration Laws and Rules*, ICCA Congress series no.7 (1996), p.72.

2. EFFICIENCY AS A PRINCIPLE

Why have problems with arbitration efficiency been such a recurring theme for so many years? Looking at the number of complaints which have arisen from thwarted expectations about efficiency, and the ideas about how to achieve efficiency, the observer will conclude that efficiency is very and increasingly important for the users of arbitration, namely, the parties.

Those advising parties need to step back and find out what their clients want when choosing arbitration as a dispute resolution process. Applying reasonable judgment to their contractual choices they want an efficient dispute resolution system. However, it might be said that an expectation of efficiency relates to all kinds of dispute resolution systems, private or public, chosen voluntarily or imposed by various laws and regulations.

But, if the parties are opting out of the state court system, it must be assumed that they do so because they expect a more efficient system of dispute resolution than that offered by the state courts. This assumption seems reasonable; surely parties do not opt out of one system in order to opt for a system which is less time and cost efficient. By making their choice the parties, business professionals, seek to optimise the dispute resolution mechanism attached to their business relationships. To resolve properly the problem with arbitration efficiency we need to accept that efficiency is the result of the principles on which arbitration is founded. Regardless of what the parties' goals and interests are with regard to the outcome of their dispute, practitioners need to acknowledge that they want a procedure which leads to an outcome which is efficient for all of them. Efficiency is in the interests of everyone.

3. EVERYONE IS RESPONSIBLE FOR EFFICIENCY

All users of arbitration are therefore responsible for ensuring efficiency of the process. The relationship between the parties (and their counsel), the arbitral tribunal and the arbitral institution should operate as a system of checks and balances, ensuring that the system works in an efficient manner. The reluctance of one party to recognise what is most efficient in given circumstances should not incapacitate the whole process, provided that all other participants (that is, the arbitral tribunal, the arbitral institution and the other party) have the required experience and act responsibly. It goes without saying that in such cases the key role is assigned to the arbitrators. Much has been said (and written) about the importance of choosing the right arbitrator. In order to achieve efficiency of the arbitration process, the arbitrator must possess strong management skills and must not be afraid to exercise them.

As "everybody is responsible for efficiency", the threat is that, in the end, no-one takes responsibility. The users of arbitration have the habit of looking at one another, expecting the other one to take necessary steps to achieve efficiency. Parties are expecting action from arbitrators; arbitrators leave it to the parties or arbitral institutions, and arbitral institutions trust in arbitrators' decisions and do not question them. As a result, many opportunities to make choices affecting efficiency pass unnoticed. Even worse, they pass unnoticed by the users, who do not act but blame other users for not ensuring efficiencies. Flexibility can, therefore, lead to a listlessness of the process.

The flexibility of the arbitration procedure provides a panoply of methods for achieving efficiency. All the methods—whether common law or civil law or other—can be applied. The origin of a procedure is not as important as the efficiency of a given tool or method. The assessment of efficiency of a given method in particular circumstances requires an open minded, creative approach, experience in applying them and an acceptance of their potential drawbacks. Modern users of international commercial arbitration are perfectly adapted to using flexibility as a key to achieving efficiency. Parties, lawyers, arbitrators and arbitral institutions have all gained experience over the decades in using different procedural solutions.

Decisions influencing the efficiency of arbitration are made from the very first stage of an arbitration: the very decision of the parties to opt for arbitration. The agreement of the

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parties to resort to arbitration is by itself a decision that arbitration is regarded by the parties as the most efficient dispute resolution method in the context of their particular relationship. Therefore, this decision needs to be made with a full understanding of what the contractual relationship of the parties is and what would be the most efficient method for the resolution of disputes arising out of this relationship. It may be that the most efficient method will require putting together various dispute resolution methods (for example, arbitration preceded by mediation). Should the parties spell out their need for efficiency at this stage? It is often not possible to do so because the exact circumstances of their potential dispute are not known at that time. However, the silence of the parties at this stage should not be understood to be a waiver of the principle of efficiency.

After a dispute arises, the key issue is how to shape the proceedings to allow for the most efficient way of resolving the dispute. Theoretically, the parties' goal is to co-operate in achieving the efficiency of the process. Because of their different interests in the outcome of the proceedings, the parties will inevitably have a very different understanding about the methods which need to be used to achieve efficiency. The parties all participate in the shaping of the arbitration procedure but the parties do not set procedural schedules themselves without the involvement of the arbitral tribunal.

4. PRO-ACTIVE ARBITRATORS

The arbitrator's mandate, which is based on the parties' agreement, should be guided by the principle of efficiency. Because of the role played by the arbitrator in shaping the structure of arbitration proceedings, the choice of a right arbitrator is the most important choice to be made by the parties. In order to make the most informed and best choice, the following questions should be considered: should there be one or three arbitrators; should there be a non-legal expert in the tribunal; when will the arbitrator need to be available; should the arbitrator know the parties' opinion about the anticipated timeframe(s) for proceedings; what managerial skills should the arbitrator possess; does he or she have experience in similar disputes (with regard to the complexity, character of the parties, the amount and type of evidence); what procedural techniques should he or she be most familiar with; what would be the arbitrators' expenses (travel, accommodation, secretary)?

The arbitrators need to have the potential to make the right decisions in the event that the parties are unable to agree about how the arbitration should proceed. They need to have enough experience in applying the various methods for efficient dispute resolution and the strength to discourage tactics which impair the efficiency of those proceedings. An arbitrator needs to facilitate and monitor the procedure closely and, if the efficiency of the process so requires, make quick procedural decisions. An arbitrator needs to be pro-active, especially when it comes to planning the proceedings in an efficient way and in enforcing the agreed timetables. An arbitrator needs to have the necessary skills and experience for that and be pro-active if necessary.

5. PLANNING

In order to decide what tools are the most efficient for the purposes of a given dispute, arbitrators will need to know about the case. What are the facts? Which facts do the parties disagree about? Which facts are relevant for resolving the case? What evidence do the parties need to prove the relevant facts? This information needs to be put together in a procedural timetable, or similar documents which serve as a roadmap for the proceedings. The tribunal should organise a procedural meeting to this effect as early in the case as possible. Careful planning of the subsequent stages of proceedings at this meeting will greatly facilitate the progress of the case. The parties and the tribunal need to find out at this meeting what evidence is going to be presented, when and how. The parties should tell the arbitrators how many witnesses and experts they anticipate calling. All this information should be presented as early in the case as possible. If there is a lot of documentary evidence to be produced,

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consideration should be given to agreed outlines or summaries. Procedural timetables need to provide for reasonable time limits for each stage of the proceedings. It needs to be clearly stated what happens if the time limit is not kept without reasonable justification. A hearing date needs to be set.

Careful planning and an exchange of information about how the parties see the presentation of their cases does not mean that changes to the agreed plan cannot occur. It is always possible, perhaps inevitable, that some unexpected events occur or the development of the case reveals other areas that need to be explored in order to resolve the dispute fairly. Such unexpected developments need, however, to be identified and brought to the tribunal's attention as early as possible and clearly, to avoid frustrating the structure that has been developed.

6. COMMUNICATION

Communication is crucial for efficient dispute management. Constant interaction between the participants of the process improves the efficiency of resolving unexpected procedural issues. Therefore, it is important to agree what means of communication will be used in the process. Electronic means of communication, 24-hour access to emails and good telecommunication services greatly facilitate communication, even if the parties and arbitrators are in distant corners of the world. Is arbitration falling behind here? Recently, Australian courts allowed the service of legal documents by Facebook and allowed the sending of notifications about proceeding dates via text messages.[2]

7. CHOOSING EFFICIENT SOLUTIONS

Many distinguished practitioners over the last decades have pointed to excellent and valuable techniques for ensuring greater time- and cost-efficiency of arbitration and the greater efficiency of arbitral procedure in general. Some techniques used in state court proceedings may also be helpful in certain circumstances. Moreover, completely novel and original techniques can be invented. Because there are so many excellent tools, experienced users are able to choose those which bring efficiency in given circumstances or, indeed, design even more efficient ones.

International commercial arbitration practitioners acknowledge that international arbitration can embrace many different procedural techniques. They should not be referred to as civil law or continental law or common law. Such a categorisation is not appropriate. Flexibility of arbitration requires open-mindedness and creativity in shaping the most efficient procedure. Experienced users of the system, and they are plentiful all over the world, should look at the utility of procedural tools rather than concentrate on where they come from.

This approach is particularly important in the context of the procedural meeting and other communications between the tribunal and the parties about the planning of the subsequent stages of procedure. Making the right choices may depend on answers to the following questions.

Witnesses

Do you need witnesses in your case? Why? What issues should they testify about? What do they know about these issues? Are these issues relevant? Should there be any restrictions as to who can be a witness? How many witnesses are required and should there be a limit on the number of witnesses? Should there be written witness statements? Should witness statements be limited only to the issues that are relevant to the facts that are contested? When and in what form should witness statements be submitted?

[2] *Financial Times*, December 17, 2008 available at *http://www.ft.com/cms/s/0/09f59f8e-cbdc-11dd-ba02-000077b07658.html* [Accessed March 10, 2009].

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Experts

Are experts necessary in the case? What issues of the case should be referred to an expert? Are they really relevant for resolving the dispute or simply "nice to have"? Should arbitrators be technical experts and non-lawyers? Do arbitrators need opinions of their own expert? Should the case be decided by the expert? Should there be party-appointed or tribunal-appointed experts? What is the appropriate area of expertise? How many experts are required? At what stage of the case should experts be introduced? What information should be provided to the expert (case file? site visits? interviews?)? What if the expert needs additional information? Should they present written reports? When should they present their report?

Documents

Should parties simply rely on their own documents or do they need documents which are in the possession of the other party or third persons? Even if a party comes from a legal background in which it has a right to disclosure or discovery in litigation, there is no automatic right to disclosure or discovery in international arbitration. As disclosure heavily impacts on the costs of arbitration, it has to be the subject of particular scrutiny. Is there really a need for it? Why? Is it necessary and reasonable to resolve the dispute? What should be disclosed and why? What documents are really relevant and material? Should the parties decide between themselves which documents are relevant? What role should the arbitrators play? How should documents be presented? Electronic or paper files? How should large collections of electronic data be made user-friendly and efficient so they can be searched?

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The hearing

Venue and organisation

The venue is a key consideration in making the proceedings efficient. Where should it be? How much space is needed? What facilities are needed (rooms, computers, beamers, flip-charts, other)? Should there be one hearing room or more? Who participates in each hearing? How many counsel will attend and how many parties, witnesses, experts? How much time for parties? What form of translation is required and how will it be given? Who provides it? These are all questions that should be agreed as soon as possible.

Opening and closing statements

Are they necessary? Can new evidence be presented in an opening submission? Should they rather be presented in writing before or after the hearing (post-hearing briefs) or both?

Witnesses and experts

Should they appear at the hearing (if witness statements or expert reports have been filed)? Can they travel because of the need for visas or health reasons? Can they participate via video-link? Who is responsible for their appearance? What if they do not appear? Should they be cross-examined? By whom? Is hot-tubbing/conferencing appropriate?

8. EFFICIENCY VERSUS DUE PROCESS?

The principle of efficiency needs to be coupled with the principle of due process in arbitration. However, these two principles are not contradictory but rather complementary. Planning the proceedings allows for greater transparency of the process and for making the participants aware what is going to happen and when.

The difference between these two principles lies in the consequences of non-compliance. Lack of due process may result in a successful application for setting aside the award or a refusal of its recognition and enforcement by a state court. There are no similar consequences

if the proceedings are not efficient. This does not mean that efficiency is less important than due process. The state does not allow its judicial authority to be outsourced to the private system without control over the fundamental requirement of due process. This is why the reintroduction of the award into the state system for the purpose of enforcement is subject to the condition of state-court scrutiny of compliance with due process requirements. Efficiency is not important for the state. Efficiency is important from a practical point of view, for those for whom the benefit of arbitration has evolved and is evolving. The parties should be ensuring efficiency. Therefore, there is no issue of due process as against efficiency but rather there is an issue of due process and efficiency. Both principles are fundamental elements of the arbitration procedure.

9. EFFICIENT ARBITRATION RULES?

The notion of fast-track proceedings has been given publicity by the famous case brought to the attention of the arbitration community by the ICC in 1992. The success of this case (an arbitral award rendered within 18 days over the Christmas and New Year holiday season) depended mainly on early, pre-dispute evaluation of the issues by the parties' counsel, through close co-operation of the parties, and the round-the-clock work of the parties, lawyers, arbitrators and the arbitral institution. There was a rigorous timetable, there was no disclosure, there was no extension to the deadlines, there were no lengthy briefs, there was no new evidence at the hearing stage, there were no requests for cross-examination. The case triggered the view that fast-track rules are needed to promote efficient and cost-effective dispute resolution, even in cases where the parties are not so co-operative.[3]

Many arbitration users seem to share the belief that some general rules can be created to achieve universal efficiency in the arbitration process. However, fast-track arbitration rules are used infrequently. Such rules seem to be the Holy Grail of international arbitration. Because arbitration is flexible, it is virtually impossible to design a set of rules that will guarantee time and cost efficiency. Efficient arbitration procedure requires the re-inventing of the rules for the purposes of each particular case.

This is not to say that rules, guidelines and other sources of information, concerning different tools which may be applied in dispute resolution procedure, are not important. They constitute valuable guides to the mechanisms that can be used in certain circumstances. However, they always need to be applied to the circumstances of a given case. If one compares guidelines for fast-track or expedited arbitrations and guidelines for efficient arbitrations, they are basically the same. There is virtually no difference between a fast-track arbitration and efficient arbitration. They boil down to the same goal.

10. CONCLUSION

What is important in achieving this goal is to embrace the efficiency principle and make all the users mindful that they are responsible for applying it. The key to success is not the rules but a responsible approach of all of the users to the principle of efficiency of the arbitral proceedings. This is the key to success of all arbitration cases, with or without fast-track arbitration rules.

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[3] Hans Smit, *ICC Fast-track Arbitration: different perspectives; A Chairman's perspective*, ICC Bulletin (November 1992), Vol.3, no.2, pp.15–17.

(2009) 75 ARBITRATION 2

Lectures, Addresses and Conference Papers

Mediation in Arbitration in the Pursuit of Justice*

by LORD WOOLF

John Cock, Chairman of the East Asia Branch of the Chartered Institute of Arbitrators, welcomed the speaker, the Rt Hon. Lord Woolf of Barnes, and special guests Andrew Li C.J., Hartmann J., Alan Limbury, Chair of the CIArb Practice and Management Committee and Mercedes Tarrazon, Mediation Representative on the CIArb Board of Management.

Colin Wall introduced Lord Woolf: It is a great pleasure that we are going to hear a talk tonight on the use of mediation in arbitration. Many people questioned, is this right? Is this the use of mediation and arbitration? I said: "No, no." I checked twice because people were querying that, because there is nobody I think worldwide who has done more to promote the pursuit of justice by making mediation a tool, which people now are looking at to use. In Hong Kong it is particularly relevant because from hopefully April 2 next year mediation is going to be introduced into the litigation system. But those of us at the CIArb who arbitrate may want to think about the use of mediation within arbitration.

Lord Woolf: Chief Justice, a Patron of the Chartered Institute, Colin Wall, fellow members of the Institute, ladies and gentlemen, it is a great pleasure for me to be here with you this evening. It is always reassuring to be asked back after you have been a speaker before, and in my case surprising. I did receive a letter once after I had given a talk at a Law Society dinner. I did my best at the Law Society, but next year I got a letter from the president and he reiterated his thanks for my giving the dinner lecture the previous year and went on:

> "We are having a dinner again this year and we would very much like you to come as our guest, but we are hoping it is going to be a light-hearted, amusing evening so you will forgive us if we don't ask you to speak."

I am going to talk about the same time that Colin and I met initially, which was 10 years ago. I was launching the changes to civil procedure. Those changes were a cultural shock to many of those involved in the English legal system, but I believe now they are really firmly rooted and people are comfortable with them. I say that because I know that under the leadership of the Chief Justice you are about to introduce your changes. They have been very carefully thought through. They aren't identical to what we have in England but they are similar. I particularly note that whereas we have "overriding principles", here they are "underlying principles". I don't know what the distinction is. I am waiting to be told in due course, but I think it shows a rather more Hong Kong attitude to civil justice, rather more gentle in effect. But whether there is any distinction to be drawn they both have the same object in mind and that is that judges should become more proactive in the delivery of justice, and in particular that they should have in the forefront of their minds the need to assist the litigants before them to resolve their dispute if this is at all possible at the first and earliest stage. Nobody who is sensible enjoys litigation and therefore, if the court can assist them to resolve their dispute without the need for going through the process, that must be beneficial to them.

* An address to the East Asia Branch, Chartered Institute of Arbitrators, Hong Kong, November 20, 2008.

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My thesis tonight is that litigation in the courts is very similar to litigation through the process of arbitration. They both have the same objective of obtaining a decision which resolves a dispute and brings it to an end. It is an imposed decision but, whereas now judges will regularly consider whether they can assist parties by suggesting some form of ADR, that just does not happen in arbitration. My argument is that it should, and it is indeed my belief that it will, and that arbitrators will have to recognise the importance of their matching the courts by offering the same sort of services.

There is great concern in relation to international arbitration, indeed in relation to all types of arbitration, that it is becoming an increasingly expensive and complex and drawn out process. These are exactly the same complaints that those who were going to the courts in England before 1998 were making and no doubt make still in many cases today. People do not want to be diverted from their normal activities in trying to resolve their disputes if that can be avoided. Litigation can be hugely destructive. In many situations the parties will ultimately resolve the dispute themselves but this happens at such a late stage.

Judges have always, when the mood takes them on the bench, from time to time tried to ask a question or two to facilitate a resolution. They can see the litigants really are behaving absurdly in fighting in the way they do and they could so easily avoid it.

I used to think when I was at the Bar that some of the insurance companies were approaching matters in a way that could only possibly be justified if they were determined to be my charitable benefactors; they realised that I enjoyed earning the brief fees and wished me to continue, because it was obvious that the cases could be settled but they did not do this. It was obvious that they were going to end up by making a payment, yet case after case after case they ignored the obvious because for some reason the claims manager thought it was more convenient to pay in a year's time, or two years' time, or three years' time, rather than straight away. And the same no doubt is happening in arbitration.

I don't believe that anybody benefits from that, and certainly as part of my process of reforms, when I met and talked to insurers they realised the absurdity of what was happening and were able to agree with me processes which would avoid this happening quite as frequently as it did. What we have got to find out is ways in which arbitrators can play a part in at least facilitating mediation and by encouraging mediation.

I have made enquires and, insofar as my personal experience goes, it doesn't happen here that arbitrators ask the parties: "Do you want me to help facilitate mediation?" It happens I believe regularly in China, and it happens in many other jurisdictions, but not in the common law jurisdictions. It seems to me if you are being involved by the parties at their request in this process and you know, as you must usually know, that their problems could probably largely be resolved by a consensual process of mediation, they should be encouraged to do that.

With my recommendations for my reforms, I had a picture in my mind of a particular court. What would happen is that those who wanted to litigate would come through the doors and there would be a table with some one there to welcome them who would provisionally ask them: "Well, what sort of dispute is yours?" And when they said what sort of dispute it was they would direct them to the best place to go to have the dispute resolved. Many of the disputes could be resolved so much better outside the courts than in the courts.

The same is exactly true of arbitration because if arbitration goes through its process it ends with a judgment. Now, quite apart from the fact that a judgment is a way of resolving a dispute which drives the parties usually further apart, it is also a judgment which has to fit within the confines of a process which lacks flexibility, because its source is usually statutory in part but consensual and contractual as well. That is the framework that governs what happens in the arbitration.

Now, in mediation all possibilities are open. The mediator can find sometimes that there is a way of positively helping the parties resolve their disputes which results in a remedy which is not connected with the dispute at all. If they had had a long relationship, for example, supplying motorcar parts to a motorcar manufacturer, what is most important to the supplier

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is the continuity of that relationship. Without the relationship it is going to be no use winning the case because his business is going to be destroyed by other pressures; if a way could be found of his getting an order which he found was attractive then he would much prefer that than the matters which are driving the parties apart. I just cite that as one obvious example.

Two years or more ago I gave up my job of judging and I went off and became an accredited mediator and it was, although I had always been an enthusiast for mediation, eye-opening as to what the potential was. I have conducted a variety of mediations which have ended up in the most satisfactory way and with results which a court could never possibly give. I have never yet been involved in a mediation, with one exception, where at the end of the mediation the parties were not grateful for the process. That is no compliment to me, it is just the reality which happens after a well-conducted mediation, and I hope my mediations are well-conducted.

The one exception where that didn't apply was where there was a substantial sum in issue. As a result of the mediation one of the parties realised that he had underestimated his claim by about 1,000 per cent and he immediately told me as the mediator to tell the other side that. As the other side were thinking of paying 10 per cent of what he was then claiming, they weren't very enthusiastic and the mediation didn't last very long because everyone had to adjust to this new situation. Try as I might I wasn't able to bring them together. But, on the other hand, I can refer to situations where we had difficulty getting the parties in the same room, never mind mediating, but once they started the process they became involved and the process ended up satisfactorily.

Sometimes the most important thing is for somebody to be there to say sorry. That can change the whole atmosphere. I had, and as this is already in the public arena I don't need to be confidential, the task of arbitrating between Iraqi citizens and the Ministry of Defence in relation to quite frankly outrageous behaviour that occurred in the treatment of those Iraqi citizens. Initially they would not take part in the mediation, but eventually about 12.00 we started, which was a great relief. There was present a very senior British soldier, the third most senior in the British army and his task was just to say how desperately ashamed he was of what had happened on this occasion, and immediately he had done that the atmosphere was transformed. He said what he felt and there was a lieutenant colonel from the Iraqi Army who said how he felt, and once that was out of the way they came down to the real business, which was to work out the compensation, and it was relatively easy. Before we parted that day the case was settled. The British Army realised they had to pay. They wanted it to be as soon and as quick as possible. They had gone to great trouble to get the Iraqis to London and it all worked so well. I can only say to you that my belief was if that case had gone on it would have ended up in the House of Lords on the very, very difficult issues which have not yet been determined. But from those citizens' point of view, the mediated agreement was so much better than the alternative long drawn out process. That is just one example.

If arbitrators are going to play a role in mediation what is that role going to be? How is this going to be achieved? One way it could be done is the arbitrator also being a mediator. The benefits of the arbitrator being the mediator is that of course he should know about the dispute. If he knows about the dispute the mediation hasn't to start right at the beginning. The second thing is he can time his intervention as mediator appropriately. If you are an experienced arbitrator you know when the parties are getting to the stage where they probably are ready to negotiate and at that stage he can decide to call them together and try and negotiate. This is something which I think most arbitrators would be very cautious about. Certainly any common law arbitrator would be cautious about doing this, because they would be worried about whether this could result in their being seen as not being objective. But it is interesting to know that now the International Bar Association has given guidance which says it can happen if it is properly and appropriately structured without that being the result, and indeed the International Bar Association Code of Ethics also makes the same thing clear.

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However, there are very real difficulties if the mediation does not work, because then the mediator has to revert to his role of an arbitrator, and I accept there will be situations where that just will not be practical because there will have been discussions with one party absent the other party in the ordinary process of mediation. Now, in Germany and Switzerland they manage to do it, and indeed I am now on a Commission with a very distinguished Swiss mediator where we are trying to draw up a code. It is a code which is going, we hope, to be able to be used internationally and, although she believes we are wrong, she does understand there will be very real resistance if the code envisages the mediator being formerly an arbitrator, becoming a mediator, and then going back and being an arbitrator again. I don't think that is a practical proposition, but what if, as she points out, the parties both agree beforehand that it should be all right and they will take the risk of that happening. Perhaps because they have faith in their arbitrators being able to put matters out of mind, even though they may have heard things that they would not normally have heard if the arbitrators had remained as arbitrators and not become mediators.

All I can say about this is that it is trite for it to be said that judges can learn things in the course of a trial and then put them out of their mind. I know after my own experience that judges bona fide try to do that. Whether you can do it I think very much depends upon what has been told and the circumstances. I think that, even if the parties say that they are prepared to take the risk, a wise mediator/arbitrator will say:

> "Well, it is not possible for you to know how I will feel if I have to reverse the process, and I must reserve the right to say I am afraid I can't go on."

There will be cases of that sort and, if you have a mediator/arbitrator of integrity, you should be able to rely upon him to do that.

There can be all sorts of information that an arbitrator receives during a hearing which he considers is inappropriate or unduly prejudicial; he has to perform the same sort of exercise I have indicated. However, there is a very real difference, for the process to be joint. Then it would mean, in the case of mediation, caucusing with the individual parties as is usually part of the process of mediation. It may just be a cultural inhibition, but I think to begin with it would be wise to avoid that. But the arbitration could be adjourned and a mediator employed in the same way as in courts. It could be possible for there to be an arrangement, if there is more than one arbitrator, whereby one arbitrator, who will thereafter withdraw from the process of arbitration, mediates on behalf of the arbitration process. That process should be sufficiently flexible to be capable of adapting to circumstances so it can happen properly; and in one form or another it can be made to work.

If you have the arbitrators bring in a mediator, the sort of problem to which I have just referred won't arise. There will, however, be a certain extra expense and there may be certain duplication of work, but in the case of any matter of substance that should be able to be accommodated so as to get the benefit of mediation.

What I am urging tonight is that arbitrators should see it as part of their role to help facilitate a settlement, and if they see their role as involving facilitating a settlement they will also encourage the parties to go to mediation if their feeling is that that will assist. I suspect of course that part of the problem is that arbitrators, unlike judges, have not the same interest and responsibility in the well-being of the system as a whole. They have been engaged as individuals. They are earning their living every day that the arbitration takes place and they have not got the same commitment in the majority of cases to how arbitration generally works. But there are of course very many arbitrators who are totally committed to arbitration in a similar way to that in which I am committed to mediation. They want arbitration to be as good as possible. They are unhappy about the way it is working at the moment and they want to see improvements. Committees of bodies such as the Chartered Institute this evening are working at improving standards all the time. However, you have to admit that at the moment they are not making the progress they should and what is needed

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is for a step forward. Here they could bear in mind what is contained in Pt 1 of the Civil Procedure Rules of England and Wales, and what is going to be in Pt 1A of your Civil Procedure Rules here in Hong Kong. There they will see set out in simple language what the alternatives are and what can be done to make the system work better. It is not really for me to do more than draw your attention to that and say, whether you think mediation is the answer or whether you think something else is the answer, your management of the arbitration, just in the same way the judge's management of the case, should be directed to resolving the dispute by bringing the parties together until ultimately in many cases they are able to resolve that dispute without having a decision forced upon them.

The sort of situation that can arise so often is that in the end the arbitration is over who shall go into liquidation, and unfortunately so often it can be both sides that end up in liquidation. This cannot be the sort of result that lawyers, and engineers, or whatever other profession they do, want to produce as a result of their involvement in the process. So that is what I will put before you. I hope I have left plenty of time for questions, and I would be very happy to answer any questions that anyone has.

The chair then asked for questions.

Paulo Fohlin: I am a Swedish lawyer. According to the Swedish Code of Judicial Procedure in litigation the judge in charge of the preparation of the case before the main hearing, before the trial, is obliged to try and work for settlement, but he also has the possibility to appoint a separate mediator if the parties consent.

Lord Woolf: What about in relation to arbitration?

Paulo Fohlin: It happens now and then in court cases in Sweden that the judge in charge of the preparations appoints a separate mediator. He might be a judge or a lawyer or somebody else connected to the court or not connected to the court and, if the case is a substantial one, the judge in charge of the preparations would ordinarily not take part in the case as a mediator himself. He would appoint a separate mediator. If we compare that with arbitration, even if you have guidelines providing that an arbitrator who steps into the role of a mediator is presumed not to be biased if the mediation fails and can thus continue as an arbitrator, isn't the problem that the mediation is never going to be as efficient as in the court system where the judge can appoint another separate mediator? Because even if I know that there are rules to the effect that he is not supposed to be presumed to be biased, I will not act as freely in my conversations with that person as if I know that he will leave the case.

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Lord Woolf: I think there is great force in what you say. Either it is going to affect the arbitration or it is going to affect the mediation, or both. My complaint against the present situation is that the arbitrators don't do what the Swedish court does, which is in an appropriate case suggests to the parties mediation. Now, I raised the possibility of the mediator being one of the arbitrators. I did see that there were real disadvantages in that, but the fact that there are those disadvantages doesn't mean that other more appropriate ways cannot be found and, as arbitration is a consensual process, the parties themselves can decide how they want to do it. The important thing is that at an appropriate stage somebody does the job of conciliating between the parties, because experience shows that an independent person can do what the parties and their lawyers are incapable of doing themselves, and that is to facilitate a settlement.

Colin Wall: My question is do you think that it would be helpful for arbitrators to be trained in mediation skills? For example, in the preliminary meeting where things get agreed by consent and the arbitrator is supposed to design the process to fit the nature of the dispute and maybe several disputes, if you are flexible some of them could well be hived off to separate mediation. Where the parties really have had advice so that they genuinely believe they are both right, that can go off to be decided by a decision maker, but other matters are mediated. So we should give some training to arbitrators in people skills to point them in the right direction?

Lord Woolf: You are absolutely right. At the moment in Hong Kong a number of judges are going through mediation training. The idea behind the mediation training as I understand

it is exactly what you are indicating. It is so easy for lawyers who have spent their whole lives negotiating to think they know all about negotiating, but with the practical experience you only find out as a result of the mediation that it is hugely beneficial to understand the negotiation process which is most likely to produce results. It has got to be tailored to the dispute and then it works. Judges need to know that just as the lawyers need to know that, and I am very glad that those who are responsible for these things in Hong Kong have made it part of their responsibility to promote mediation as a preliminary step to the introduction of the reforms. It is not extensive training. It is relatively short and therefore relatively economical and not demanding. I think that every lawyer and every judge who is involved in commercial work should actually make sure that he becomes trained and regularly refreshes his skills after he has been trained. It will help him or her in all the things that they do. It is part of the life skills in fact and, you know, mediation now is moving into many more fields than litigation. Large companies are finding that the presence of a mediator to help them resolve matters like reducing staff can be hugely advantageous, that within their board they can have disputes that have to be resolved where the presence of a conciliator can make a very significant contribution. And I can only say to those who are here who haven't had the advantage of training, if they have the opportunity to do so, do take advantage of it because you will not regret it. You will find it fun and you will find that it improves your skills.

Mark Sutherland: You mentioned mediation in an informal sense. How would you see the agreement of terms of reference between the parties and the mediator, and indeed the payment of fees in the event that an arbitrator had first been appointed? How would you see the interlinking of those two matters?

Lord Woolf: I don't think it really creates any particular difficulties at all. The mediator will be employed as he is employed in regard to any dispute. Often the parties will agree that in any event his fees will be divided between them. If the settlement is reached the agreement can say the settlement should include the costs of the mediator. This is a completely flexible process, not subject to legislation, and they can agree exactly how they want it done. The arbitrator is there to serve them and he will put that into effect. Of course, to have mediation in conjunction with arbitration has one great advantage, at the end of the mediation if there is a settlement and if it is of an appropriate type it can be then the basis for an award. That award then becomes enforceable as any other decision in the arbitration and that can be a huge benefit.

I have at the moment the responsibility for setting up a court to deal with commercial and civil disputes in Qatar. The model that we are in the process of bringing into effect is one where the mediation and the arbitration should be all part of the court which is going to be a dispute-resolving court, and all three processes will work together to support each other. If we see it as centrally organised, then we can get the best of all worlds for those who choose because they have to choose to submit to the jurisdiction of the commercial and civil court of Qatar. In a country like Qatar, which is seeking to attract financial services, it is important there should be the infrastructure to support those financial services, as they would find if they had the wisdom to come to Hong Kong that there were ample resources here.

Andrew Aglionby: I am a solicitor in Hong Kong but occasionally I go to China and I have been involved in CIETAC arbitration.

Lord Woolf: Yes, and they have special provisions for dealing with this.

Andrew Aglionby: But they have different rules. They are slightly different in many ways. For instance, the mediation concept as I understand it as taught in Hong Kong and in the United States, and I think in the United Kingdom, is a win/win concept. It is the concept that the parties are brought to realise that when they discuss issues they can both have an outcome which is an improvement. But negotiation in China, from my experience, starts from the prospect that it is a win/lose, that it is a zero sum negotiation and perhaps that feeds through into the CIETAC mediation, or conciliation as they call it, where the arbitrators act

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as conciliators but really talk about the outcome, the rights and the obligations of the parties in the context of a particular dispute, the legal remedies, if you like, not the commercial wider interests. I guess the question that comes out of that is, how does one take account in all of this in international arbitration of the very different cultures which meet, perhaps in violent misunderstanding of each other's motives, and do those different cultures meeting in that forum lend themselves to the sort of mediation process that you have been talking about?

Lord Woolf: Well, you are absolutely right about the fact that there are different approaches. My understanding of the Chinese approach, and I am afraid it is only secondhand, is that in a Chinese arbitration routinely they ask the parties whether they want a conciliation. That is one of the first things that is asked, and if that is right they are already in a different league from what happens in the majority of international arbitrations today which aren't in China. They have a particular model; in different parts of Europe there are other models; and, of course, there is a different model in the United States. It is my belief that in all aspects of civil justice there is a process of harmonisation taking place. It doesn't happen overnight, but it is again the task of bodies such as the Chartered Instituted to try and promote forms of carrying out activities that we are discussing this evening in a way which is attractive to the majority of users, whatever their cultural background. The different cultural backgrounds will no doubt be taken into account in the appointment of the arbitrators, but there usually can be sufficient give-and-take within the process to meet the different cultural background. Once arbitrations are taking place accommodating the different approaches, then we all learn from the process, and it is so much easier the next time to devise a system which will serve those interests better than we did on the previous occasion. So I think it is an evolving situation and it is by evolving, taking into account the experience in different jurisdictions, that we will get the best results.

Alan Limbury: I am the Chairman of the Chartered Institute of Arbitrators' Practice and Standards Committee. That committee has set up a working group to devise a protocol for Med/Arb. The idea is that the parties would get full advantage of the opportunity to have private caucuses with the mediator and, if that is not successful, that same person arbitrates. We have taken as one discussion model the Australian Commercial Arbitration Act, which provides for Med/Arb, but it has not been very well used. I think the reason is that, in order for it to happen, the parties have first to agree that the arbitrator will mediate. Then at the beginning they have to waive any objection that they might have on procedural fairness or apparent bias grounds. The model that we are now looking at in order to try to make it more attractive is that there should be the opportunity not merely for the parties, but also for the mediator, to opt out after the mediation phase. So, depending upon what has happened, not only could the mediator say, "well, thank you very much, I don't feel comfortable arbitrating", but the parties could say, "well, even if you do feel comfortable, we don't", in which case they would have to have somebody else appointed, in the hope that it might tempt more people to try it, knowing that they could opt out, as it were, halfway through.

Lord Woolf: I think you were not here when I was trying to explain a similar sort of position. I was saying that whereas there are those countries—Switzerland and Germany are two—which very much go down the idea of Med/Arb, there are real handicaps. I, therefore, think it is very ambitious. It seems to me that your approach is much more likely to lead to a model which will more acceptable to both the user and those who practise arbitration and mediation. But the great thing is to get over the hurdle that people have now of thinking about mediation when they are involved in arbitration, and for the life of me I just don't understand that. Had they been in litigation they would have been told by the court, encouraged by the court, to go off and try the mediator.

Bob Vart: I am a consultant and engineer. I have given evidence recently at a number of arbitrations, LMAA in London in maritime disputes, and it has been my experience that the tribunal has effectively ordered a meeting of experts, which I think has always resulted in

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some progress, at least in narrowing the issues. Would it not be possible for a tribunal also to order a mediation?

Lord Woolf: I think it is possible. I query the use of “order”. I think it is much better to keep it, especially for mediation, as a consensual process. So I would say “encourage” rather than “order”, but that is my particular view. When I was doing my report on civil procedure reform, I visited Australia and I visited the United States. In both jurisdictions they were keen on ordering people to mediate, and they have had great success using that. They said, “[y]ou will never get many people mediating unless there is a power to order”, and I think that probably is right. Nonetheless, I think it comes at a cost, and the cost is the consensual nature of mediation. If I may say so, asking two experts to meet and to agree where they are in agreement and agree where they differ is quite a different process from mediation, and the court is in charge there and can enforce orders, but I don’t see how you can really satisfactorily enforce mediation on people who don’t want to mediate. They just won’t play the proper role. Albeit that there are sanctions, the sanctions will take you into satellite litigation, and satellite litigation can be even more frustrating and expensive than the original litigation, so one has to be a little bit cautious.

John Cock: Thank you. Lord Woolf has given us an interesting talk tonight about an area that everybody is always talking about, the introduction of mediation into litigation and other areas of dispute resolution. I think there are probably very few people in this room who have got experience of mediation in arbitration, but it is certainly an area ripe for discussion as is obvious from the questions raised from the floor and the interest in the talk and the topic. May I ask you to join with me in thanking Lord Woolf in the usual way?

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(2009) 75 ARBITRATION 2

Forget ADR! Think A or D*

by SIR ANTHONY EVANS

First, I must thank you for the honour of inviting me to make this keynote presentation. "Keynote" gives me the opportunity to develop some thoughts about what is known, all too pervasively and unfortunately in my view, as ADR—so-called "alternative dispute resolution". This phrase has always prompted the question, "alternative to what?", and no clear answer can be given; some say "alternatives to the courts", especially I'm sorry to say the Government and sometimes even the courts themselves. What they really mean is: "take your dispute elsewhere, only as a last resort bring it here", so that the cost of providing the courts service will be reduced. On the other hand, many lawyers, those of my generation in particular, think of ADR as synonymous with mediation and other alternatives to the two traditional methods of dispute resolution, litigation and arbitration. To these traditional methods it is important to add a third, though it is not fashionable to do so. I'm referring to a good old-fashioned settlement agreement, negotiated usually and sensibly by the parties and the lawyers themselves. More about that anon.

This difficulty of classification is exemplified by the subject of today's conference: adjudication under what I shall call simply the 1996 Act. Is this no more than an alternative to litigation (as arbitration itself is, if the first of the two definitions is correct), or is it now a firmly established method of dispute resolution which is recognised for its own merits, not as an alternative to anything? I have given you a clue as to how I personally would answer the rhetorical question I have just posed.

So I am giving this paper the title, "Forget ADR! Think A or D", and I will explain why. A stands for agreement, D for decision, and my thesis is that these are the only two methods of dispute resolution. Put another way, the dispute continues until it is resolved either by agreement or by the decision of a third party, which is binding in law. So I say, "think A or D".

The requirement that a decision—the decision of a third party—must be binding as a matter of law straightaway brings me to a topic which I have been asked to cover, that is, the subject of "natural justice". It is now accepted that this means little, if anything, more than "fairness", or in terms of dispute resolution, "a fair decision". The kind of third party decision which is binding in law on the parties to a dispute is made either by a judge, and it goes without saying that judicial proceedings must observe the rules of natural justice, or by a third party whose decision the parties have agreed to accept as a binding resolution of their dispute. The third party may be an arbitrator or an independent expert or possibly even an independent non-expert, or layman. Whichever it is, the law requires that person to observe the rules of natural justice. To put it another way, in more fashionable contemporary terms, the decision must be reached fairly and the degree of fairness must be proportionate to the circumstances and the nature of the dispute.

Although my theme is "think A or D", I shall take D first: the different ways in which a dispute may be resolved by the decision of a third party, which is binding on the parties by law. *Litigation* is premised on the coercive powers of the state, and a slightly old-fashioned view is that it is the duty of a modern democratic government to provide courts to which all citizens can take their disputes for resolution by the decision of a state-appointed judge. The judge must make the decision according to law, appeal courts exist to correct any errors of fact or law that may be made, and as noted above. It is axiomatic that the proceedings

* Keynote address, Annual Conference, Association of Independent Construction Adjudicators, London, April 2008.

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shall be conducted fairly, and in accordance with the rules of natural justice. The judge's decision, if not complied with voluntarily, can be enforced through what I have called the coercive powers of the executive branch of the state.

Arbitration is another procedural mechanism which produces a decision that the parties are bound to accept. But in this case the third party is appointed by the parties themselves and the decision is binding as a matter of contract; ultimately, it can only be enforced by utilising the same executive powers of the state. Arbitration procedures of course are regulated by law and, for the arbitration award to be enforceable, the provisions of, currently, the much-praised Arbitration Act 1996 must have been complied with. The rules of natural justice must always be observed, and these in their statutory form are defined in the Act. The third kind of binding decision I shall describe generally as *expert determination*. Again, the decision is only binding as a matter of contract, and therefore it must be reached in accordance with the procedures which the parties have agreed. The rules of natural justice apply here also, though in a modified form. This was established by the House of Lords in a valuation case where it was held that, whilst a valuer could take account of matters within his own knowledge—that after all is the reason for appointing him—nevertheless he must make sure that the parties know what he is doing.

Before I proceed to consider methods of dispute resolution by agreement, the A of my suggested A or D, I should say a little more about natural justice, especially bearing in mind that this was the specific subject on which I was asked to speak. At the risk of seeming facile, and it is a concept which has generated much judicial learning and very many judgments over the years, I suggest that essentially there are only two rules: first, the judge or decision-maker must be independent of the parties, and unbiased in his decision-making between them; and secondly, both parties must have the opportunity to present their arguments to him and to comment on the evidence on which he acts. In short, he must be independent and unbiased, and both parties must be heard. I confess that some years ago I was greatly relieved to learn that what had always appeared a somewhat imprecise even philosophical concept could be, and should be, reduced to these two practical rules. That is not to say that the rules cannot sometimes be difficult to apply in practice—the cases on what should be regarded as "apparent bias" in a decision maker, particularly an arbitrator, are a clear demonstration of this—but the two basic rules themselves are clear enough.

The concept of "natural justice" has had a long and sometimes tortuous history in the course of its development by the courts. I am indebted to the learned authors of *Wade & Forsyth on Administrative Law*[1] for their summary at p.440 and following of the current (9th) edition. Before the landmark judgment of the House of Lords in *Ridge v Baldwin*,[2] the view had been expressed, and had found some favour with the courts, that "natural justice" was a matter for judges and the courts; as such, it was not applicable to other tribunals (arbitration, I think, apart), particularly not to administrative tribunals which by definition were not part of the judicial system, and the decision-makers were not judges. The basis for that belief was the conventional view of the separation of powers: judges and the judiciary are one thing, the executive and administrative authorities are another, and the false conclusion was drawn from this that an administrative tribunal could not be required to observe rules that governed the exercise of judicial powers. The House of Lords exploded this belief, holding that tribunals, like judges, are required by law to reach their decisions fairly, which in practice means that they must observe the basic rules of natural justice, modified perhaps in the circumstances of a particular case.

More recently, under the influence of the Human Rights Act and the increasing use of the concept of "proportionality" which, as Lord Denning predicted, has flowed into this country from European law, it has been questioned whether "natural" adds anything in the

[1] C.F. Forsyth and William Wade *Administrative Law*, 9th edn (Oxford: Oxford University Press, 2004).

[2] *Ridge v Baldwin* [1964] A.C. 40.

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phrase “natural justice”; and if the concept is justice simpliciter it may be the same thing as “fairness”, which might be and no doubt will be defined in terms of procedures which are “proportionate” having regard to the nature of the dispute, the type of the procedure and all relevant circumstances of the case. *Plus ça change, plus c’est la même chose*, may be the appropriate European comment.

So I come to the different processes of dispute resolution which I group under the heading “Agreement”. First and foremost is a straightforward settlement agreement, or compromise agreement, the legal aspects of which are dealt with so capably and so comprehensively in Foskett J.’s book.[3] It is not fashionable, unfortunately, to regard a settlement agreement formally as a process of dispute resolution, “alternative” or otherwise, but I believe that it should be and I wish that it were. The reason, I think, why it is not, is that the plethora of publications—books, articles, and even judgments—on mediation and other processes which have appeared during the past 20 years have hi-jacked the phrase which I dislike so much—ADR—to such an extent that its meaning is limited to those processes, and the best form of consensual outcome—a negotiated settlement agreement negotiated by the parties and their representatives—effectively is excluded from it.

So let me move on to *mediation*, which I say straightaway I regard as a valuable and sometimes indispensable process of dispute resolution, requiring professional skills in the mediator which are quite different, even distinct, from those of an arbitrator or judge. Those are decision-makers; the mediator’s role is to lead, push, cajole or bully the parties into a settlement agreement which they and their representatives are unable to reach for themselves. The outcome when the mediation is successful is a settlement agreement, but it does not follow from this that mediation is always necessary for a settlement agreement to be reached. Rather, as a matter of principle, I would say the reverse: the parties and the representatives should usually be able, in a two-party case, to negotiate a settlement agreement when the issues are such that a compromise is possible, but that is not always the case, and it is then that the assistance of a skilled mediator is desirable and may be essential if agreement is to be reached. The two main categories of case where this may apply are, in my experience: (1) when more than two parties are involved: for example, an insured and his insurer and his broker, perhaps a reinsurer also, all have competing claims and interests, and an overall settlement is unlikely to be achieved without the help of a mediator; and (2) where two parties or regrettably as sometimes occurs their lawyers are at loggerheads or are under a misapprehension as to the strength and merits of their respective cases. For this reason, I feel uncomfortable when the proponents of mediation, and even the courts, say that mediation should be the normal rule, or that mediation should be the invariable precursor to proceedings in court. If this is the practice, it has commercial advantages, of course, not only for mediators and mediation institutions, but also for the lawyers representing the parties in the mediation process. I would prefer to ask two questions; is mediation likely to assist the parties to reach a settlement agreement in this case? If it is capable of settlement, why cannot the parties and their lawyers negotiate it for themselves? And I would expect the success rate in mediations to be high, because mediation ought not to be attempted, let alone required, unless the chances of settlement are high.

I can refer shortly to other processes which may encourage or propel the parties towards a settlement agreement, and which may be justified in the circumstances of a particular case. Foremost among these is *judicial evaluation*. This was introduced in the Commercial Court in this country in 1991 and, unsurprisingly in my view, it has been very little used. Like mediation, the process is limited to assisting the parties to reach a compromise agreement which for whatever reason they and their lawyers have been unable to achieve by negotiation between themselves.

[3] David Foskett, *The Law and Practice of Compromise with Precedents*, 5th edn (London: Sweet & Maxwell, 2002).

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And so I come, finally, to the principal subject of your interest today: the statutory process of adjudication. Into which of my two categories does this fall? Unlike most and probably all of you, I have not had any practical experience of adjudication, and so I hope you will forgive the jejune mistakes I am bound to make. However, I have learned enough to know that the statutory process introduced, abruptly, in 1996, as a means of avoiding long and expensive delays in construction projects when disputes arose between the contractor and sub-contractors and perhaps other parties too, has certainly been successful in achieving that result. The procedure involves adjudication—the dispute is resolved, at least temporarily, by a third-party decision—and it operates under a short and strict time scale. Decisions of the courts have confirmed, or established, that the right of appeal is very limited indeed. But the losing party still has the right to refer the dispute to arbitration and thus to reopen the issues, if it chooses to do so.

In practice, I am told, the decision of the adjudicator is accepted in the vast majority of cases. The result in terms of arbitration, and court, business has been dramatic. The number of construction arbitrations is only a fraction of what it was, with a consequent reduction in the number of cases coming before the TCC.

To answer the question I posed earlier, this method of dispute resolution undoubtedly should be classified, in my view, as a form of third party decision, in my category D. But at the same time, there is a consensual element as well, because the losing party has the right to reopen the issues and by not doing so could be said to have accepted the result. Some way from a settlement agreement, or voluntary compromise, but there is a whiff of "A for agreement" about it as well.

The conclusion I draw from the spectacular growth and acceptance of adjudication during the past decade at the expense of arbitration, is that parties prefer the benefits of speed and relative cheapness which it offers, compared with the longer and more expensive process of arbitration. This is more than just a straw in the wind. It is concrete evidence that arbitration as a dispute resolution process has become over-costly and inefficient, and all those concerned with arbitration should take note. This is especially true outside the construction field, where the formal process of adjudication is not available, but all arbitrators in my view should be spurred into bringing their procedures more into line with what the success of adjudication seems to indicate is what parties want.

This may also be the lesson that arbitrators, and I would say lawyers generally, should learn from the development of mediation during the past, roughly, 20 years. Here, different factors have been at work, such as the Government's desire to economise when it comes to providing the legal system of courts and judges which in principle at least should be in the front line of dispute resolution procedures available in a community such as ours. But the saving of costs and time is one of the advantages of mediation over court, or arbitration, proceedings about which we hear a great deal. Having heard my earlier remarks, you will not be surprised if I conclude by asking why not concentrate on straightforward inter-party negotiation and compromise? That will be quicker and cheaper still, in the great majority of cases, and the responsibility lies with the lawyers in every case.

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Past, Present, and Future Perspectives of Arbitration

by KARL-HEINZ BÖCKSTIEGEL

1. INTRODUCTION

Let me first of all say that it was with great pleasure that I accepted the invitation to join this important conference organised by the Malaysian Branch of the CIArb and to address you shortly. On the list of participants I see many distinguished colleagues a number of whom I meet quite frequently at meetings in other parts of the world. And, of course, Cecil Abraham is a colleague on the International Council for Commercial Arbitration whose conference in Dublin this year was attended by many of you. Though I have been on the panel of advisors of the Kuala Lumpur Regional Centre for Arbitration for quite some time, my last visit to this city was quite a while ago. It is good to be back here in this beautiful country.

As you will be aware, the time for my short address is limited so that the conference can go on with its regular working program. I thought I should use it to present a few selective thoughts on the development and role of arbitration in the past, today and its future perspective.

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2. WHERE DO WE COME FROM?

If one wants to fully understand the present role of arbitration, one will have to start by looking at past developments that were the basis for the present situation. This is a truism, though, at any point in time, to the observer and even more to the practitioner, the present circumstances, issues, problems and developments will look specific and unique. Most of the time, they are not and, at least, can be better understood if one looks at the developments leading to them.

Therefore, it may be at least briefly recalled that the origins of arbitration go back to dispute settlement usages in ancient times, in Europe, in Greece and Rome including Roman law, and in Asia. In Europe, the Middle Ages revived the Roman tradition and, some centuries later, the French Revolution considered arbitration as a "*droit naturel*" and the Constitution of 1791 (art.86) and the Constitution of Year III (art.210) proclaimed the constitutional right of citizens to resort to arbitration.

Parallel thereto, England already had an Arbitration Act of 1697, to which a number of enactments were added over the years up to the "new" Arbitration Act of 1889, which continued to dominate arbitration law in England into the early part of the last century. During that last century, many substantive changes were then made by the new Arbitration Acts of 1934, 1950, 1975, 1979 until we now have a modern arbitration law with the new English Arbitration Act of 1996.

On the European continent, during the same period, though many countries developed their own arbitration laws with a number of diverging characteristics, particularly stressing either the procedural or the contractual aspect of arbitration, ways have always been found to provide for a binding submission to arbitration for future contractual disputes. And, as is well known, by now all legislators in the major European countries have reacted to the demands of the modern international business community for efficient specific dispute settlement systems by enacting new legislation, starting from the French legislation in the early 1980s and continuing more recently with the adoption of the UNCITRAL Model Law in Germany effective from the beginning of 1998 and in many other countries throughout the world.

Though I am aware that arbitration has a long tradition in Asia as well, I must admit that I am not very familiar with the historic development of arbitration in this part of the world. But I would be very interested to learn more in this regard.

Parallel to these developments at the national level, inter-state conventions on arbitration have provided progress at the international level. Earlier in the last century, the Geneva Protocol of 1923 and the Geneva Convention of 1927 were the first steps. The quantum leap, however, was provided by the New York Convention of 1958 (NYC), which is by now ratified by all relevant states throughout the world with very few exceptions. And a further landmark was the UNCITRAL Model Law on Arbitration which is accepted by more and more countries throughout the world.

Even this extremely short outline shows that the practical demands of trade and particularly international trade, throughout history, have led to the creation of arbitration machineries and respective legal frameworks and their continuous updating. Thus, when looking at the situation today, from a historic perspective, there is nothing special about the mere further development of international arbitration. All that is special are the present and future circumstances provided by society and law and particularly business practice and technology leading to the demands which will decide on how arbitration has been shaped today and what future developments will occur.

3. WHERE IS ARBITRATION TODAY?

Now, turning first to international dispute settlement in general at the present time, we have to realise that it provides more options and is used in practice more than ever before in history for the peaceful solution of disputes. The role of the International Court of Justice today is of much more significance than earlier. Even for politically most sensitive disputes, it has been possible to form and use specific judicial bodies, as I have experienced in my function as president of the Iran–United States Claims Tribunal at The Hague. Not every such judicial body finds general support by all major states, as the example of the International Criminal Court shows, which the present administration of the United States does not accept. But, in many important fields of international law, there is wide acceptance by all relevant states. The World Trade Organisation's dispute settlement machinery is widely used. And, for international investment, most of the by now more than 2,400 bilateral investment treaties (BITs) provide for arbitration between the host state and foreign investors which is used in a growing number of cases administered either by ICSID of the World Bank or other mechanisms.

At the non-governmental international level, commercial arbitration, such as that of the ICC and the LCIA, has become the generally accepted method of dispute settlement between private enterprises and for international government contracts including worldwide enforcement of awards by the NYC.

At the regional level, the European Union has a fully available court system for the by now vast body of European law by the European Court of Justice in Luxemburg. The European Human Rights Convention offers legal protection to Europeans against their own and foreign states by its separate Court in Strasbourg. In Asia, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has been available for a long time. And, on the American continent, NAFTA provides a widely used arbitration system for the protection of investors in North America and, for Central America, CAFTA has provided a similar arbitration machinery since 2007, which is being used for the first time in a case just starting which I have been asked to chair.

As well, some arbitration institutions formed at the national level play an important role, not only for domestic but also for international disputes. Examples are the Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC), the Singapore International Arbitration Centre (SIAC) and the Korean Commercial Arbitration Board in Asia, as well as in Europe the national arbitration institutions in Austria, Germany, Sweden and Switzerland, and in the United States the American Arbitration Association.

It must also be noted that judicial adjudication has even been used much more than before to deal with highly politically sensitive disputes. Let me shortly mention two examples with which I became familiar as an arbitrator.

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The first is the Iran–United States Claims Tribunal at The Hague formed after the Iranian Revolution of 1979 by instruments of public international law, the so-called "Algiers Accords", to decide all disputes between the two states and their citizens. The Tribunal, in its almost 4,000 cases, using the UNCITRAL Arbitration Rules with some alterations, has issued a large body of decisions and awards. They are of interest not only because—unlike in most arbitrations—they are all published, but also because they deal with most procedural problems occurring in international arbitration and with a great many substantive questions relevant in other and later international arbitrations and particularly modern investment disputes. As some of you will know, the Tribunal was not an easy institution to work in or even to lead. The fundamental political as well as cultural differences between the two states and between many of the persons involved presented a continuous challenge. Nothing could be taken for granted. As President of the Tribunal, my guideline was: try hard to achieve the best but be prepared for the worst. And indeed, procedurally, not seldom the worst-case scenario did occur. Looking back, it is still astonishing that, in spite of the many opposing political and economic interests and rather frequent confrontations at the Tribunal, it was possible to process and decide several thousand cases in an orderly manner.

My second example is the United Nations Compensation Commission (UNCC) which was formed after the first Iraq War following Iraq's invasion of Kuwait to deal with foreign claims against Iraq under the supervision of the United Nations Security Council. Again, the UNCITRAL Rules served as guidance, though the procedure had a number of specific characteristics normally not used in arbitration. Enforcement of awards running into billions of US dollars was available from the large funds coming from a portion of the income Iraq had by the oil sales permitted by the United Nations in the so-called "Oil for Food Program". From my experience as panel chairman of the UNCC, it seemed to me that the adjudication worked rather well in spite of the obvious political sensitivity of the disputes and the millions of claims, such as by Egyptian workers, for which computer programs had to be developed which later were helpful in other mass claim adjudications.

Furthermore, in this context of politically sensitive arbitrations, one may mention the inter-state cases after the hostilities between Eritrea and Yemen as well as between Eritrea and Ethiopia, the *TABA Case* between Israel and Egypt, the *Rann of Kutch Case* between India and Pakistan, and the *Beagle Channel Case* between Argentina and Chile.

Inter-state adjudication and arbitration cases often, in substance, dealt with interests and rights of nationals of one of the two states rather than of the state itself. However, since traditionally only states were recognised as subjects of international law and, in particular, had standing to sue another state in international proceedings, the private persons involved could not be procedural parties themselves and their home state, by way of the traditional concept of diplomatic protection, had to sue the other state.

An early exception was certain concession contracts which provided mostly for ad hoc arbitration in which the private company receiving the concession, in return for its investment, was granted the right to directly start arbitral proceedings against the granting state. This led to well known arbitration cases like ARAMCO, AMINOIL and the like. Similarly, even without a concession, if states, state institutions and state enterprises concluded commercial contracts with foreign private companies on subjects such as infrastructure or construction projects, they often accepted arbitration clauses referring to commercial arbitration. In fact, over many years, up to 10 per cent of all ICC arbitrations involved such state parties.

However, a fundamental change came with the rise of investment arbitration by modern bilateral treaties on the promotion and protection of foreign investment, the BITs, which regularly include arbitration provisions, and by the ICSID Convention created by the World Bank, providing a special arbitration system for investment disputes. Together with the enormous growth of foreign investment activities in today's globalised world economy, they led to today's great and still growing number of investment arbitration cases.

Specific arbitration rules have been provided for investment disputes by ICSID, NAFTA, CAFTA and the new Energy Charter Treaty. But the traditional systems created for

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commercial arbitration between private enterprises, such as those of the ICC, the LCIA, the Stockholm Chamber of Commerce and the UNCITRAL Rules, are also frequently used for investment cases. As a matter of fact, in view of some criticism of the ICSID and NAFTA systems, it seems to me that there is a recent trend to turn more often to the traditional commercial arbitration systems. Particularly, the UNCITRAL Arbitration Rules seem to profit from this development. In this context it is noteworthy that most recently, in the so-called *Softwood Lumber* cases between the governments of Canada and the United States, of which I chair the first one, the LCIA was chosen to administer the dispute under its arbitration rules.

Thus, in spite of the many differences that investment disputes show regarding the disputing parties and the applicable law, it would seem that the arbitration procedures are not that different to what we are used to in traditional commercial arbitration. One important difference, however, should be noted: while commercial arbitration still is generally confidential, in investment arbitration there is a strong trend for more transparency. This not only leads to publication of more awards. As I know from my *Softwood Lumber* case and my *NAFTA* and *CAFTA* cases, the procedures provide or the parties have agreed that all major submissions of the parties and decisions of the tribunal are made available to the public via the internet and hearings are open the public as well.

But for most aspects of procedure, commercial arbitration and investment arbitration have much in common. Regarding the procedure used in practice, of course, one relies primarily on the rules provided by the arbitral institutions. However, if we look more closely at these rules, we see many similarities and often identical solutions. This is the result of the modernisation of almost all relevant arbitration rules in recent years trying to take into account the experience and demands of arbitration practice. Additional instruments such as the IBA Evidence Rules, the IBA Conflict of Interest Guidelines, and the UNCITRAL Notes on Arbitral Procedure contribute as well to a global harmonisation. And finally, as most rules leave a wide margin of discretion to the arbitral tribunal to shape the procedure as it considers best fit for its case at hand, one finds that this discretion is used very similarly in practice regarding such frequent and important issues as case management in general and in particular interim measures, relying on a full written procedure including written statements by witnesses and experts, a limited disclosure of documents, shortened oral hearings focussing on cross and re-direct examination and additional questions by the arbitrators, and finally post-hearing briefs. All this results in a global harmonisation of arbitral procedures, at least in international commercial and investment cases.

In this context, the use of electronic media in arbitration procedures has grown considerably. This can go far beyond the by now general use of email communications and the submission of documents on CDs or USB-sticks in arbitration. Arbitral institutions have held a number of meetings and tried to create options for their most efficient use, such as WIPO for a number of years and, more recently, the ICC by its NetCase system. The recent efforts to demonstrate these options have shown their limitations. Actually hearing and seeing a witness in cross-examination will remain important and, very often, even testimony by video conference may not be sufficient or of equal value for that purpose.

While thus arbitration has in many ways become an important feature in international relations and in the framework and enforcement of international law, vice versa as well, international law has become more relevant in many ways for and in commercial arbitration. The most obvious relevance in our context comes from instruments of public international law which directly deal with or provide for international commercial arbitration. This category includes the well-known conventions on commercial arbitration and similar instruments such as the various Geneva instruments and particularly the New York Convention, as well as the treaties I have mentioned providing for investment arbitration. Another kind of relevance in the context of our topic can be seen, if subjects of public international law provide arbitration services. Other examples are the arbitration centres of WIPO, Regional Centres of the United Nations such as those in Cairo and Kuala Lumpur, and of the American states. Another kind

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of service is provided on the one hand by UNCITRAL by its well known instruments such as the Arbitration Rules and the Model Law which have a wide impact throughout the world and on the other hand by UNIDROIT by its various instruments. Furthermore, in past and present practice, subjects of public international law have been and are parties in many cases of international commercial arbitration. In most of these cases, states as well as their bodies, institutions or enterprises are involved. In this context, many issues of international law arise.

Finally, while in most cases a national law will be the applicable law in commercial arbitration, in quite a number of ways principles of public international law can become applicable as part of the substantive law in international arbitration. First, there used to be and still are, sometimes, certain contracts such as concession contracts or so called economic development agreements which contain a choice of law clause expressly selecting public international law, or at least the general principles of law which are part of it according to art.38 of the ICJ Statute. Then there are references to public international law in the rules of certain institutions such as art.42 of the ICSID Convention. But, even without such express authorisations, certain parts of public international law may be considered relevant as part of the applicable substantive law, particularly if states are involved as parties. Nowadays, this may particularly be true for the Convention on the Law of Treaties, mandatory decisions of the UN Security Council such as those establishing foreign trade embargoes, the European Human Rights Convention, and the competition and antitrust law of the European Union. Furthermore, the General Principles of Law or certain principles of international customary law may be applied, such as those on state responsibility elaborated by the International Law Commission, or those supplying guidance on what can be considered international public policy. Finally, it may be argued that certain obligations of private law contracts are transformed into obligations under public international law either by umbrella clauses in BITs or as being covered by the property protection provisions in BITs or in customary international law.

Presently, there is still a great variety throughout the world, both in practice and in law, regarding the role arbitrators may play in the promotion of amicable settlements between the parties. In countries such as China, Germany and Japan, at least in domestic arbitrations, there is an expectation by the parties and their lawyers that the arbitrators, at some stage in the procedure, and in consultation with the parties, will try to promote an amicable settlement and suggest solutions for such settlement. In these countries, this is permitted by law and leads to a majority of domestic arbitration cases ending in such amicable settlement, often then put into the form of an award on agreed terms. In many other countries, such a role of the arbitrators is either not permitted by law or at least not performed in practice. But discussions at international meetings have shown that companies and in-house counsel would often like to have such an option available, because an amicable settlement provides a better basis for future business relations between the parties.

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4. WHAT MAY WE EXPECT?

First of all, with the continuing expansion of international trade and investment, the number of arbitration cases in general will also increase. Regarding the subject matter of arbitration, as it has been in the past, so in the future changes in technology and changes in international trade and investment will lead to corresponding changes in international contract practice which, in turn, will be reflected in changes regarding the subjects of international arbitration. Compared to the traditional areas using arbitration, new kinds of contracts in fields such as telecommunication, transfer of technology, genetic engineering, electronic commerce, entertainment and sports including sponsorship will present their specific demands to dispute settlement and probably take a relatively greater share of arbitration cases. And, in a globalised economy, the growing relevance of intellectual property has not only led the World Intellectual Property Organization (WIPO) to create a highly sophisticated dispute settlement machinery with many creative ideas possibly relevant for other fields of business, but will lead to new kinds and new numbers of international disputes, as is already illustrated

by the many domain name disputes. And also, the growing commercialisation of sports may lead to new arbitration bodies such as the Court of Arbitration for Sports (CAS) in which either sport federations or individual athletes appear as parties.

Parallel to this development of international commercial arbitration, one may have to take into account that, starting in the later part of the last century, arbitral procedures have been used for the peaceful settlement of politically highly sensitive disputes. Though I would not expect arbitration to be the settlement solution in situations of political turmoil or military disputes, as a perspective for the new century, it is comforting to see that at least in some politically sensitive international disputes arbitral procedures have provided the basis for the peaceful settlement of international conflicts.

Regarding the disputing parties, private companies will, no doubt, continue to represent the greatest number of parties in international arbitration as they are the most numerous and significant players in international trade. However, as in history and particularly in the last century, states, state institutions and state enterprises as well as international governmental organisations can be expected to participate in many ways and by many contracts in international trade and even more in the field of international investment, and consequently in arbitration proceedings.

Domestic arbitration does not exist in a vacuum but is subject to and influenced by its national political, economic and legal environment, as well as the practice of state courts and the usages of the national business community. For the different regions of the world, cultural differences will continue to play a role regarding the settlement of disputes. For the Asian region, where previously mediation and conciliation were primarily used to solve disputes, a study of the Asian Development Bank confirmed that, as markets expand beyond the national frontiers, informal dispute settlement mechanisms become less reliable and formal institutions and procedures with powers of decision and enforcement more important. On the other hand, the Asian tradition may have an impact on arbitration in other parts of the world in promoting arbitral procedures in which an amicable settlement is pro-actively sought with the consent of the parties.

5. CONCLUDING REMARK

In conclusion, first of all, I would expect a growing harmonisation between national arbitration laws. National legislators will continue to be pushed by their own constituencies, particularly their business communities, to adapt their respective legal frameworks to the demands of international business practice for efficient dispute settlement machineries. This, and also the many similarities between the other modern national arbitration laws even if they do not follow the Model Law, has already led and will continue to lead to a harmonisation of national arbitration law to an even greater extent in the future.

My next prediction, though it may sound strange, is that international arbitration will become more international. With the growing number of international arbitration cases and the growing number of lawyers and arbitrators involved in international arbitration, I would expect them to become less dependent on their specific national particularities and more open and flexible to the specific needs of disputes in the international context. In a more and more globalised economy and contract practice, regional differences will become less important. A globalisation of arbitration can also be noted as parties seem less and less to take the traditional approach of selecting arbitrators from their own legal background, but rather select arbitrators from any region of the world whom they consider best equipped for the particular case.

Finally, the often-repeated truism that arbitration can only be as good as its arbitrators will also be valid in the future. In view of the fast growing numbers of cases, it may become increasingly difficult to find the best possible arbitrators for each individual case. On the other hand, this growing number of arbitration cases will produce a growing number of lawyers experiencing international arbitration as counsel and a growing number of persons having some experience in the function of arbitrator. However, both in national arbitration,

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and even more so in international arbitration, it is not sufficient merely to select a good lawyer or a good jurist or a good engineer. If one wants to ensure the specific advantages of arbitration and ensure that the particular arbitration procedure does not become the practice ground for a new arbitrator to the detriment of the interests of the parties, acquaintance with and experience in the particular demands of arbitration and particularly international arbitration will continue to be indispensible.

The Chartered Institute of Arbitrators will have to play a major role in this context in providing education to the beginners and a forum for exchange of experience to those already active in arbitration.

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Dealing with Multi-Tiered Dispute Resolution Process

by DOUG JONES*

1. INTRODUCTION

Multi-tiered dispute resolution processes are becoming increasingly common, especially in international construction contracts.[1] The process essentially involves resolving disputes through a multi-tiered dispute resolution clause which provides for separate dispute resolution processes at distinct and escalating stages. Techniques which are commonly incorporated into multi-tiered dispute resolution clauses include: negotiation, mediation, expert determination and, finally, arbitration. Furthermore, different stages may engage different personnel, with more senior participants becoming involved as the tiers escalate. While such a process provides certain advantages over traditional forms of dispute resolution, the complexity of combining several processes within one clause can also increase the risk of failure. As a result, making the right choice in relation to a multi-tiered dispute resolution process is vital.

This paper examines both the benefits and risks associated with a multi-tiered dispute resolution process. To that end, it will first outline the benefits of a multi-tiered dispute resolution process. Secondly, it will provide practical examples of multi-tiered dispute resolution clauses. It will then outline the benefits and risks of such a process, in particular focussing on the interpretation and enforcement of individual tiers within the dispute resolution process. Finally, it will discuss the best possible ways to draft multi-tiered dispute resolution clauses so as to best utilise advantages provided by the multi-tiered dispute resolution process.

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2. BENEFITS

The primary reasons for using multi-tiered dispute resolution are both to improve efficiency and lower the cost of dispute resolution. Arbitration, while an effective method of dispute resolution, can be costly, lengthy and cumbersome. A multi-tiered process essentially acts as a filtering process. With this filtering system, only the complex disputes, or those disputes requiring more extensive procedures, extra cost and greater time, will result in arbitration. This system produces a more efficient dispute resolution process, saving the parties both time and money by addressing more basic disputes at a lower level.[2]

Another reason for the expansion of a multi-tiered process is its adaptability.[3] This is especially valuable in relation to large construction contracts which tend to be complex and frequently involve conflicts between a number of parties. A well-structured multi-tiered clause can effectively deal with a range of conflicts with a minimum of disruption to the project. In addition, shifting dispute resolution to a series of tiers encourages early resolution of disputes, with minimum hostility achieved by facilitating initial discussions in less adversarial settings.

* The author gratefully acknowledges the assistance provided in the preparation of this paper by Lee Power, Legal Assistant, Clayton Utz.

[1] See, e.g. FIDIC's range of standard conditions of contract.

[2] Michael Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18 *Journal of International Arbitration* 159, 159.

[3] Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18 *Journal of International Arbitration* 159, 159.

As a result, the business relationship between participants is better preserved, a factor which is essential to the success of long-term contracts.[4]

3. PRACTICAL EXAMPLES

At an international level, numerous large construction contracts have adopted a multi-tiered dispute resolution process. For example, construction of the Channel Tunnel between England and France involved a two-tiered process for the resolution of disputes. The first step required referral to a "Panel of Experts", then, if a party was displeased with the experts' decision, the dispute could be referred to arbitration.[5]

However, not all contracts utilise a simple two step process. Construction of the Hong Kong Airport involved the following four-tiered process for dispute resolution: submission of a dispute to an engineer; mediation; adjudication; arbitration.[6]

The range of Fédération Internationale des Ingénieurs-Conseils (FIDIC) standard forms of contract also contain multi-tiered dispute resolution clauses.[7] These rely on a three-tier process for settlement of disputes. Clause 20 of the FIDIC Red, Yellow, Silver and Gold Books provide that in the case of a dispute, the following process occurs: the dispute is referred to a dispute adjudication board (DAB) which then provides a decision; amicable settlement (after notice of dissatisfaction with the DAB's decision); arbitration (final settlement by international arbitration).[8]

Much of the following discussion will be based around a multi-tiered dispute resolution process similar to that found in FIDIC's range of contracts, but with a compulsory mediation at step two, rather than an amicable settlement (in order to facilitate discussion on enforceability).

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4. RISKS

Not surprisingly, given its level of complexity, the use of a multi-tiered dispute resolution clause can have difficulties. Inexperience or haste in drafting will often result in confusion concerning the meaning, appropriateness and, sometimes, validity of such clauses. Given the layered nature of multi-tiered clauses, the impact of inadequate drafting is increased.

Two types of issues generally occur. The first concerns the interpretation of a tier and what is required to complete a tier. This issue arises where, for example, a party ignores the initial tier and files a request for arbitration without having engaged in adjudication and mediation. The second issue is one of enforceability of the tiers, in particular, the degree to which the lower level tier decisions of the DAB and the mediator are enforceable.

What comprises a tier and when is a tier completed?

While terms such as adjudication and mediation are well understood, the procedures for each are varied. In the absence of a clearly specified procedure, parties can end up in a dispute about whether or not a step in the dispute resolution process has been satisfied.

[4] Klaus Peter Berger, "Law and Practice of Escalation Clauses" (2006) 22 *Arbitration International* 1, 2.

[5] Alan Connerty, "The Role of ADR in the Resolution of International Disputes" (1996) 12 *Arbitration International* 1, 50.

[6] Connerty, "The Role of ADR in the Resolution of International Disputes" (1996) 12 *Arbitration International* 1, 53.

[7] e.g. *Conditions of Contract for Construction* (the Red Book) (1999); *Conditions of Contract for EPC Turnkey Projects* (the Silver Book) (1999); and *Conditions of Contract for Plant and Design-Build* (the Yellow Book) (1999); *Conditions of Contract for Design, Build and Operate* (the Gold Book) (2007).

[8] FIDIC, *Conditions of Contract for Design, Build and Operate* (2007), cl.20.

Who decides whether pre-arbitration requirements have been met?

The capacity of an arbitral tribunal to decide whether pre-arbitration requirements have been met does not stem directly from the arbitration agreement itself. If this were the case, it would result in the logical problem that the power of an arbitral tribunal to decide the validity of an agreement cannot come from the very same agreement. Rather, there is a general consensus that if there is a valid arbitration agreement, this issue is to be decided by the arbitrators.[9] This result corresponds with the principle of competence-competence which refers to an arbitral tribunal's power, or competence, to rule on its own jurisdiction. The competence-competence principle is recognised in most national arbitration legislation. The principle can be found in the English Arbitration Act 1996:

> "Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement;
> (b) whether the tribunal is properly constituted; and
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."[10]

Similarly, in the Model Law:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[11]

These provisions, replicated in various forms across most international arbitration legislation, provide the source of an arbitral tribunal's capacity to decide its own jurisdiction.

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Does failure to satisfy the DAB or mediation pre-arbitral requirements affect the arbitral tribunal's jurisdiction?

The effect of a failure to comply with pre-arbitral requirements under the multi-tiered process (DAB and mediation) may be that jurisdiction over the dispute does not pass to the arbitral tribunal. If a party raises an objection to this effect, the arbitral tribunal will decide the jurisdictional question relying on authority under the competence-competence principle.

The Model Law is silent as to the enforceability of processes that the parties have addressed in the contract as a precondition to arbitration. However, pursuant to the ICC Rules:

> "[I]f any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself."[12]

As a result, the effectiveness of the clause will depend on whether or not there is doubt as to the parties' intention to resolve the dispute by arbitration, should previous tiers fail. Generally however, an arbitral tribunal will hold that it has jurisdiction where the wording of the dispute resolution clause makes the use of lower tiers optional.

9 Alexander Jolles, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement" (2006) 72 *Arbitration* 329, 335.
10 Arbitration Act 1996 s.30(1).
11 International Arbitration Act 1974 (Cth) Sch.2 art.16(1).
12 ICC Rules of Arbitration 1998 art.6(2).

ICC Case No.4230[13] involved a multi-tiered dispute resolution process which required the parties to first enter into conciliation proceedings, before submitting the dispute to arbitration. However, arbitration proceedings were initiated without undertaking conciliation. Following the defendant's challenge to the arbitral tribunal's jurisdiction, the tribunal found that it had jurisdiction to hear the dispute because it interpreted the clause as not being expressly obligatory.[14]

Further, in ICC Case No.10256,[15] it was held that the word "may" in a three-tier clause, which provided as a second tier that the parties *may* refer the dispute for mediation, was permissive rather than mandatory. As a result, the tribunal retained jurisdiction.

Conversely, where the multi-tiered dispute resolution process imposes a clear obligation on the parties to take prior dispute settlement steps before entering into arbitration, such as in cl.20 of the current range of FIDIC contracts, the arbitral tribunal will decline jurisdiction. In the ICC Case Nos 6276 and 6277, the arbitral tribunal considered a situation involving the equivalent to cl.20 under the previous 1989 FIDIC conditions in which the claimant had failed to satisfy the condition precedent set forth in the dispute resolution clause. As a result, the tribunal found that it lacked jurisdiction and that any request for arbitration was premature.[16]

A failure to satisfy a pre-arbitral tier could be addressed in two ways. First, it could be addressed via a procedural approach in which the issue is treated as a matter of admissibility. Under this approach, parties must comply with previous tiers before they can progress. Secondly, it could be addressed as a matter of substantive contract law under which non-compliance with previous tiers may amount to a breach, the classical remedy for which would be damages.[17]

In most instances, such a problem has been addressed as a procedural matter.[18] This way of resolving the issue seems to satisfy the parties' expectations. When parties agree to a multi-tier dispute resolution process, they expect that a tribunal:

> "[S]eized with the matter at a premature stage would decline to review the case prior to the initial steps having been complied with by the parties."[19]

Of course it is always open to the parties to alter any agreement to remove a tier, thereby conferring jurisdiction on the arbitral tribunal and ensuring that the dispute can head straight to arbitration.

Nevertheless, the question remains whether an arbitral tribunal that lacks jurisdiction due to non-compliance with a mandatory pre-arbitral tier can accept jurisdiction on the proviso that the parties satisfy pre-arbitral requirements. On this point, it should be noted that art.16(3) of the Model Law states:

> "The arbitral tribunal may rule on a plea [that the arbitral tribunal does not have jurisdiction]... either as a preliminary question or in an award on the merits."

It therefore seems possible that, where a tribunal is asked to rule on its own jurisdiction due to non-compliance with a pre-arbitral tier, it could do so as part of a final award, amounting

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[13] ICC Case No.4230 JDI 1975 at 934–938.

[14] Peter M. Wolrich, "Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules", Special Supplement to *ICC International Court of Arbitration Bulletin* (2001), pp.7–22.

[15] ICC Case No.10256 interim award of August 12, 2000.

[16] Wolrich, "Multi-Tiered Clauses", Special Supplement to *ICC International Court of Arbitration Bulletin*, 2001, pp.7–22.

[17] Jolles, "Consequences of Multi-tier Arbitration Clauses" (2006) 72 *Arbitration* 329, 336.

[18] Jolles, "Consequences of Multi-tier Arbitration Clauses" (2006) 72 *Arbitration* 329, 336.

[19] Jolles, "Consequences of Multi-tier Arbitration Clauses" (2006) 72 *Arbitration* 329, 336.

to the tribunal making a ruling on the proviso that a party satisfy pre-arbitral requirements at a later date.

In contrast, courts have held that an arbitration initiated in breach of a pre-arbitral condition is null. This theory is basic and stems from the fact that an arbitral tribunal's jurisdiction is based on an agreement between the parties to submit their dispute to arbitration. A failure to fulfil a pre-arbitral obligation means that, in effect, there is no agreement to arbitrate, and as a result the arbitration is void.[20] Such a step would not be taken lightly by the court, given that closing proceedings would have adverse effects on any relevant limitation periods.

What if a party refuses to proceed with the next tier?

In Australia[21] and the United States[22] there is a willingness by courts to exercise their discretion to order parties to undertake dispute resolution processes, whether they have been agreed upon or not. This is based on the idea that, even where a party is initially unwilling to participate, an unexpected outcome may be achieved with the aid of experienced dispute resolution facilitators. As such, it may sometimes be appropriate to compel one or more parties to undertake dispute resolution processes such as mediation.[23] It is worth noting that this is at odds with the English view as given in the judgment in *Halsey*.[24] In *Halsey*, the English Court of Appeal considered whether the parties should be compelled to mediate. The Court answered this in the negative, indicating that, while mediation should be strongly encouraged, it could not be compelled. However, in recent years English courts have shown an increased willingness to encourage litigants to explore dispute resolution processes before (or even after) going to trial.[25]

5. ENFORCEABILITY

Perhaps the most challenging question concerning the multi-tiered dispute resolution process is that of its enforceability. While the enforceability of the arbitration tier is well established in practice, the question as to the enforceability of earlier pre-arbitral tiers (in this instance the DAB and compulsory mediation tiers) is less certain. This paper will now turn to a discussion of how various courts have approached the issue of enforceability of such tiers.

Enforceability of the DAB tier

Essentially, the substantive obstacle to enforcement of an agreement to submit a dispute to a DAB is the courts' lack of statutory basis for staying concurrent court proceedings to allow the unfettered operation of the expert determination procedure which operates in the DAB.[26] In contrast, the court *does* have the statutory power to stay its proceedings in favour of arbitration.

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[20] Kah Cheong Lye, "Agreements to Mediate: The Impact of *Cable & Wireless Plc v IBM United Kingdom Ltd* [2003] BLR 89" (2004) 16 S.A.C.L.J. 530.

[21] *Hopcroft v Olsen* [1998] SASC 7009.

[22] *Atlantic Pipe, Re* 304 F.3d 135 (1st Cir. 2002).

[23] Kent Dreadon, "ADR post-Halsey: recent amendments to the CPR further encourage mediation" (2006) *The In-House Lawyer* 76.

[24] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.

[25] For further discussion see Dreadon, "ADR post-Halsey" (2006) *The In-House Lawyer* 76. [See also the hints on future developments from Lord Phillips and Sir Anthony Clarke (2009) 74 *Arbitration* 406 and 419 - Editor]

[26] The English Arbitration Act 1996 s.9(2) can be used to enforce some expert determination agreements since it provides that an application to enforce an arbitration agreement by staying court proceedings may be made, "notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures".

In the Australian state jurisdictions it may be possible to invoke the inherent jurisdiction of the Supreme Court to seek the stay of court proceedings which are the subject of a DAB agreement. There have been challenges to the enforceability of similar agreements, on the basis that such agreements constitute an impermissible ouster of the jurisdiction of the courts. It has been argued that public policy renders void any contractual provisions purporting to oust the jurisdiction of the courts on a question of law, thereby disentitling parties in such agreements to a stay of the court proceedings.

However, the tendency of courts to give weight to the freedom of parties to contract has meant that courts have generally refrained from interfering with these agreements. Generally speaking, their approach to DAB agreements has been to interpret these clauses as not ousting the jurisdiction of the courts. In Australia, decisions[27] have relied on the 1935 High Court judgment of *Dobbs v National Bank of Australasia Ltd*.[28] The majority in that case said that:

> "Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon arbitrament or discretionary judgement of an ascertained or ascertainable person."

To this effect, a court is unlikely to interfere with a decision unless the decision maker has acted outside their terms of reference, as set out in the contract.[29] The situation is the same in other jurisdictions with courts generally willing to recognise public policy favouring alternative dispute resolution clauses. As a result, courts will hold that an agreement to submit a decision to a DAB is valid, provided it is sufficiently certain.[30]

This approach is by no means uniform. A recent decision of the Western Australian Supreme Court refused to enforce an expert determination agreement on the basis that it was against public policy for purporting to oust the jurisdiction of the courts.[31] With respect, this case appears to contradict the general position adopted by courts in Australia, though it can perhaps be distinguished on the grounds that the dispute involved significant issues of law, a claim of $400,000 and a cross claim of approximately $3.6 million. Because the case involved complex questions of law, the Supreme Court was of the opinion that the expert determination procedure prescribed by the agreement was wholly unsuited to the resolution of the dispute.

Thus parties cannot confidently predict that their "final and binding" decision by a DAB will be enforced in the face of court proceedings commenced in respect of its subject matter.

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Enforcement of the outcome

There is no legislative basis upon which a DAB's decision may be enforced. Any avenue of enforcement of a DAB's decision is therefore dependent on the terms of the contract

[27] See for example, *Atlantic Civil Pty Ltd v Water Administration Ministerial Corp* (1992) 39 N.S.W.L.R. 468; *Fletcher Construction Australia Ltd v MPN Group Pty Ltd* Unreported July 14, 1997 Supreme Court of New South Wales, Rolfe J.; *Fletcher Construction Australia Ltd v State of New South Wales* Unreported December 1, 1997 Supreme Court of New South Wales, Hunter J.

[28] *Dobbs v National Bank of Australasia Ltd* (1935) 53 C.L.R. 643.

[29] For example, in the English case *Bouygues UK Ltd v Dahl-Jensen UK Ltd* Unreported November 17, 1999 TCC, per Dyson J., the court (drawing an analogy in this respect between adjudication and expert valuation) refused to rectify a clear miscalculation made by the adjudicator in coming to his award, because the mistake was as to fact not jurisdiction. See also *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 E.G.L.R. 103, in which a factually erroneous expert valuation as to a rent review was not set aside because it could not be demonstrated that the expert had not performed the task assigned to him.

[30] Tanya Melnyk, "The Enforceability of Multi-Tiered Dispute Resolution Clauses: The English Law Position" (2002) 5 Int. A.L.R. 113.

[31] See *Baulderstone Hornibrook Engineering Ltd v Kayah Holding Pty Ltd* (1997) 14 B.C.L. 277.

between the parties. For this reason, a successful party usually brings an action for breach of contract for failure to comply with the DAB's decision, or sues for the value of the decision as a debt due and payable to it.[32]

For multi-tiered dispute resolution processes with an international element, a feature which they commonly have, particular difficulties arise due to the purely contractual nature of the DAB tier. Parties to a decision featuring an international element are faced with having to rely on the various conventions, treaties and national laws governing the enforcement of foreign judgments in different countries. Understandably, a party would only seek to enforce a foreign judgment in the event that another party is withholding money owed and, considering the time and added cost involved in launching an action to have a foreign judgment enforced, the amount of money owed would have to be considerable. In this respect, arbitration would appear to have a distinct advantage over the use of a DAB in light of the New York Convention,[33] which is widely observed, simple and effective. The formalities require a party to simply produce the original or a certified copy of the arbitral award and the original arbitration agreement to the relevant court, and the court will grant recognition and enforcement provided none of the grounds for refusal are satisfied.

In practice, international organisations have tended to adopt the use of a DAB as a binding interim dispute resolution procedure, thereby enabling recourse to arbitration when a party wishes to appeal or needs to enforce a DAB's decision.[34] Incorporating a DAB as a step before possible arbitration reflects a recognition that the outcome of a DAB is not itself easily enforceable and, apart from the delay involved, is an appropriate fabric for dealing with transnational matters. However, one would query whether it is necessary to have a DAB at all, when there is a risk that a lack of co-operation between the parties will force disputes to arbitration. An answer to this might be that the risk of having to resort to arbitration to enforce a DAB's decision is outweighed by the benefits to be gained from using a DAB.

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6. PROCEDURAL ASSISTANCE

If the DAB process breaks down because, for example, the parties cannot decide upon the appointment of board members, or if the agreement between the parties is incomplete as to a procedure necessary for the DAB to be effective,[35] then the agreement to use a DAB may be unenforceable and therefore void. This is a challenge typically brought by a party reluctant to abide by DAB provisions. Such challenges could be avoided by prescribing the procedure for the DAB in the dispute resolution clause. An example of this can be seen in cl.20.3 of the FIDIC Gold Book where, if there is failure to agree upon a listed aspect of the DAB:

> "[T]he appointing entity or official named in the Contract Data shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official."

[32] The capacity of parties to overturn an expert's decision for even obvious error is generally limited to mistakes as to the expert's terms of reference only, a principle recently confirmed by Dyson J. in *Bouygues UK Ltd v Dahl-Jensen UK Ltd* Unreported November 17, 1999 TCC, a case concerning an adjudication under the CIC Model Adjudication Procedure.

[33] Alan Redfern and Martin Hunter discuss the origins of the New York Convention in Chs 1 and 10 of *Law and Practice of International Commercial Arbitration,* 3rd edn (Sweet & Maxwell, 1999). See also Lord Mustill, "Arbitration: History and Background" (1989) 6 *Journal of International Arbitration* 43.

[34] See for example, cl.20.7 of the FIDIC Red Book, *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer* (1999).

[35] In *Fletcher Constructions Australia Ltd v MPN Group Pty Ltd* Unreported July 14, 1997 NSW Supreme Court it was held that if the parties cannot decide upon an appropriate procedure, the expert is to decide.

However, it is difficult if not impossible to provide contractual machinery for every conceivable procedural difficulty. This represents a key risk of the DAB process, as opposed to more established dispute methods such as arbitration, where statutes typically provide for assistance by the courts where procedural difficulties arise. For example, if the parties cannot agree on the appointment of an arbitrator, or an arbitrator's impartiality is doubted, there are legislative procedures to help facilitate arbitration and ensure it stays on foot.[36] However, no such procedural assistance applies to a DAB. The courts have refrained from "filling gaps" in agreements which utilise a DAB,[37] and it is therefore imperative that such agreements set out a comprehensive procedure and default provisions which apply when procedural difficulties arise. The common practice is to provide that, in certain situations, a third party will step in to make a decision as to procedure in order to prevent the DAB process from breaking down.

Moreover, the liabilities of members of the DAB, as compared to arbitrators, may be contrasted. If the parties fail to specify how the proceedings are to be conducted in the DAB, the DAB members are left to their own opinions or devices. But, unlike arbitrators, DAB members do not have any legislative protection from liability in relation to their conduct in making a decision.[38] This raises the possibility of the parties suing for professional negligence or breach of the contract with respect to the procedure adopted by the DAB, as well as for the decision itself. Of course, a DAB member can avoid liability by obtaining an indemnity from the parties with respect to the decision, or attempt to limit potential liability by providing reasons for his or her decision. At any rate, neither an arbitrator nor the court can intervene, provided the decision has been made honestly and within power (in the sense of "in accordance with the contract").[39] If a contract fails to outline the DAB's duties they may still need to comply with an implied duty to act fairly,[40] and will owe a duty of care to the parties to the decision.

It may well be that the only time a lack of statutory procedural assistance would prove a real disadvantage would be in the situation where a recalcitrant party refused to cooperate or the appointed DAB failed to resolve a procedural difficulty. The effect, after all, of there being no facilitative legislation for a DAB's decision is that the procedure remains at all times in the hands of the contracting parties. But the lesson is that if a DAB clause is poorly drafted, then parties are likely to have difficulty enforcing the dispute resolution mechanism. In an effort to avoid these difficulties, parties usually incorporate into the DAB agreement a set of standard rules promulgated by a professional body.

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7. PRACTICAL PROBLEMS

Like any dispute resolution procedure, the DAB process may be utilised by a recalcitrant party to disrupt a contract and delay dispute resolution. However, in arbitration, the arbitrator has powers to combat a party's dilatory tactics. For example, a court can issue a subpoena to force the production of material, or the arbitrator(s) can progress with an ex parte arbitration.[41] A

[36] See uniform Commercial Arbitration Acts Pt 2, "Appointment of arbitrators and umpires"; s.42(1), "Power to set aside award"; and s.44, "Removal of arbitrator".

[37] e.g. *Triano Pty Ltd v Triden Contractors Ltd* (1992) 10 B.C.L. 305.

[38] See uniform Commercial Arbitration Acts s.51 in relation to the exclusion of liability of arbitrators and umpires for negligence.

[39] See *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 15 Const. L.J. 488; (1999) 15 B.C.L. 49.

[40] Where the contract is silent as to a duty to act fairly there is support for the position that the expert is obliged to be fair: see *Lee v Showmen's Guild* [1952] 2 Q.B. 329 at 342, per Denning L.J.

[41] e.g. uniform Commercial Arbitration Acts s.18(1) and (2), "Refusal or failure to attend before arbitrator or umpire etc."; also *WFA Pty Ltd v Hobart City Council* [2000] NSWCA 43, where it was held that the powers given the arbitrator under the Tasmanian Commercial Arbitration

mere expert, on the other hand, has no coercive power, and a court cannot assist the process. The DAB process could be easily derailed if party relations turn sour and co-operation ceases.

Some agreements have attempted to overcome the difficulty of delay by inserting time restraints in the DAB clause. If a party fails to submit documents or attend meetings in accordance with the DAB clause it will be liable for breach. Another clause can be inserted into the DAB agreement referring any dispute or claim arising out of or in connection with the DAB's decision, or breach thereof, to be finally settled by arbitration. These contractual provisions may create enough dissuasion to avoid delay altogether, but the question again arises: why choose a DAB over arbitration if it is probable that a dispute will ultimately be determined by arbitration anyway?

A further complication arising from use of a DAB is the scope for further delay where the DAB agreement fails to clearly delineate the board's jurisdiction and the types of matters which can be submitted to it. Parties may be forced to abandon DAB proceedings in order to determine subsidiary questions relating to the board's jurisdiction.

In relation to the issue of what should be referred to the DAB, cl.20.4 of the FIDIC Gold Book provides:

> "If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract."

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8. ENFORCEABILITY OF A COMPULSORY MEDIATION TIER

Various courts internationally have traditionally adopted different approaches regarding enforceability of a mediation clause. In recent times, however, there has been a trend towards enforcing mandatory mediation clauses. In Australia, the trend in recent court decisions, including *Hooper Bailie*[42] and *Aiton,*[43] has been to hold that, if mediation is a clear and determinative pre-condition to arbitration, a court or tribunal will be likely to forgo jurisdiction until the pre-condition tier has been followed.[44]

In the most recent decision, *Aiton*, Einstein J. adopted Giles J.'s test for enforcement from the earlier case of *Hooper Bailie*:

> "An agreement to conciliate or mediate is not to be likened to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement."[45]

The court in *Aiton* then provided some guidance as to what is enforceable:

- The clause should operate to make the completion of mediation a condition precedent to court proceedings (or arbitration).
- The processes established by the clause must be certain. There cannot be stages in the mediation process where agreement is needed on some course of action before the process

Act enabled him to refuse deviation from the arbitration timetable formulated by himself and the parties in accordance with the contract.

[42] *Hooper Bailie v Natcon Group* (1992) 28 N.S.W.L.R. 194.

[43] *Aiton v Transfield* [1999] NSWSC 996.

[44] See also Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18 *Journal of International Arbitration* 159.

[45] *Aiton v Transfield* [1999] NSWSC 996 at [45].

can proceed since, if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.

- The processes for selecting a mediator and determining their remuneration should be specific, with a mechanism for selection by third parties should the parties not reach agreement.
- The clause should also set out in detail the process of mediation to be followed, or incorporate these rules by reference. These rules will also need to state, with particularity, the mediation model that will be used.[46]

Beginning with the *Channel Tunnel*[47] case, English courts have also tended towards enforcing mediation clauses. The situation in the United States is also very similar, with courts willing to enforce a mediation clause as long as it is a mandatory pre-arbitral component. It can therefore be seen that the wording of any clause is vital to its enforceability, for while a discretionary mediation clause is not enforceable, a mandatory one probably is.

However, the courts' willingness to enforce mandatory mediation clauses is not to say that mediation and arbitration are on an equal footing. For example, the costs of not complying with an arbitration agreement are usually greater than those of non-compliance with a mediation agreement. Furthermore, an arbitrator can begin, conduct and conclude the proceedings in the absence of a party. A mediator cannot, with mediation depending squarely on the continued consent and co-operation of the parties.[48] Given party autonomy is necessary for mediation, a multi-tiered dispute resolution clause must consider and resolve certain issues in advance of a dispute arising. If this is not done, failure in the dispute resolution process is likely to occur.

The most important of these issues involves the appointment of the mediator. Ideally, the contract should indicate who will serve as a mediator or detail a process by which a mediator will be selected. Any process must be clear given that when the clause is invoked the parties will be in the thick of their dispute, making agreement on a mediator at that point highly unlikely. Other factors, such as how the parties will allocate the cost of the mediation phase, must also be addressed in advance. It is also vital that each party be represented at the mediation by an individual who has full and complete authority to resolve the case, as mediation can often fail if the individual with authority to resolve the dispute is not present.

The most contentious of the criteria with respect to enforcement of a dispute resolution clause is whether or not the clause is of sufficient certainty. In December 2008, the uncertainty rule was interpreted broadly by the New South Wales Supreme Court in *United Group Rail Services Ltd v Rail Corp New South Wales*.[49] The issue was whether the requirement (in the written contract) to negotiate a building dispute "in good faith," without a predetermined procedure was void for uncertainty. Detailed dispute resolution clauses were inserted into the contract. However, the plaintiff claimed that the clause requiring senior representatives of each firm to meet and undertake genuine good faith negotiations was void for uncertainty.

Rein J. held that a provision requiring contractual disputes to be the subject of negotiation in good faith is binding and enforceable, expressing the view that an obligation of good faith in the performance of a contractual obligation has "content" and is not void for uncertainty[50]:

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[46] *Aiton v Transfield* [1999] NSWSC 996 at [69].
[47] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334; [1993] 2 W.L.R. 262.
[48] Bobette Wolski, "New rules to facilitate the use of ADR in the resolution of international commercial disputes" (2003) 5(9) *ADR Bulletin* 149, 150.
[49] *United Group Rail Services Ltd v Rail Corp New South Wales* [2008] NSWSC 1364.
[50] *United Group Rail Services* [2008] NSWSC 1364 at [13].

> "Because I am of the view that 'good faith in negotiation' has content, I think that parties could legitimately gain comfort in extracting a promise from the other party that disputes will be the subject of good faith negotiations in attempt to resolve them."[51]

The negotiation clause was held to be valid and enforceable notwithstanding that the parties had a broad requirement to meet and resolve disputes (after they arise) in good faith.

9. DRAFTING TO ENSURE VALUE OF CLAUSES

In light of the discussion above, the following measures should be taken into account when drafting to ensure the enforceability of a multi-tiered dispute resolution clause: the suitability of dispute resolution techniques chosen for potential disputes and their order in the tiered system; ensuring that parties are obligated to comply with a tier, rather than simply being entitled to employ it; and the establishing of a smooth transition between tiers to ensure proper functionality in the event of a dispute. [52]

With respect to the first point, it is important to remember that while the choice of the dispute resolution technique is generally left to the parties, there may be circumstances where "less advanced" processes, such as a DAB, may be viewed as inappropriate by the courts.

In relation to the second and third points, direct criteria should be used to provide a clear trigger from participation in, or completion of, a tier. Subjective criteria, such as "make all efforts", to describe satisfactory completion of a stage will usually lead to unwanted disputes and should be avoided. The best way is often to do this by way of a time limit which provides that a decision or an agreement has to be reached within a set period or else the next tier is automatically initiated.

10. CONCLUSION

The multi-tiered dispute resolution process is on the rise in international contracts. While there have been a range of reasons for this, it is largely due to the adaptable nature of such processes in resolving a diverse range of disputes. However, as multi-tiered clauses get progressively more complex, the risks of a tier being held unenforceable are compounded. As a result, clear drafting, which imposes an obligation on the other party to comply with each tier of the process, is required. Those that do not have clear drafting will inevitably end up in the courts.

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[51] *United Group Rail Services* [2008] NSWSC 1364 at [15].
[52] Berger, "Law and Practice of Escalation Clauses" (2006) 22 *Arbitration International* 1, 5.

(2009) 75 ARBITRATION 2

Arbitrating with Different Legal Traditions: Civil Law

by RICHARD H. KREINDLER

1. INTRODUCTION

In the context of experiences and suggestions regarding common, civil and Chinese law perspectives on arbitration proceedings, I have been asked to address primarily the civil law perspective, with an emphasis on the examination of fact witnesses and the extent of orality of proceedings as well as on written submissions.

The civil law perspective could in this regard mean a variety of things, including the vantage point of: (i) the civil law user of arbitration (that is, the party); (ii) the civil law counsel; or (iii) the civil law arbitrator in an arbitration with a seat, rules and/or procedural or substantive law which in turn may, or may not be, be civil law in nature.

All of this of course begs the question of what is civil law, and what differences may exist between and among two sister civil-law arbitral jurisdictions, such as Germany and Switzerland. For the sake of simplicity and unfortunately superficiality, let us take Germany and German law as our baseline for what follows.

With respect to the German nexus of such an arbitration, the matter could furthermore in fact have little or no connection to Germany or to German practice other than one of the following components: (i) the counterparty in the underlying negotiations is German; (ii) the opposing party is German; (iii) the opposing counsel is German; and/or (iv) one or more of the arbitrators is German, and therefore—presumptively—is influenced at least in part by elements of German court or arbitration practice. I say presumptively because it is all quite presumptuous of me or anyone else to immediately assume that any such player in an arbitration environment is automatically rigidly influenced by his "home jurisdiction's" way of approaching litigation or arbitration matters. And it is equally as presumptuous in this day and age to immediately assume that there is even one "single" discernible way of approaching such issues as written pleadings, witness statements, discovery, examination of witnesses at trial, settlement, etc. simply because that actor hails from Germany as opposed to Malaysia, the United Kingdom, the United States or any other country.

In short, things are normally not so black and white, and it will depend upon the individual involved and the overall circumstances: With the increasing overlapping of experiences in arbitration, international law firms, international exchange programs, arbitration working groups, the influence of the Model Law and the like, we are often dealing not with black and white, but with shades of grey.

Against this introductory background, my task is to explore these shades of grey in the so-called civil law context, and also to address areas where in fact the grey can often become somewhat black and white. I aim to do so based on five categories of typical issues and challenges: negotiating and drafting the Anglo–German contract subject to international arbitration; initial and subsequent written pleadings; requests for production of documents; the relation of written pleadings and documentary evidence to witness testimony; and the purpose and nature of the oral hearing.

2. NEGOTIATING AND DRAFTING THE ANGLO–GERMAN CONTRACT SUBJECT TO INTERNATIONAL ARBITRATION

The issues often begin, as in any other arbitration analysis, with the drafting of the contract and of the arbitration agreement—often at the 11th hour, often without enormous due care.

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Seeking to apply US concepts of rights and duties to German substantive law and vice versa

How often have we seen contracts, for example sales and purchase agreements, in which the parties seek to forcibly marry US and German concepts, and provide for arbitration of disputes on the basis of such a terrain? One variation is the highly elaborate, lengthy, voluminous, often expertly drafted US-style sale and purchase agreement (SPA) (which may in fact have been drafted by a German lawyer or merchant!), with an effusive enumeration of rights and duties, representations and warranties, pre- and post-closing expert determination mechanisms, definitions of events constituting or not constituting a "material adverse change" (MAC), exclusion of consequential damages, allowance for punitive damages, etc., etc. and then providing, ever so succinctly, that the whole structure shall be subject to *German* substantive law!

A second, somewhat mirror-image variation is the lean, tightly drafted, in its own way just as generic German-style SPA (which may have been drafted by an American, but not likely!), with little in the way of specific enumerations of rights and duties, reps and warranties, but with specific references to, or exclusions of, *culpa in contrahendo, positive Vertragsverletzung, positive Kenntnis, Erfüllungsgehilfen, sittenwidrige Schädigung*, etc., etc. and then providing, just as succinctly, that the whole structure shall be subject to New York law, or even "the laws of the United States"!

Neither of these scenarios is far-fetched, and both of them pose challenges for any subsequent arbitration: the interpretation of the contract, the will of the parties, the role of witnesses and of drafts of the contract in elucidating such issues, etc.

The point here first and foremost is, this mixing and matching can also be a recipe for turmoil and tension both in the performance of the contract and in any later arbitration, and should be avoided at all costs. If and when an arbitration arises, one key challenge will be for the party and counsel involved, which may not be the same ones as drafted the mix-and-match effort, to choose arbitrators who can constructively deal with such constellations.

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US versus German seat: FAA versus 10th Book, grounds for challenge, potential court intervention, etc.

Whether or not such mixing and matching has taken place, I would submit that the next challenge, also for any later arbitration, is the arbitration agreement itself. Here we need not address the obvious questions that arise in drafting an arbitration agreement, but rather two or three specifics relevant to the US–German context.

First, the seat: the US user who agrees to a German seat must understand not only the differences between, say, the UNCITRAL Model Law and the Federal Arbitration Act (FAA) or the New York Civil Practice Law & Rules (CPLR), but also the differences between the Model Law and the 10th Book of the ZPO, particularly: the operation of ZPO s.1032 (arbitration agreement and substantive claims before a court); the operation of ZPO s.1051 (rules applicable to the substance of the dispute); and the operation of ZPO s.1059(2)(d) (application for setting aside, and a showing that a non-compliance with the applicable arbitral procedure "presumably affected" the award, in contrast to Model Law art.34(2)(a)(iv)).

Secondly, the applicable rules: the US user who also agrees to ad hoc arbitration in Germany or to the DIS Rules would be well advised to focus on certain consequences, such as the following: in an ad hoc German context, again the operation of ZPO s.1032 as effectively a German extension of art.II.3 of the New York Convention respecting a "race to judgment" between a claim in arbitration and a claim before the state court; in an ad hoc or also DIS context, the operation of ZPO s.1037(2) or s.18.2 of the DIS Rules of Arbitration providing initially for a decision on a challenge of an arbitrator to be made by the tribunal itself; and the potential reach of ZPO s.1042(4) ("[t]he arbitral tribunal is empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence"), and of s.27.1 DIS Rules ("[t]he arbitral tribunal is not bound by the parties'

applications for the admission of evidence") and s.24.2 DIS Rules ("[t]he arbitral tribunal shall undertake to obtain from the parties comprehensive statements regarding all relevant facts and the proper applications for relief").

Arguably, certain of these provisions are not dramatically different from those to be found in, or construed from, the FAA, the New York CPLR, the AAA International Rules, the ICC Rules or the UNCITRAL Model Law as applied to international arbitration matters in certain US states. In fact, though, these provisions are the product of a particular legal environment in Germany and need to be understood by the US user operating in a wholly or partially German context—indeed whether or not a German seat and whether or not the DIS Rules apply.

Initial and subsequent written pleadings

If and when we do have an arbitration in, let us say, the German–US or German–UK context, with one or more German and one or more Anglo–American components, what are some of the challenges at the inception of the arbitration?

First, whether from the claimant's or the respondent's perspective, the non-civil law user, counsel, even the US or UK arbitrator once he or she is later in office and reviewing the file, must come to grips with the concepts of specification of factual allegations (*Substantiierungspflicht*) and specification of the offers of evidence (*Substantziierung von Beweisantritten*).

Especially from the claimant's point of view, but also the respondent who may be subject to a reversal of the burden of proof, excessive comfort should not be taken from the seemingly liberally phrased rules in this regard. For example, ZPO s.1044, which applies to any arbitration with its seat in Germany whether domestic or international, provides that unless otherwise agreed, the, "request [for arbitration] shall state... the subject-matter of the dispute and contain a reference to the arbitration agreement", while s.1046(1) requires that in the statement of claim the claimant, "*shall* state his claim and the facts supporting the claim, and the respondent *shall* state his defence in respect of these particulars" and that the parties:

> "*[M]ay* submit with their statements all documents they consider to be relevant or *may* add a reference to other evidence they will submit."

Quite broad, quite precatory, indeed even less stringent than art.23.1 of the UNCITRAL Model Law! One might conclude, from the US or UK user's point of view, that flexibility is the order of the day, and that, in the case of the US user, a US-style "notice pleading", as sometimes encountered in US state court proceedings—lean, broad-brush, without specifics of witnesses, documents, or applicable law—would fulfil the requirements of the ZPO.

Experience dictates that such a conclusion would be dangerous at best, and would probably ignore the unstated expectations of substantiation of factual allegations and of offers of evidence mentioned earlier. Indeed we are normally speaking not just of expectations but of duties. Such duties are reflected more clearly in the German Institution of Arbitration (DIS) Rules, which dig deeper in this regard, e.g. s.6.2 on the contents of the statement of claim and notably s.24.2 mentioned earlier ("[t]he arbitral tribunal shall undertake to obtain from the parties comprehensive statements regarding all relevant facts and the proper applications for relief"). But even the DIS Rules, which are meant to be flexible and internationally minded, arguably do not "alert"—if that is the right word—the US user to the nature and extent of these duties, which also relate to burden of proof and burden of presentation.

The US user might assume, wrongly, that such duties are analogous to those related to a summary judgment motion in the US context, which allows a challenge of the legal sufficiency of a claim or defence on the basis that the factual disputes raised in the pleading are not genuine, and do not give rise to a legal disagreement. This is a different matter from the initial duty, in the German context, of pleading the claim, whether factually or legally, with sufficient particularity and specificity, including evidence or offers of evidence. In other

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words, the case is meant to be properly and fully framed, and to be ripe for decision, at the *beginning* of the dispute, as opposed to making the case up or discovering the case as one goes along, benefiting from a discovery process which, in the German context, may never come, or in any event not in the same manner and same scope as the US user might have expected.

Requests for production of documents

From a US perspective, requests for production of documents, certainly in complex disputes, are an integral part of the arbitration, and of a discovery process. Indeed it is one of the fruits which the US user may hope to reap to enable him to ultimately plead, and then prove, his case with particularity and specificity. This perspective, which has in fact found recognition of a sort in the 1999 IBA Rules on the Taking of Evidence (IBA Rules), may or may not mesh with the perspective of one or more German participants in the US–German arbitration. Where the IBA Rules or something similar do not apply, requests for production may or may not take place at all. That they *may* take place is clear under, e.g. ZPO s.1042(4) and s.27.1 DIS Rules, which specifically mentions the ordering of “production of documents“ by the tribunal. If they take place, it is likely to be after both parties have submitted, or were expected to submit, all documents on which they respectively rely.

Of course, from a US point of view this might suggest an unacceptable, even naive honour system, in which clearly neither party would voluntarily produce documents not favourable to its cause. And if requests take place, or the tribunal orders production, it is likely to be pursuant to a strict, narrow and specific identification and definition of documents, and not even categories of documents. This contrasts with art.3.3 of the IBA Rules, which speak of a “description of a requested document sufficient to identify it”, or of a “narrow and specific requested category of documents that are reasonably believed to exist”.

There are indeed cases where a party in a US–German context is highly dependent upon receiving documents from the other side to prove its case or disprove the opponent’s case; one example might be in an SPA, where essentially the entire documentation relating to the target company and its underlying accounting went over to the purchaser upon closing; another might be where a contractor’s documents at a construction site are wholly within the control of the owner who has taken possession of the site. But even then, from a German perspective, or for that matter an IBA perspective, the requests need to be specific, and should not be counted on as a crutch which excuses the sufficiently specific pleading of the case before such requests are even considered by the tribunal.

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Relation of written pleadings and documentary evidence to witness testimony

From a US perspective, the link between initial written pleadings and subsequent witness testimony is not necessarily at the forefront, certainly not at the beginning stage of the arbitration. Even where witnesses and knowledgeable persons are identified, available, interviewed and held in reserve, so to speak, for the reasons mentioned above their specific testimony may not yet be factored into the initial pleadings, or even the later full memorials.

From a German perspective, this may be a significant shortcoming and mistake. There are at least two elements worth mentioning here:

First, the primacy of written submissions and documents in the German concept: while witnesses can play a crucial role in German litigation or arbitration, indeed they may be the sole focus, it is fair to say that in a typical international commercial arbitration with German elements between two enterprises, witnesses will not be the sole or even the primary focus. And even if they are, or precisely if they are, this should already be reflected in the initial written submissions and the full submission—by specific identification of witnesses for specific allegations or defences related to specific events, communications, meetings or the like. Unless there are truly extenuating circumstances, the US party would be well advised to strive toward such specificity in its initial pleading or in any event in its next,

fuller submission. A decision not to do so, on the assumption that there will in any event be written witness statements later on, or worse that there will be depositions first and then written witness statements, could be costly.

Secondly, the relative importance of written witness statements plays a role in the above calculus. Depending upon the rules agreed or otherwise applied by the tribunal, there may not be written witness statements: the tribunal may consider such an exercise, with the likely ghostwriting by counsel behind the scenes, to be a waste of time and effort, and not likely to be revelatory of the truth. Or the parties and the tribunal may agree that there shall be such witness statements, both for fact witnesses and experts if any, but will specify that the written statement is in lieu of direct oral examination at trial. Or the tribunal may invite the parties to appear at a hearing with any and all knowledgeable persons, but declare that it is not interested in or does not consider useful witness testimony, and then proceed to engage in an "informational questioning" of the same persons without characterising the exercise as a witness examination.

Whichever of these scenarios may apply, as in any other procedural situation the cardinal rule is for there to be transparency, clarity, predictability and even-handedness. The US counsel or party who believes that evidence may largely be postponed to a written witness statement, or may be warmed up again in full on direct examination before the tribunal, may be sorely disappointed. And in so doing, he may miss the opportunity to have listened closely to the tribunal as to which specific issues truly interest it, for example in the context of issuance of a *Beweisbeschluss*, which would actually allow the witnesses to be prepared in an even more tailored and focused fashion.

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Purpose and nature of oral hearing

From a US perspective, many if not most trials and arbitrations settle before the hearing, sometimes on the proverbial courthouse steps. Perhaps the same applies to many international arbitrations, but it is fair to say that the prospect of a very likely settlement probably plays more of a role in the US calculus than in the German calculus, as long as the settlement overtures are initiated *by the parties* and not by the tribunal.

Should the arbitration advance as far as to an oral hearing, the first classical question from a US point of view is, Whose hearing is it anyway, the parties' or the tribunal's? This is the issue of the balance between party autonomy on the one hand and tribunal direction on the other. A glance at the 10th Book of the ZPO or the DIS Rules, or indeed any other leading rules or legislation for that matter, indicates that there is ample flexibility, ample opportunity for party agreement, ample opportunity for the parties to take and hold the reins. The reality, also in many German–American disputes, is however that either the parties are unable to agree on such matters as the procedural rules, the question of witness examination, opening and closing statements, etc. or in some cases the tribunal steps in and, sometimes with a heavier hand than other times, proposes a game-plan which a party may feel compelled to accept.

But this is not necessarily different in German–US or–UK disputes than in others. What are some of the issues specific to Anglo–German disputes when it comes to the oral hearing? Three points may be made here:

First is the relation of oral hearings to prior written pleadings. Above and beyond what has already been remarked regarding written pleadings and written witness statements, it is probably not an exaggeration to say that the tendency in a US-influenced arbitration (let alone in an English-influenced arbitration) is to assume or hope that the oral hearing, with oral pleading and witness testimony, will be a significant embellishment upon the written pleadings, perhaps even a quantum leap compared to the prior written record. By contrast and at the risk of some generalisation, the tendency in a German-influenced proceeding is to have more modest expectations of the added value of the hearing.

Indeed in a DIS Rules arbitration the wording of s.28 ("[s]ubject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings") is sometimes seen

by US parties as an unacceptable presumption against the holding of an oral hearing, and by German parties as simply an accurate reflection of the modest parameters of such a hearing.

Secondly, the manner in which oral testimony is conducted may be a significant source of friction. Will there be any direct examination? If yes, of what nature and of what extent? What are the rules and expectations attaching to cross-examination, to redirect examination, and to questioning by the tribunal?

These issues can easily be agreed by way of procedural order, and nothing in the 10th Book or the DIS Rules circumscribes the ability to do so. At the same time, it is fair to say that the US counsel or party who expects a full-fledged direct examination or a theatrical, tightly scripted cross-examination to compensate for a poorly substantiated prior written record is proceeding dangerously. Increasingly, direct and cross-examination are tolerated, and often practised with skill and aplomb by any number of German practitioners. And in some cases such examination may truly make the difference.

However, more often, the German-skilled tribunal will have its own set of questions which it may either ask straightaway, preempting examination by counsel, or will ask if counsel does not do so at the logical juncture. US counsel who hopes to avoid the posing of certain questions on the expectation that the Tribunal will sit by passively and allow counsel to do their best job is again treading dangerously. It is also entirely conceivable that a witness who has not been offered for direct testimony and not been summoned for cross-examination may still be called by the tribunal, as for example s.27.1 of the DIS Rules clearly allows.

Thirdly, the hearing comes full circle to the issue of settlement. From a US perspective the prospect of a very likely settlement probably plays more of a role in the US calculus than in the German calculus, as long as the settlement overtures are initiated by the parties and not by the tribunal. This may seem contradictory but it is not.

Despite the influence of court-ordered mediation, special masters for discovery and various forms of ADR in the United States, there is little question but that the US party or counsel normally does not want the arbitrator to play a role in settlement *unless* the parties ask him to do so. A spontaneous expression by the tribunal of its provisional assessment of the strengths and weaknesses of the case, or a declaration of the same even after one party has expressly declined such an assessment, would strike most US participants as absolutely anathema to the process, and indeed as arguably a violation of the right to be heard or the right to equal treatment, or as irretrievably vitiating the tribunal's impartiality. Once the provisional assessment is on the table, it may profoundly affect settlement tactics and posturing.

Of course, from a German standpoint, this is precisely the purpose, and is not anathema to the process. Thus, s.32.1 DIS Rules states,

> "[a]t every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute"—

"should", not "shall". The US party or counsel must be conversant with this provision which, interestingly, is not replicated in the 10th Book, based on the UNCITRAL Model Law.

The US party must also understand that the "should" is sometimes unhesitatingly interpreted by a civil law tribunal to be a licence to provide an unsolicited, unapproved non-binding assessment of the case, and that the fact of doing so would by itself hardly be grounds to challenge the tribunal on the basis of lack of impartiality or abuse of procedure, or to challenge the later award on the same grounds in the context of art.1059 ZPO. By the same token, the US arbitrator working in a German environment with German counsel should also appreciate that counsel may expect the offering and rendering of such a non-binding assessment without their asking, and be quizzical if it does not come. When all is said and done, however, there is little doubt in my own mind that the most appropriate way to handle this issue and accommodate the competing mindsets is not to proceed with the non-binding assessment unless the parties expressly consent.

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In summary, US counsel or a US party or a US arbitrator engaging in the realm of German or civil law arbitration has a variety of issues, challenges and opportunities, which can lead to a highly satisfactory result as long as one's eyes are open from the very beginning. That the eyes of the German arbitrator faced with US counsel should be at least as widely open, and his mindset flexible, goes without saying, since whatever the seat and whatever the law, one set of good practices can always learn from another. And surely the same applies when the German party, counsel or arbitrator dips his toe into the ocean of US arbitration practice with a *US* seat, which is a subject for another day…

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Arbitration of Investment Disputes: A Malaysian Perspective

by DATO' CECIL ABRAHAM

1. INTRODUCTION

Historically, investors whose investments were expropriated or nationalised by the host state had few rights of redress, namely to seek to enforce their rights in national courts of the host state or appeal to their own home state to place commercial, diplomatic or military pressure on the host state depending on the nature of the said investment.

However, the international community has taken a conscious step to promote investment into developing nations by creating avenues for foreign investors to protect their rights in the last 50 years.

The first key development was the creation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1965. This established the International Centre for the Settlement of Investment Disputes (ICSID) as a division of the International Bank for Reconstruction and Development (World Bank).

Over the last few years, there has been a growth in the number of investment dispute arbitrations that have been resolved before ICSID as foreign investors seek to protect and enforce their rights by relying on the protection afforded in bilateral investment treaties (BITs) between the state the foreign investor is investing in and the home state.

The arena of investment dispute arbitration is a burgeoning one and is seen by arbitrators, practitioners and academics alike as the epitome of international arbitration. It is seen as creating a powerful regime for the resolution on investor-state disputes and as overcoming a barrier to the flow of investment into the less developed or developing countries. It is also perceived as creating a powerful and vigorous regime for the enforcement of awards handed down by ICSID perhaps even more favourable than those awards handed down by the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA).[1]

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2. WHAT IS ICSID?

ICSID is an autonomous international institution established under the ICSID Convention; 155 member states are parties to the ICSID Convention which is a multilateral treaty formulated by the World Bank. It came into force on October 14, 1966. The aim of the Convention is to remove major impediments to international flows of private investment posed by non-commercial risks and to provide specialised international methods for resolution of investment dispute settlements. It was created as an impartial international forum for providing facilities for the resolution of legal disputes between eligible parties through conciliation or arbitration procedures. Malaysia acceded to this Convention in October 1966 and has entered into BITs with 67 countries.[2]

There has been a rapid expansion of ICSID caseload. At the end of 2007, the number of conciliation and arbitration cases registered with ICSID since its inception has reached

[1] *Protecting Investment Overseas: Bilateral Investment Treaties, Foreign Investment Laws and ICSID Arbitration* (Lovells LLP, 2008).

[2] The full list can be found on the ICSID website at *http://ICSID.worldbank.org* [Accessed March 12, 2009].

more than 236. ICSID's membership has increased following the ratification of the ICSID Convention by Serbia and more recently Canada. But recently there has been a denunciation by the Republic of Bolivia. There are rumblings that other countries in the developing world may follow suit.

3. WHAT IS AN INVESTMENT DISPUTE?

Investment disputes generally arise when an investor, who may be an individual or a limited company, or a party to a joint venture or shareholder, has its investment in a contracting state nationalised, expropriated or unfairly treated by the state. The investor can then, through the BIT with the investor state, resort to an investment arbitration or conciliation under the ICSID Arbitration or Conciliation Rules.

4. DEFINITION OF AN "INVESTMENT"

The Washington Convention gives no definition of "investment". Article 25, in conferring jurisdiction on the Centre, merely provides this:

> "Article 25(1)
> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

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Georges R. Delaume has attempted to explain the rationale[3]:

> "The term 'investment' is not defined in the Convention. This omission is intentional. To give a comprehensive definition . . . would have been of limited interest since any such definition would have been too broad to serve a useful purpose [or] might have arbitrarily limited the scope of the Convention by making it impossible for the parties to refer to the Centre a dispute which would be considered by the parties as a genuine 'investment' dispute though such dispute would not be one of those included in the definition in the Convention."

In contrast, most BITs have a provision which defines "investment". For example, the UK–Malaysia BIT states:

> "Article 1—Definition:
> For the purposes of this Agreement
>
> (1) (a) 'investment' means every kind of asset and in particular, though not exclusively, includes:
> (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
> (ii) shares, stock and debentures of companies or interest in the property of such companies;
> (iii) claims to money or to any performance under a contract having a financial value;
> (iv) intellectual property rights and goodwill;
> (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

[3] Georges R. Delaume, "The Convention on the Settlement of Investment Disputes Between States and National of Others" (1966) 1 *International Lawyer* 64, 70.

(b) The said term shall refer:
(i) in respect of investments in the territory of the United Kingdom of Great Britain and Northern Ireland, to all investments made in accordance with its legislation, and
(ii) in respect of investments in the territory of Malaysia, to all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an 'approved project'."

At this juncture it would be poignant to point out that a number of older BITs involving Malaysia and the foreign state makes reference to the term "approved project". In these BITs it is not sufficient for a foreign investor to satisfy the requirements that its project or contract amounts to an investment. There is an additional hurdle to pass in order to be entitled to protection under these BITs, namely that the project or contract must be afforded the status of an "approved project".

The Government of Malaysia takes the view that a project is afforded "approved project" status when the foreign investor has obtained the express approval of the Ministry of International Trade and Industry (MITI) designating the project as an "approved project". The mere fact that the Government of Malaysia has entered into a contract with a foreign investor does not automatically afford such an investor protection under a BIT where the clauses relating to "approved projects" are relevant.

The problem with this approach is that there appears to be no clear or uniform guidelines published by MITI as to the precise procedure involved in securing "approved project" status. It appears to be arbitrary to an extent. This very notion of an "approved project" has been raised in the *Phillippe Gruslin* and *MHS* cases, where the Government of Malaysia in objecting to the reference of the dispute to ICSID on jurisdictional grounds contended that the contracts were not afforded protection under the respective BITs as they were not "approved projects". The tribunal in the *Phillippe Gruslin* case concurred with the submissions of the Government of Malaysia. The tribunal in the *MHS* case did not address this issue in its award.

Increasingly, however, the term "approved project" is being removed from the BITs that the Government of Malaysia is negotiating with foreign states. This notion of "approved project" status is however not relevant to Malaysia alone. Singapore, Thailand, the Philippines and Indonesia appear to have a similar concept, save that the wording of the relevant clauses are somewhat different:

"BIT between Malaysia and the Belgo-Luxemburg Economic Union
Article 1—Definitions
(3) The term "investment" shall comprise every kind of assets and more particularly, though not exclusively:
Provided that such assets when invested:
(i) in Malaysia, are invested in a project classified as an 'approved project' by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon."

"BIT between Singapore and Pakistan
Article 2.
1. This Agreement shall only apply:
(a) in respect of investments in the territory of the Republic of Singapore, to all investments made by nationals and companies of the Islamic Republic of Pakistan, which are specifically approved in writing by the competent authority designated by the Government of the Republic of Singapore and upon such conditions, if any, as it shall deem fit."

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"BIT between Belgium and Indonesia
Article 9.
The protection accorded to investors by the provisions of the present Agreement shall apply:
(a) in the territory of the Republic of Indonesia only to investments which have been approved by the Government of the Republic of Indonesia pursuant to the stipulations contained in the Foreign Investment law No.1 of 1967 or other relevant laws and regulations of the Republic of Indonesia."

"BIT between The Netherlands and the Republic of The Philippines
Article 2
This Agreement shall apply only to investments brought into, derived from, or directly connected with investments brought into the territory of one Contracting Party by nationals of the other Contracting Party in conformity with the former Party's laws and regulations, including due registration with the appropriate: agencies of the receiving Contracting Party, if so required by its laws."

"BIT between Thailand and the United Kingdom
Article 3

(1) The benefits of this Agreement shall apply only in cases where the investment of capital by the nationals and companies of one Contracting Party in the territory of the other Contracting Party has been specifically approved in writing by the competent authority of the latter Contracting Party.
(2) Nationals and companies of other Contracting Party shall be free to apply for such approval in respect of any investment of capital whether made before or after the entry into force of this Agreement."

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It can therefore be seen that the mere fact that a foreign investor may satisfy the ingredients of what constitutes an "investment" under a BIT does not necessarily mean that protection is granted. The said "investment" may also have to satisfy the additional requirement of being an approved investment in accordance with the express provisions of the BIT.

5. WHAT ARE THE INGREDIENTS OF AN "INVESTMENT" WITHIN THE CONTEXT OF THE ICSID CONVENTION?

The term "investment" is by its very nature broad and not easily defined. Professor Christoph Schreuer[4] has suggested that an "investment" exhibits the following characteristics: the project must have a certain duration; there is regularity of profit and return; there is an assumption of risk; the commitment of the investment is substantial; and there must be a significant contribution to the state's development.

Whilst the notion of investment and its definition have not become a serious barrier to jurisdiction in investor-state arbitrations, there are nevertheless differing views on what constitutes an "investment" within the meaning of art.25 of the ICSID Convention. Tribunals have to a large extent approached each such objection to jurisdiction on its own merits with regard to the individual circumstances of the case at hand.

Although there is a large pool of academics and practitioners particularly from Europe and the United States that takes a very liberal view in interpreting the term "investment", there is another school of thought that adopts a more restrictive approach. This has been discussed in a number of ICSID decisions.[5] It should be noted that there is no doctrine of stare decisis in ICSID jurisprudence—the decision of one tribunal is not binding on another.

[4] Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge UP, 2001), pp.121 et seq.
[5] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* ICSID Case No.ARB/00/4; *Joy Mining Machinery Ltd v Arab Republic of Egypt* ICSID Case No.ARB/03/11; *Bayindir Insaat*

6. ICSID AND THE MALAYSIAN EXPERIENCE

Malaysia has not been exempted from investment treaty arbitrations. To date the Malaysian Government has been named as a respondent in three ICSID arbitrations, despite Malaysia having no history of expropriation or nationalisation.[6] A Malaysian investor has also successfully succeeded in an investment dispute arbitration.[7]

The Gruslin decision

Gruslin, a Belgian national, claimed that in January 1996 he made an investment of some US $2.3 million in securities listed on the Kuala Lumpur Stock Exchange (KLSE) through the entity known as the Emerging Asian Markets Equity Citiportfolio (EAMEC portfolio). He claimed from the Malaysian Government (Malaysia) losses in the value of his investment arising from the alleged breach by Malaysia of the terms of an Intergovernmental Agreement with the Belgo-Luxemburg Economic Union. The claim was that the imposition by Malaysia of exchange controls in September 1998 constituted a breach of obligations owed by Malaysia to Gruslin under the terms of the BIT.

Malaysia argued that Gruslin's investments in Malaysia were not an "approved project" within the meaning of art.1(3)(i) of the BIT. Malaysia also argued that the portfolio and stock market investments did not fall within the definition of "approved project". Malaysia relied on historical evidence, namely the correspondence between MITI and various foreign governments and respective investors who had obtained "approved project" status for their investment.

Gruslin relied on a *note verbale* exchanged between the Malaysian Foreign Ministry and the Dutch Embassy in Malaysia with regard to the clarification of the term "approved project". It read:

> "[T]he term 'Approved Projects' under Article 1(3)(i) of the Agreement on Encouragement and Reciprocal Protection of Investments between Malaysia and the Belgo-Luxemburg Economic Union should be read together with Article 1(3)(a) to Article 1(3)(e). If any project undertaken does not require approval from the relevant designated Ministries, hence Article 1(3)(i) is not applicable."

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The tribunal took the view that the *note verbale* was of uncertain effect in relation to the Gruslin investment. It also took the view that it was for Gruslin to discharge the burden of proof that the particular assets of the EAMEC portfolio constituted by the KLSE investment fell within the definition of the art.1(3). The tribunal therefore rejected Gruslin's contention that the *note verbale* had the effect of abrogating the requirement of proviso (i) to art.1(3) of the BIT.

Gruslin also argued that, as the investment had been approved pursuant to art.7 of the KLSE Listing Manual which required approval of the then Capital Issues Committee (CIC), therefore the listing of any shares on the KLSE was an investment in an "approved project" and therefore requirements of proviso (i) to art.1(3) of the BIT were satisfied.

The tribunal, however, took the view that the proviso to art.1(3) and the CIC requirement concerned different subjects and that approval by the CIC only satisfied a governmental requirement that business of a corporation be approved by a governmental agency; and that

Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan ICSID Case No.ARB/03/29; *Ceskoslovenska Obchodni Banka A.S. v Slovak Republic* ICSID Case No.ARB/97/4; *PSEG Global Inc and Konya Ilgin Elektrik Uretim ve Ticaret Ltd Sirketi v Republic of Turkey* ICSID Case No.ARB/02/5; *Jan de Nul N.V. Dredging International N.V. v Arab Republic of Egypt* ICSID Case No.ARB/04/13.

[6] *Malaysian Historical Salvors Sdn Bhd v Malaysia* ARB/05/10; *Phillippe Gruslin v Malaysia* ARB/99/3; *Phillippe Gruslin v Malaysia* ARB/94/1.

[7] *MTD Equity Sdn Bhd v MTD Chile SA* ICSID Case ARB/01/07.

whether or not the investment was an "approved project" within the meaning of art.1(3) had to be an approval which was of a regulatory nature and not mere approval of general business activities of a corporation and thereby upheld the objection of the Malaysian Government that Gruslin's investment was not an "approved project" attracting protection under the BIT.

THE *MHS* DECISION

Malaysian Historical Salvors Sdn Bhd (claimant) entered into a salvage contract on August 1991 to salvage the wreck and contents of a sunken vessel, *Diana*. Disputes arose under that contract which resulted in arbitration between the Claimant and Malaysia. The claimant was dissatisfied with the outcome of the arbitration proceedings and subsequently commenced proceedings in the Malaysian courts in which it was unsuccessful. It subsequently instituted an arbitration pursuant to art.II of the ICSID Convention, claiming that Malaysia confiscated the claimant's property and that the Malaysian courts denied the claimant due process of law in Malaysia.

Malaysia took the jurisdictional argument, namely that the salvage contract was not an investment within the meaning of the BIT between the United Kingdom and Malaysia and also that it was not an "approved project". The jurisdictional objection was upheld on the grounds that it was not an "investment" and the "approved project" argument was not addressed. However, the Malaysian Government argued that the salvage contract was not an "approved project" as the claimant had not submitted an application to MITI for its investment to be classified as an "approved project" in order to enjoy protection under the relevant BIT.

The onus lies on the party seeking protection under the BIT to make an application to MITI. It is immaterial whether the protection sought under the relevant BIT is for manufacturing or non-manufacturing sectors.

Malaysia argued that no undue emphasis should be placed on the execution of the salvage contract by a government department on behalf of the respondent as all contracts entered into by the respondent have to be signed by authorised persons pursuant to the Government Contracts Act 1949 (Act 120) s.2:

> "All contracts made in Malaysia on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Malaysia and may be signed by a Minister, or by any public officer duly authorized in writing by a Minister either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization."

Malaysia also argued that the fact that a number of Ministries of the Government were involved did not accord "approved project" status to the salvage contract and that publicity with regard to "approved project" status was contained in a number of Government publications. Malaysia also relied on the *Gruslin* decision.

The tribunal, in upholding the Government of Malaysia's objection on grounds of jurisdiction, concluded that the salvage contract did not amount to an "investment" within the meaning of art.25(1) of the ICSID Convention. After analysing these decisions and the Convention, it came to the conclusion that the claimant's contract was in essence a marine salvage contract. It opined that the hallmarks of an investment should be fact specific and there should be a holistic assessment. First, it held that the lack of regularity of profit and return in respect of the salvage contract was immaterial. Secondly, that the contributions of a financial nature were made under a commercial salvage contract. Thirdly, that the fact that the contract took four years to complete was a risk that would be associated with the salvage contract in view of the element of fortuity. Fourthly, that the risks that the claimant assumed under the contract were inherent in a salvage contract in view of the "no find no pay" concept and they were normally commercial risks that would be assumed in salvage contracts. Lastly, it held that the salvage contract did not make either a significant or substantial contribution

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to the economic development of Malaysia. It therefore held that it was not "an investment" and dismissed the claimant's claim on jurisdictional grounds.

The tribunal did not address the arguments on "approved project". The claimant has since sought to annul the decision upholding the Government of Malaysia's jurisdictional objection and annulment proceedings are currently pending.

MTD Equity Sdn Bhd v Chile SA

This is a case in which a Malaysian investor took advantage of the BIT between Malaysia and Chile. This is an investment made by MTD Equity Sdn Bhd, a Malaysian company (a wholly owned subsidiary of MTD Chile SA), with regard to the development of a mixed used planned community in Santiago, Chile. The site which was zoned for agriculture required rezoning and applications were made to various Chilean agencies and approval was granted and development commenced. Subsequently, MTD was informed that the project was inconsistent with the Government's urban development policy, by which time MTD had invested substantial monies. There was an ICSID arbitration and the Government of Chile was held liable and ordered to pay approximately US $6 million together with interest.

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7. CONCLUSION

In conclusion, the following salient points should be given due consideration. *Gruslin* recognises that in BITs it is permissible and legal under international law to specify mandatory governmental approval as a condition precedent for investment protection. Investors and their legal advisers should therefore be familiar and appreciate the provisions of these types of BITs before embarking on investments in countries such as Malaysia and those in the Association of South East Asian Nations (ASEAN), as BITs vary from country to country with regard to State approval. States in ASEAN and their state organs promoting foreign direct investment should publicise the fact that, in order to qualify for investment protection, state approval may be necessary. This may be done, for instance, in Malaysia, through the Malaysian Industrial Development Authority. Perhaps all ASEAN countries should do the same through their appropriate government organs. Investing states should inform their appropriate business organisations with regard to the peculiarities in their BITs, in particular, with ASEAN countries where state approval may be an advantage for investment protection. Investors should not feel secure merely because some organ of Government has considered and approved the investment. There may be another layer of approval amounting to state approval as *Gruslin* reflects.

Malaysian investors and the foreign investor should therefore be extremely careful in investing in what are considered to be countries which are high risk countries, namely a number of countries in Africa who do not have BITs with Malaysia and even in ASEAN, because if the appropriate state approvals are not obtained, it is then possible that the investment may not be protected within the meaning of the BIT. It should also be noted that a number of countries in South America, namely Bolivia and Venezuela, have now decided to denounce the ICSID Convention in view of a number of unfavourable ICSID decisions against them. Venezuela has refused to honour the joint venture with Exxon-Mobil.

The Malaysia experience at ICSID has been relatively favourable, with the two ICSID cases having been dismissed on jurisdictional grounds thereby affirming that Malaysia does not have a history of expropriation of foreign investments. The national courts do not favour the Government and provide foreign investors with suitable protection. In the commercial context, there is no denial of justice and Malaysia has established the necessary legal infrastructure to promote foreign investment and avenues for foreign investors to enforce their contractual rights, be it by recourse to the courts, mediation and/or arbitration.

Specific Issues in Islamic Dispute Resolution

by MOHAMED ISMAIL MOHAMED SHARIFF

1. INTRODUCTION

Islam is a way of life. The *Qur'an* is the divine scripture of the Muslims revealed by Allah swt[1] through the angel Jibraeel to the Holy Prophet of Islam, Muhammad saw.[2] It contains the message of Allah to all of humanity and particularly Muslims. It is concise but comprehensive. The very reading of the *Qur'an* or hearing it read reduces Muslims to tears even if they do not understand the meaning. Such is the power of the *Qur'an*. It cannot be understood fully on a first reading because each verse or collection of verses has a history behind it. There are volumes of literature called *tafseer Al-Qur'an* which explain the verses of the *Qur'an* and their true meaning. These *tafseer* should be studied and understood for a full comprehension of the *Qur'an.*

Being a comprehensive code it contains the very basic matters about all things that affect a human's daily life, from the profound to the mundane. It is therefore not surprising to find in it verses that deal with *muamalat*[3] matters. Thus, there are several verses in the *Qur'an* that deal with such matters as justice and resolution of disputes. On justice:

> "And Allah commands justice; the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion. He instructs you, that ye may receive admonition."[4]

On fulfilling obligations: "O ye who believe! Fulfil all obligations."[5] This verse is pregnant with meaning, as the footnote shows. On evidence: "And cover not Truth with falsehood, nor conceal the Truth when ye know (what it is)."[6] On judging between man and man:

> "Allah doth command you to render back your trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things."[7]

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[1] Abbreviation of *subhanahu wa ta'aala*, a term of glorification of Allah swt. It is always added whenever Muslims write Allah swt's name.

[2] Abbreviation of *sallallahu alaihi wasallam*, a salutation to the Holy Prophet, invoking the blessings of Allah swt upon him. It is always added whenever Muslims utter or write the Holy Prophet's name.

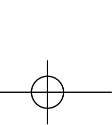
[3] The term *muamalat* refers to all man-to-man dealings, that is to say, all interactions among human beings on all aspects of life.

[4] *Qur'an,* S.16:90. All quotations of the *Qur'an* in this paper are taken from Abdullah Yusuf Ali, *The Holy Qur'an, Text, Translation and Commentary,* new revd edn (Brentwood: Amana, 1989). The mode of reference here is reference to the *surah* (Chapter) and then the verse; thus S.16:90.

[5] *Qur'an*, 1989, S.5:1. The learned translator says in fn.682: "This line has been justly admired for its terseness and comprehensiveness. Obligations: *'uqud:* the Arabic word implies so many things that a whole chapter of commentary can be written on it. First ... He [Allah swt] further sent Messengers and Teachers, for the guidance of our conduct in individual, social and public life. All these gifts create corresponding obligations which we must fulfil. But in our own human and material life we undertake mutual obligations express and implied. We make a promise, we enter into a commercial or social contract... we must faithfully fulfil all obligations in all these relationships."

[6] *Qur'an*, 1989, S.2:42.

[7] *Qur'an*, 1989, S.4:58.



The next verse is a powerful admonition alike to those who administer justice as well as to those who seek justice. They are commanded to uphold justice and to put justice above self-interest:

> "O ye who believe! Stand out firmly for justice, as witnesses to Allah, even against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: For Allah can best protect both. Follow not the lusts of your (hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do."[8]

2. THE QUR'AN ON ARBITRATION

The *Qur'an* teaches man how to resolve differences in matrimonial disputes, thus:

> "If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace Allah will cause their reconciliation: for Allah hath full knowledge, and is acquainted with all things."[9]

Commercial contracts: The *Qur'an* gives complete guidance on how commercial contracts should be concluded:

> "O ye who believe! When you deal with each other in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties; let not the scribe refuse to write: as Allah has taught him, so let him write.
>
> Let him who incurs the liability dictate, but let him fear his Lord Allah, and not diminish aught of what he owes.
>
> If the party liable is mentally deficient, or weak or unable himself to dictate, let his guardian dictate faithfully. And get two witnesses out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (for evidence).
>
> Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves;
>
> But if it be a transaction which ye carry out on the spot among yourselves there is no blame on you if ye reduce it not to writing.
>
> But take witnesses whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things."[10]

The learned translator and commentator amplifies the seminal significance of this verse as follows:

> "Commercial morality is here taught on the highest plane and yet in the most practical manner, both as regards the bargains to be made, the evidence to be provided, the doubts to be avoided and the duties and rights of scribes and witnesses. Probity even in worldly matters is to be, not a mere matter of convenience or policy, but a matter of conscience and religious duty. Even our everyday transactions are to be carried out in the presence of Allah." [11]

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[8] *Qur'an*, 1989, S.4:135.
[9] *Qur'an*, 1989, S.4:35.
[10] *Qur'an*, 1989, S.2:282.
[11] *Qur'an*, 1989, fn.333.

Hadis (Sunnah)[12]

The sayings of the Holy Prophet are replete with statements on justice and the administration of justice. A close comparison of such sayings with modern concepts in the common law, for instance, will show that many of these modern concepts are restatements of the corresponding *hadis*.

No man is above the law: it is reported in a *hadis* that the Holy Prophet had said:

> "The earlier communities before you were ruined and destroyed. Whenever a noble person was convicted of theft, they left him unharmed, but if the same thing happened to a lowly person, they exacted the punishment on him. By Allah, had Fatima[13] stolen, I would have had her hand cut off."[14]

There are sayings to the effect that a judge should not judge between two persons while he is in an angry mood, that he should hear both parties before making a decision[15] *(audi alteram partem)*, etc.

3. ARBITRATION IN ISLAM

Arbitration is specifically mentioned in the *Qur'an,* Surah 4, verse 35, which was quoted above. Though that was in reference to a matrimonial dispute, there is no reason why it cannot be extended to commercial disputes. This has in fact been done. In Islam the arbitration contract is known as *tahkim* in which the parties agree that if there is a dispute or disagreement with regard to the agreement such dispute will be settled by referring it to a *hakam* or arbitrator.[16]

The Kuala Lumpur Regional Centre for Arbitration has recently set up the machinery for the arbitration of Islamic financial business disputes and published Guidelines, with Rules for Islamic Banking and Financial Services Arbitration 2007. It also provides a model arbitration clause:

> "Any dispute, controversy or claim arising from Islamic banking business, *Takaful* business, Islamic financial business, Islamic development financial business, Islamic capital market products or services or any other transaction or business which is based on *Shariah* principles out of this agreement/contract shall be decided by arbitration in accordance with the Rules for Arbitration of Kuala Lumpur Regional Centre for Arbitration (Islamic Banking and Financial Services)."

The *Qur'an* encourages mediation/arbitration. Again in reference to matrimonial disputes it exhorts the parties in the following manner:

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[12] *Hadis* (also spelt as *hadith*) and *Sunnah* are the sayings and actions of the Holy Prophet collected and recorded by various compilers. There are several compilations available, each comprising several volumes and these are usually referred to by the name of the compilers, e.g. Bukhari, Muslim, Tirmidzhi, etc.

[13] Fatima was the beloved daughter of the Holy Prophet.

[14] Abdur Rahman Doi, *Shariah: The Islamic Law* (Malaysia: Noordeen, 2nd reprint 1990), p.259.

[15] See Bukhari, Muslim.

[16] It is interesting to note the wording of the arbitration clause in the Kuala Lumpur Regional Centre for Arbitration Model Arbitration which reads as follows: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration." This rule is adapted from the UNCITRAL Model Arbitration Clause. It need not be said that the *Qur'an* (and thus the advice therein to refer matrimonial disputes to arbitration) precedes the UNCITRAL rules by over 1,300 years!

> "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best."[17]

Qur'anic code for settlement of disputes

It is evident from the foregoing brief survey of the *Qur'an's* verses and the *hadis* that Islam provides a mature method to settle disputes. It prescribes a simple and practical yet effective way. It not only encourages arbitration and mediation but also provides for the manner in which disputes should be settled. It would be evident to any person familiar with arbitration that the modern arbitration methods found in the arbitration legislation are in essence those prescribed in the *Qur'an* and *Hadis.*

Specific issues in Islamic dispute resolution

As was seen above there is a comprehensive code for the resolution of disputes provided by the *Qur'an* and the *Hadis*. The question is whether there are specific issues that might hinder the resolution of disputes that are to be decided in accordance with Islamic principles. Before discussing that matter it would be appropriate to distinguish between two different modes of resolution of such disputes: (1) where the dispute is resolved and the award enforced, where necessary, entirely within an Islamic regime of dispute resolution, and (2) where the dispute is decided based on *Shariah* principles but the enforcement of awards is done according to the available conventional means through the civil courts.

The writer is not aware of any instance or jurisdiction where the first mode of dispute resolution is practised although that ought to be the preferred mode for Islamic dispute resolution. It is hoped, indeed expected, that the relevant authorities in the concerned jurisdictions would take the required initiatives towards putting in place such a regime. Accordingly for now it is the second mode that is discussed here. In my view there are three issues that arise in this mode of dispute resolution.

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The law applicable

The mainstream Islam is the *Sunni* sect, the other being the *Shia.* There are four schools of jurisprudence in the *Sunni* sect. These are referred to as *madzahib* (singular *madzhab*) in Islam. These *madzahib* all agree on the basic tenets of Islam, such as the Oneness of Allah, prayers, fasting and the *Hajj* pilgrimage. There are, however, some differences in opinion among jurists and scholars of these *madzahib* on several issues, mainly on *muamalat*[18] matters, such as the validity of certain contracts. For instance, contracts such as *bai bithaman ajil, bai al-inah and bai al-dayn* are regarded as valid *Shariah* contracts in Malaysia but not so in certain other countries in the Middle East and Pakistan.

The Holy Prophet has said that differences of opinion among the *ummah*[19] are a blessing. This remains a cardinal principle in Islam. However, in commercial dealings among the peoples, especially where they are from different jurisdictions, that is to say, in cross-border transactions, there is a need for a common platform as regards the law applicable to contracts. Otherwise there would be no uniform law to govern the legal relationship between the parties. Having a common law in this respect does not detract from the principle that differences of opinion can exist; the issue is the acceptance of a particular principle or law (whichever one it may be) by all parties concerned as being applicable to the type of contract in question so that the parties can deal with each other on a mutually agreed basis. This will also satisfy one of the fundamental requirements of *Shariah* with regard to contracts, that is that there must

[17] *Qur'an*, 1989, S.4:128.
[18] *Muamalat* refers to dealings among peoples in their daily affairs, e.g. business, social, political and others.
[19] *Ummah* refers to the Muslim community as a whole.

be certainty in contracts. If the parties are not agreed on the law applicable to a particular contract it cannot be said that there is certainty in the contract. On that ground alone the contract will be invalid. It therefore seems clear, in my view, that agreeing on a common law to govern contracts is not only desirable but essential for the very validity of contracts under the *Shariah*.

A common code of law for cross-border transactions would be an ideal solution. But that may be a long way off from becoming a reality. In the interim, however, there must be a mutual acceptance of the law applicable to particular types of contracts. For instance, if the parties are entering into a *bai bithaman ajil* or *bai al-inah* transaction they should agree that these are to be regarded as valid contracts. Otherwise there would be endless disputes and entering into *Shariah*-based cross-border transactions would become impossible. Only if there is a common acceptance of the law applicable can disputes arising from such contracts be resolved. In the absence of such an acceptance, an arbitrator cannot even begin to consider whether the contract which is the subject of arbitration is a legally valid contract, and what the respective rights of the parties are. In a general way of comparison, the situation may be likened to the laws of two jurisdictions being applicable to a single contract, particularly where the laws applicable to the contract in these two jurisdictions are in conflict. It would not be possible to make a proper determination of the dispute.

At this juncture it would be instructive to take note of the judgment in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd.*[20] One of the issues was the governing law of the contract, which was stated to be: "Subject to the principles of Glorious *Sharia'a*, this agreement shall be governed by and construed in accordance with the laws of England." The trial judge in dealing with the question of the applicable law referred to the Rome Convention on the Law Applicable to Contractual Obligations 1980 (to which England was a party) and said that that only made provision for the choice of *law of a country* but did not provide for the choice of law of a non-national system of law, such as *Shariah* law. He said that the quoted words were no more than a reference to the fact that the bank purported to conduct its affairs according to the principles of *Shariah* but that did not mean that Shariah law was applicable to the contract in an English court.

On appeal the Court of Appeal said that the quoted words were:

> "[I]ntended simply to reflect the Islamic religious principles according to which the bank holds itself out as doing business rather than a system of law intended to 'trump' the application of English law as the law to be applied in ascertaining the liability of the parties under the terms of the agreement... Thus the reference to the 'principles of ... *Sharia'a*' stand unqualified as a reference to the body of *Sharia'a* law generally. As such, they are inevitably repugnant to the choice of English law as the law of the contract and render the clause self-contradictory and therefore meaningless... I share the judge's view that, having chosen English law as the governing law, it would be both unusual and improbable for the parties to intend that the English court should proceed to determine and apply the *Sharia'a* in relation to the legality or enforceability of the obligations clearly set out in the contract."

This case is significant because, in many cross-border contracts like the one in the instant case, *Shariah* law is stated to be the law of the contract and English courts as the court of jurisdiction. It is clear from *Shamil Bank* that an English court will not apply *Shariah* law to the contract even if it is expressly chosen as the law of the contract. Accordingly, where an arbitration is held in England and the contract expressly states that the law applicable is *Shariah* law, the arbitrators would nevertheless be bound by the decision of the Court of Appeal in the *Shamil Bank* case and, therefore, would not, in my view, apply *Shariah* law. Instead they would hold English law to be the applicable law.

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[20] *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19; [2004] 1 W.L.R. 1784; [2004] All E.R. 1072.

Qualified adjudicators

Those who adjudicate disputes arising from *Shariah*-based contracts should be qualified in *Shariah* law. There are of course scholars who are so qualified. But modern cross-border transactions are often of an intricate nature and adjudicating disputes concerning them requires a thorough knowledge of those intricacies. As a general statement it would not be incorrect to say that most *Shariah* scholars who may sit as arbitrators may not be possessed of the level of knowledge or understanding of those transactions that they require to independently adjudicate such disputes.

Furthermore, at present the Arbitration Rules that are applied to arbitrations are mostly based on the common law or the civil law. Although the Rules are procedural in nature and so are not difficult to understand and apply, yet a working knowledge of such laws is necessary to properly implement or apply these Rules to pending disputes. Such a situation will not arise if there are Rules based solely on *Shariah* principles.

What this means is that it would be difficult to find arbitrators who are proficient in both *Shariah* law and the civil laws to independently adjudicate these disputes. This in turn will necessitate having a minimum of two arbitrators where one would normally suffice, resulting in additional costs for the parties. If, however, the arbitration agreement requires the appointment of three arbitrators, the problem can be resolved by appointing the right mix of arbitrators.

Enforcement of awards

Awards handed down by arbitrators are enforced through the civil courts. It could transpire that certain awards made in *Shariah*-law based arbitrations may not be compatible with civil law principles. For example certain heads of damages awarded in the arbitration may not accord with the civil law. In such instances a conflict of laws situation will arise. Given the significant differences between these two systems of law, areas of conflict are likely to exist and these may raise issues at the enforcement stage. If there is no mechanism in place to resolve such conflicts, awards handed down in *Shariah*-law based arbitrations could remain unenforced or partly enforced, thus defeating the purpose of the arbitration in that mode.

It is, therefore, essential to ensure that suitable provisions are made in the Rules of Court of the jurisdictions where awards handed down pursuant to an Islamic dispute resolution process, to facilitate such enforcement in the civil courts without issues of conflict of laws and the like being raised during the enforcement process.

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Other issues

In addition to the three issues raised, it is likely that there may be others that could hinder the evolution of an Islamic dispute resolution process within a civil law system of courts and administration. All such issues must be identified and appropriate provisions should be made in the civil courts system to accommodate them before a fully-fledged Islamic dispute resolution process can emerge as a viable alternative system.

(2009) 75 ARBITRATION 2

Specific Issues in Islamic Dispute Resolution

by MARK HOYLE

1. INTRODUCTION

Islamic law has a rich tradition of supporting and facilitating dispute resolution. Consensus and agreement underpin procedures. This is especially so in contractual disputes when parties have already given their consent to dispute resolution outside the litigation structures of the state.

2. POLICY OF CONSCIENCE OR OVERRIDING "PUBLIC" POLICY

One aspect of arbitration that needs consideration is whether or not there is an "Islamic" overview of the underlying contract. For example, let us say that a *sukuk* (in Western commercial shorthand a bond) is issued. On the face of it the instrument complies with the *Sharia*, is traditionally accepted as being a suitable instrument to support the Islamic economy, and would on its own be upheld if its form was consistent with the fundamental principles of the *Sharia*.

Ordinary bonds, which rely solely on the attraction of interest to support their purchase, are plainly not *Sharia*-compliant. The issue of a bond with a coupon for interest is simply the arrangement of a loan for interest. The fundamental and acceptable concept of the s*ukuk* is for the holders to share in the venture. This is consistent with the concept of using money for partnership, rather than using money as a commodity. What if, though, a dispute over a s*ukuk* develops into a dispute into whether or not the finance arranged by the *sukuk* is supporting a non-*Sharia* compliant enterprise?

Plainly, if the entire *sukuk* return is to build a distillery, produce alcohol, and sell it, it will be supporting a venture forbidden to Moslems by the *Sharia*. At the other end, if it is to support a *madrassa* for the education of orphans, so that they may learn the Holy Koran, and understand the principles of Islam, it is *Sharia* compliant.

In between there are many illustrations where jurists and secular lawyers can argue whether a venture is *Sharia* compliant. What if the *sukuk* has been offered to raise funds to build a supermarket, which itself sells alcohol? Jurists differ on whether or not sale of alcohol in a supermarket to non-Muslims invalidates any Muslim connection with the supermarket. The broad view adopted in Europe by Muslim jurists is that, provided the supermarket only has a small proportion of its sales involving alcohol, there is no requirement for a Muslim to be involved in the offering of alcohol, and that alcohol is not in some way made available to Muslims, there is no impediment to investment. Others say that regardless of whether or not a Muslim may be tempted by alcohol, that is a matter for his personal conscience, and does not invalidate a supermarket stocking it. Others still opine that there is no impediment to a Muslim selling alcohol, provided he does not support the establishment and operation of unique alcohol outlets.

The question then is, what if the s*ukuk* is alleged to be invalid because it has supported non-*Sharia* compliant enterprises? Is this a matter of public policy? Who will raise it? Should the arbitral tribunal be aware of such matters? Given that a *sukuk* can provide for the equitable distribution of profit, all investors will benefit but equally, therefore all investors will have responsibility to consider their investment.

There is no general restriction on non-Muslims obtaining finance through a *sukuk*, nor in offering finance to those who offer a *sukuk*. Is this a matter which needs to change? If the matter is capable of being raised before an arbitral tribunal, it is plain that it should also be raised before a court. To give an illustration on a comparative level, bribery

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and corruption are taken seriously by courts, and more seriously now than before by arbitrators. This is because both bribery and corruption are regarded as matters of public policy, regardless of whether there are specific laws regarding such activities. Why should not non-*Sharia* compliant financial instruments also be regarded under the view of public policy?

3. CHALLENGE TO THE TRIBUNAL

Is there, in these days, any bar on women becoming arbitrators, or non-Muslims determining the commercial disputes of Muslims? The current state of international arbitration suggests that while the parties approve either the arbitrators themselves, or the mechanism by which arbitrators are chosen, there can be no dispute between the parties that the tribunal is valid and will be constituted according to its formal terms. A formally constituted tribunal is capable of issuing a valid award which, under the New York Convention, will be enforced in Convention countries. Similar enforcement procedures may be obtained through the Amman and Riyadh Conventions.

What then of a challenge in the country where the award is to be enforced, on the basis of public policy? This is not an idle question. The sums at stake in international arbitration are very high. If a party wished to derail an award, however such derailment is offensive to the contractual choice of the parties, a loser who would otherwise suffer enforcement against his assets may well choose to claim to rely on religious principles. Here we have a conflict.

A person who signs a contract, compliant with the *Sharia*, for dispute resolution which is itself consistent with the *Sharia*, may then choose to refuse to honour the award that he has agreed to honour (expressly or implicitly by the arbitration agreement) on the basis of what he claims is religious conscience. The present situation in my view is that such challenges after the award has been made would be struck down. If there is a valid an objection to the constitution of the panel, that objection must be made before the deliberations.

Another factor to consider of course is the liberty that commercial law grants under the *Sharia* for contracts between non-Muslims. There has been a long tradition of freedom of contract for non-Muslims in Muslim countries, and there is no tension between the principle that Muslims are forbidden, for example, to deal in pork, but (again for example) Christians are permitted to do so. While subtle arguments could pertain regarding a contract between a Christian and a Muslim concerning pork, two Christians contracting for something which would be forbidden to a Muslim would, generally, have their contracts upheld, unless there was overriding public policy. This might occur if the agreement was analogous to the two Christians setting out to sell pork to Muslims.

Equally, therefore, if there was a question about arbitration of such a dispute, the outcome could either be a refusal to arbitrate by Muslim judges, or a declaration by the Muslim arbitrators that the contract was unenforceable. This leads on to a further issue: who should bear the loss? Is it right that one party could take the pork and sell it, without paying for it, thus disadvantaging the seller? Should there be a policy that both sides are left in the position they would have been had the contract not been agreed? In the traditional *Sharia*, agreements made as a result of arbitration could be reviewed, but only in limited circumstances. There had, for example, to be an evident lack of consent. This type of provision is reflected in all Arab codes, and indeed was in the Hanafite Ottoman Majella. It is a universal principle, that can be seen in the common law and civil laws. In passing, I suggest that we should regard the *Sharia* as the common law of Muslim countries. It has significant parallels of form; the development of jurisprudence through the writings of judges and jurists is very similar to that development of the common law before the middle of the 20th century. Let us not forget that Lord Atkin set down the modern law of tort in England, in the House of Lords, by reference to the religious principles in the *New Testament* regarding loving thy neighbour.

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4. CHALLENGES TO ENFORCEMENT: POTENTIAL ISSUES

Some thought must be given to the fact that the Judicial Co-operation Convention signed in Riyadh in 1983, a Convention between the signatory Arab states for the enforcement of awards, provides that the enforcing authority in the country where the award is to be turned into recovery is allowed to refuse enforcement if the award itself has provisions within it that are contrary to the *Sharia*. This is set out in the Convention, and therefore must give ability to the judge or enforcing authority in the target country to refuse enforcement even if the local "secular" law requires that there be enforcement.

Many writers have taken the illustration of interest to be a paradigm for this case. The Egyptian Civil Code and the Constitutional Court sanction limited interest on debts in Egypt. Equally, other codes do the same, and contractual interest may be enforced in several Arab jurisdictions. Nonetheless, Saudi Arabia could refuse to enforce an award expressing interest on its face because its view of the *Sharia* would mean that the interest provision is unenforceable. I query, therefore, whether a judge in Egypt, taking for example a Lebanese award, could also say that it is unenforceable, notwithstanding that both Egyptian and Lebanese law recognise interest. After all, let us assume that the judge is convinced in his conscience that interest is contrary to the *Sharia*, his conscience, it can be argued, must override the local law, given the terms of the Riyadh Convention. There has been insufficient intellectual debate on whether or not the Amman Convention of 1987 would give rise to similar issues.

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5. GENERAL THOUGHTS

The settlement of disputes is inherently good for society. To have confrontational arguments about the resolution of disputes is to ensure that there is at least some legacy of anger and bitterness. The utility of mediation, now recognised world-wide, is because mediation provides a method whereby, without attacking each other, parties can meet and resolve their disputes and then record their binding settlement. Such a settlement often includes matters which are not within the legal format of a litigation or arbitration, and thus allows parties to give and take in a much more flexible manner.

This method is entirely consistent with traditional Arab and Islamic resolution procedures. The collective interests of the family, then the tribe, the wider community, and eventually the nation, are easily served by consensus. The collective interest requires that energy is not expended on confrontation. Harmony is good. In that respect a judge or an arbitrator must exercise some form of conciliation. This matches neatly with the framework within which Muslim countries traditionally operated. The judge was one part of the whole. Unlike in western countries, where the judge was clearly of the society, but aloof from it, traditional Muslim judges often had other occupations, and saw themselves as part of the greater Muslim world, seeking consensus. Can it be said that this is now the case? For the future it is a very important question. If there is divergence between different Muslim countries in the approaches taken to conciliation and settlement, there will unfortunately be tensions, and no clear path. There must be recognised legal principles to prevent people taking the law into their own hands.

In the age of ignorance parties more often attempted to settle their differences by force; consensus is a surer foundation. You need only look at the extensive system of *Wasta*, where mediation to resolve disputes was the norm.

The challenge in international arbitration is to rebuild traditional methods of consensus with the benefit of a proper structure so that awards can be made in a context understood by the parties but enforceable world-wide. The fact that parties have a different faith, or have different public policy considerations from Western models, must not mean that those parties are disadvantaged.

This then makes me turn to the concept of the arbitrator and his qualifications. It is a given that an arbitrator must understand something about the legal issues, and preferably

the subject matter. What is not a given is that the personal qualities of an arbitrator are also relevant. Is he a man sensitive to the way that people behave, the differences between faiths and customs? Does he have the skills to maintain control of an arbitration whilst still not acting like a detached judge, and can he steer the parties towards a result, rather than imposing his will with the sanction of the state? Arbitrators of course should not only be chosen for their legal skills, but also because they are honest and trustworthy.

There should be no difference between cultural norms when the concept of justice is concerned. It is the act which must be viewed not the actor. There should not be one justice and one form of mercy for one category of people as against another. The alternative would lead to resentment and confrontation. Is it not therefore time that Western frameworks took on board the requirement to have rules drafted to ensure that the procedures and hearings instituted under the rules were *Sharia* compliant? A private committee in London has drawn up *Sharia* compliant rules, but as yet no institution has taken them up. Just in the same way that Islamic finance has been shown to be workable in the wider world, so *Sharia* compliant arbitration can be too.

How does one utilise the duty of reconciliation, *sulh*? The teachings of the *Holy Book* encourage all parties to use *sulh* so as to create reconciliation. Let us not forget that God has said that he loves those who are fair and just. In the sense then of seeking compromise and mediation, the Muslim world has a lot to offer because of the longevity of its learning. I hope to see in the future much more movement towards achieving consensus.

6. CONCLUSION

In an increasingly smaller world, with global reach and cause and effect being felt much quicker, it may well be said that we all live in the same legal house. Perhaps in different rooms, but I hope with open doors and the same aim.

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Is Adjudication Killing Arbitration?

by RASHDA RANA

1. INTRODUCTION

The trend over the past decade or so has been for the gradual expansion of dispute resolution clauses in construction contracts. In particular, the usual clause has grown from one that was sometimes barely a general agreement to arbitrate to one that now has many tiers and permutations to it.[1] Experience shows that some disputes are capable of being dealt with effectively at one or more of those tiers and yet when a nasty one goes all the way, each step often seems superfluous. There have been disputes where the parties have agreed to waive the right to the early steps because they know that the matter has become so vexed that nothing short of arbitration will resolve it, that is, no other amicable form of negotiation or a determination that is neither final nor binding, will do. In other instances, the parties may elect a form of dispute resolution, either statutory or contractual but, once they have opted in, there is little opportunity for opting out. What then is the what, when, how and why in construction disputes?

Adjudication has now successfully infiltrated dispute resolution processes around the world. It comes in many guises: statutory, single adjudicator, dispute adjudication boards, voluntary processes, compulsory processes and contractually nominated adjudicators. It is, of course, sometimes confused with arbitration and expert determination. Indeed, in some jurisdictions it is very much akin to an arbitral process and yet in others similar to an expert determination. It has started to creep into dispute resolution clauses and it has certainly been the mode of dispute resolution made compulsory by statute around the world.

In its most basic form, adjudication is intended to provide a speedy, efficient and cheap resolution of disputes concerning a variety of claims on an interim basis. In its most complex form it can involve the resolution of all disputes between parties to a contract on a final and binding basis.

2. DEFINITIONS: THE "WHAT" IN CONSTRUCTION DISPUTES

Sometimes, a definition of the concept helps in understanding it. *The Macquarie Dictionary*, used extensively in Australia, defines "adjudication" as, "1. the act of adjudicating; 2. the act of a court in making an order, judgment or decree; 3. a judicial decision or sentence". The thesaurus provides the following alternatives for "adjudication": "adjudgement, arbitrament, arbitration, decision, determination, ruling, opinion, order, pronouncement and resolution". On the other hand, it defines "arbitration" as:

> "1. [L]aw—the hearing or determining of a dispute between parties by a person chosen, agreed between the parties, or appointed by virtue of a statutory obligation;
> 2. international law—the application of judicial methods to the settlement of international disputes."

[1] Robert Gaitskell (2005) 71 *Arbitration* 288, 288 wrote: "When I was called to the Bar 27 years ago 'alternative dispute resolution' did not exist and even the phrase 'dispute resolution' was rarely used.... However, in the last 10 years a whole range of new dispute resolution procedures has become available, particularly in the construction industry." He was/is not alone. In making that observation he spoke for more than a generation. In fact, that statement is being made every year by a whole host of practitioners, even those who regard themselves as being well versed in alternative dispute resolution!

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The thesaurus provides the following alternatives for "arbitration": "adjudgement, arbitrament, adjudication, decision, determination, ruling, opinion, order, pronouncement and resolution". Which one are you involved in when you are adjudicating? Is it arbitration by another name? Is it the new face of arbitration? Does it serve a distinct purpose? What is adjudication? What is arbitration? Is adjudication killing arbitration?

It is not difficult to understand why many consumers—as well as practitioners—do not appreciate the differences between the various forms of dispute resolution. There are many forms: certification (engineer's decision), expert determination, dispute adjudication boards, dispute review boards, mediation, med-arb and arbitration. They are all processes in the nature of conflict management, varying in degree of formality, cost and finality.

Certification is, in its simplest form, the reference of a dispute to the contract engineer/superintendent for his/her determination. It is usually provided for in the contract and is reviewable. It is often viewed with suspicion because the engineer is often regarded as a partial player whose decisions will tend towards or be in favour of the employer/principal.

Expert determination is the reference of a dispute to an expert selected by the parties in advance (sometimes stipulated in the contract). It is usually used to decide on a specific matter of contract or other law or on disputed facts or financial valuations. Usually the expert investigates and reports on the issue and does not necessarily rely exclusively on submissions made by the parties. The decision is generally binding and cannot be appealed.[2]

A dispute board is an independent committee established by the parties to construction contracts. Dispute boards are usually provided for in the contract and thus are in place from the commencement of the project. They usually comprise three members; one chosen by each party and the third chosen by the two nominees. Dispute review boards can hold informal hearings and produce non-binding recommendations. They are a roving band of reporters charged with acting impartially and independently dealing with problems as they arise. Dispute adjudication boards, on the other hand, deal with matters that are in dispute. The procedure adopted by a DAB is usually more formal and structured, containing provisions such as time stipulations for notices and so on. A DAB's decision is immediately binding unless challenged by a notice of dissatisfaction. Both the recommendations of a DRB and the decision of a DAB may be admitted before an arbitrator, if the matter proceeds to that stage.

Mediation is a flexible confidential process involving a neutral third party assisting the parties in working together towards a negotiated settlement of a dispute or difference over which process the parties have ultimate control. The decision to settle and the terms of the resolution are controlled by the parties.

Med-arb is a process that gives the parties the opportunity to use mediation to reach a settlement and then rely on a decision by a neutral third party if there are issues on which no agreement can be reached. This process encourages parties to create their own best settlement in the knowledge that an arbitrator will, otherwise, impose a decision.

It is no longer true to say that some offer a final means of resolution and others only interim, since there are ways in which to convert an interim decision into a final and binding one.

3. SIMILARITIES AND DISTINCT DIFFERENCES BETWEEN ADJUDICATION AND ARBITRATION

The focus of this paper will be the more generic form of adjudication, such as is to be found in the various statutes. On the whole, there are a number of features common to both

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[2] A recent decision of the Victorian Court of Appeal confirmed the inquisitorial powers available to an expert in an expert determination: *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160, where the experts held a hearing and permitted cross-examination of witnesses.

adjudication and arbitration, in that both forms: can be agreed in dispute resolution clauses in contract; can be consensual; are used a great deal in construction contracts of all types; can involve a tribunal of one or three people; are intended to be cheap; are intended to be quick; can be the subject of statutory regulation; are enforceable to different degrees; and sometimes suffer from questionable quality and standards of tribunal expertise.

However, there are a number of distinct differences which may serve to give one an advantage over the other: arbitration is always consensual—adjudication can be compulsory; finality of arbitration—adjudication is an interim determination until challenged (it becomes final and binding if not challenged but how effective are the methods of enforcement?); arbitration has the force of the New York Convention (NYC) for enforcement internationally—adjudication has the force of local legislation only; and arbitration is specifically agreed in contracts—adjudication can be imposed compulsorily.

4. THE RISE AND RISE OF ADJUDICATION—THE "HOW" IN CONSTRUCTION DISPUTES

John Tackaberry has dealt with the history of adjudication.[3] The statutory form of adjudication was certainly introduced in order to allow for a quick, cheap and interim decision on a claim in the course of the project with a view to allowing the parties an opportunity to fight about the wider bases of the claims later and in another forum: arbitration or litigation.

It has now been over nine years since the security of payments legislation was introduced in New South Wales.[4] This followed hot on the heels of similar legislation in England dealing with the adjudication of claims made under defined construction contracts in 1996.[5] Since the amendments took effect to the New South Wales Act in 2003, other states have followed suit with similar legislation in Victoria,[6] Queensland,[7] Western Australia[8] and Northern Territory.[9] The shadow of the New South Wales Act has been cast further afield with New Zealand enacting similar legislation in 2002[10] and Singapore also enacting legislation based on the pre-amended NSW 1999 Act.[11] In South Australia, the Building and Construction Industry Security of Payment Bill 2008 had its second reading in the South Australian Legislative Council on September 24, 2008. An adjudication act is also being proposed in Malaysia.

The object of each of the acts is consistently to give the claimant a statutory right to make progress payment claims and to receive payment even where there is no provision for the Act in the contract. The basic purpose and motivation behind the Acts is also similar. Take the New Zealand legislation as an example:

> "[T]o reform the law relating to construction contracts and, in particular, to facilitate regular and timely payments between the parties to a construction contract; and to provide for the speedy resolution of disputes arising under a construction contract; and to provide remedies for the recovery of payments under a construction contract."

There are a number of common features within the statutes: contracting out of the Act is prohibited; "pay when paid" clauses in construction contracts are ineffective; a strict regime

[3] John Tackaberry, "Adjudication and Arbitration: The When and Why in Construction Disputes" (2009) 74 *Arbitration* 235–243.
[4] Building and Construction Industry Security of Payment Act 1999 (NSW).
[5] Housing Grants, Construction and Regeneration Act 1996.
[6] Building and Construction Industry Security of Payment Act 2002 (Vic).
[7] Building and Construction Industry Payments Act 2004 (Qld).
[8] Construction Contracts Act 2004 (WA).
[9] Construction Contracts (Security of Payments) Act 2004 (NT).
[10] Construction Contracts Act 2002 (NZ).
[11] Building and Construction Industry Security of Payment Act 2004 (Singapore).

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for the adjudication of claims (relevantly payment claims or otherwise); the preservation of all other rights the parties may have under the contract or the general law; and other contractual mechanisms, including dispute resolution processes, open to the parties may run in parallel with the adjudication process or at any time before or after. Similar sentiments, objectives and aims are contained in the other like legislation.

There are a number of critical provisions common in each of the Acts: the various Acts provide a statutory entitlement to a party to a construction contract to submit a claim to a party liable to deal with it or liable for the payment of such a claim; the party liable is required to issue a response called a payment schedule or notice of dispute; the time permitted for each step of the process is highly onerous; it is an interim decision which, unless challenged, can become final and binding; judicial review in most jurisdictions is not easily available; and it is a system that propounds the "pay-now-argue-later" way of life.

There were over 1,500 adjudications in the United Kingdom last year and each year has attracted about that number. In NSW, for instance, there were on average 85 adjudication applications per month in the first half of this year. In Australia, there are now over seven authorised nominating authorities with the task of nominating adjudicators to determine the applications submitted by applicants under the various legislative schemes. In Queensland alone (a vast state but with a population of only three million people), there have been nearly 200 adjudication applications under the Act to the end of August 2008. Each year adjudication applications have been growing, at the expense of both litigation and arbitration.

However, adjudication is not without its problems or criticism. The critical factors relate to the strict time stipulations imposed by either contract or legislation; the quality of the adjudicators, especially in nearly every domestic scene with which I have been involved (London, Sydney, Brisbane, Perth, Melbourne, Darwin and Singapore) and the unavailability of review of any kind. The combined effect of the tight time stipulations, the interim nature of the determinations and the force of statute behind the enforceability of the determinations makes it a rough and ready form of "justice".

So far, the rough and ready nature of justice appears to have been acceptable to most parties. This may well be a reflection of the global economy enjoyed in most parts of the world over the past five years or so. It is likely to change in the next few years especially as the economic climate worsens. Traditionally construction claims have moved inversely to the economic conditions: when the economy is up the number of claims are down. Since in booming economic conditions, construction companies are also working on a greater number of projects and the parties are usually too busy on projects to be fighting. They don't want to tie up valuable resources on a legal wrangle in relation to a project that is either near completion or complete when there is work to be done on the next bigger and better project. Settlements, in such times, are usually relatively easily reached. As the credit crunch begins to bite and work becomes scarcer, more and more contractors will fight the fight and will not accept the outcome of adjudications as readily. This is beginning to happen now.

Although the odd case gets through to the courts for judicial review of an adjudicator's determination, the lid has been tightened on that avenue of challenge of an adjudicator's determination. In England, it is settled law that an adjudicator's decision is binding and should normally be enforced even if it is clear the adjudicator has erred on the law or the facts.[12] In NSW, the situation is similar: a mere error of law by an adjudicator in the consideration of the issues in dispute will not amount to a reviewable jurisdictional error of law so long as the basic and essential requirements of the Act have been met. Only substantial denial of natural justice will do.[13] In Singapore, the Act allows for a determination to be reviewed by a review panel appointed under the Act. There has only been one case before the courts in Singapore which dealt with the question of whether an adjudicator appointed under

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[12] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] B.L.R. 15.

[13] *Brodyn v Davenport* [2004] 61 N.S.W.L.R. 421.

the Act had jurisdiction to determine a payment claim dispute on a final claim.[14] Whether the Singapore courts will permit judicial review of a determination (whether initial or by a review panel) and on a basis wider than is currently permitted in England or NSW is yet to be tested. In my view, it is unlikely to go beyond what is the situation in NSW.

The combined effect of the credit crunch and the limited grounds available for judicial review is, in my view, likely to increase the number of matters being challenged in arbitration or litigation, but more probably arbitration.

Legal costs can still mount up in the limited time: more resources are required even though it is over a short period (all hands on deck!). There is also the potential for ambush which is related to the limited time available and a party's desire to disadvantage the other party (which each regime, perhaps, inadvertently allows). Procedural fairness is hampered by the strict default provisions. In consequence, some of these shortcomings are being addressed in order to make the process fairer but also as a precursor to adjudication taking on a central role in the dispute resolution system. A longer time period between steps is one such suggestion.

There are now moves to introduce international adjudication as a tier in dispute resolution clauses in international transactions. This has already started to happen to some extent with dispute adjudication boards. However, the global nature of business today (most marked in construction contracts) means that although the procedure adopted in adjudications may well be acceptable, the enforcement of the determination or decision will need to be considered. For a determination (whether DAB or some other format) to be treated as an arbitral award will require the intervention of some other necessary step(s). The determination will have to be recorded slightly differently and will need to include certain formal requirements for it to be recognised as an award enforceable under the NYC. For instance, how and by whom will the "seat" of the "award" be determined and so on? It is not impossible but I don't think it is just a matter of easy conversion from determination to award and not a matter that is cured by the parties saying that it will be treated as an arbitral award or by a "deeming" provision.

There is also now in place in Australia a Contractual Adjudication Group, a scheme that:

> "[P]rovides a means for an interim but binding assessment of disputes about payment in the construction industry at a fraction of the cost of litigation or arbitration and in just three weeks[!]"

There is also talk in Australia that it may be possible for a Federal Act to be introduced under the corporations power of the Constitution to replace the state Acts. This would give consistency to the provisions and treatment of the legislation and give consumers certainty in terms of what they are dealing with and how the various provisions have been or are likely to be treated by the courts.

5. PERCEIVED PROBLEMS WITH ARBITRATION

The problems with arbitration are numerous. There is also a lot of activity worldwide, focused on the rectification or amelioration of the difficulties that have emerged over the years. Some of those problems are related to expense, the lengthy period from go-to-whoa and the time taken up in discovery/disclosure arguments and the process itself. It is no longer true to say that an arbitration will lead to an award within six months. It is true to say that the once perceived advantages of arbitration have now been turned on their head.

The problems with arbitration are being voiced not just by lawyers involved in the process but by the consumers. Recently, the experiences of GE were spelled out including the

[14] *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] SGHC 142; [2007] 4 S.L.R. 364.

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fact that, in some offices around the world, GE has categorically refused to participate in arbitration.[15] Salutary lessons must be learned by those involved in the world of international arbitration when a consumer says that, "it ain't working".

The main advantage in arbitration is the finality and binding nature of the award and the enforceability regime. However, it has been mooted by some around the world that adjudication decisions arising from a contractual dispute resolution clause should be given immediate final and binding status. That is, they should be enforceable unless challenged on a final basis, as with domestic situations. One mechanism that has been suggested is that the adjudication takes effect as an "arbitral award", which then has the full force of the NYC behind it. I have dealt with some of the immediate difficulties that spring to mind above.

Courts, supposedly the last resort in construction contract disputes, are also catching up. In late September 2008, Sydney hosted a major international forum on optimising the performance of courts. Judicial officers from 15 countries were among 120 participants at the Court Quality Forum. The conference launched an International Framework for Court Excellence which is intended to provide courts with guidelines to assess and enhance their performance. It was said that:

> "[T]he framework is designed to be adaptable to all courts, regardless of their size, location or resources. It should be equally effective in a large urban court as it is in courts in smaller rural areas, or in developing countries."

The courts are also examining ways of incorporating arbitration following the commencement of a commercial matter in court. In this instance, the matter would be arbitrated and the "award" would be converted into a judgment of the court and enforced as a judgment of the court. It is, as yet, unclear as to the advantages of that process.

6. THE "WHEN" IN CONSTRUCTION DISPUTES

When should one process be used or preferred over another? The escalating nature of dispute resolution processes within a dispute resolution clause is often a reflection of the escalating seriousness of the dispute or its "agedness". This is sometimes a question of complexity and sometimes simply a question of timing. Arbitration is traditionally the last step in the multi-tiered dispute resolution clauses in construction contracts and hence still has a specific and important place and role to fulfil. It does not always mean that it is used last. Arbitrating at the end of the contract still holds sway because that is when the relative position of the parties has crystallised: some arguments and issues will still be pursued; some will have fallen away (sometimes as a result of successful resolution through other methods). In one sense, that situation is not only contemplated by the contracts but also contemplated by the various statutes. There is a view that the killing of arbitration by adjudication has been helped along by this shunting of arbitration to last resort. However, some have argued that, with appropriate rules and robust arbitrators, short form or limited issue arbitrations can and should be undertaken during the course of the contract. Others see that as a recipe for disaster, diverting attention from the job at hand just at the time when, probably, the parties should be focusing most closely on getting the work done instead.[16] This last perspective gives adjudication the motivation that it now employs.

[15] See also the results of research carried out by Queen Mary University of London and PwC, International Arbitration; Corporate Attitudes and Practices 2008. The results indicate 86% of respondents were satisfied with international arbitration, with 18% being "very" satisfied. 5% of the counsel respondents were "rather" or "very" disappointed with arbitration. The report states that, "their concerns stemmed from their experience of the increased costs of arbitration and delays to proceedings".

[16] My gratitude to John Cock for articulating this argument (off the cuff) so succinctly and clearly.

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However, these processes are not at two extreme ends of a spectrum. There is some interaction between the two. In most contracts which include a tiered dispute-resolution clause adjudication is an early step, sometimes limited by the amount of the claim or type of claim. In addition, even where adjudication has occurred, the determination may only be final and binding if it is not challenged. If challenged, then it is liable to being opened up and re-examined. It can be opened up and re-examined by the disgruntled party issuing notice of dispute and referring the matter to arbitration for the final resolution of the issue. In statutory adjudications the arbitration can, in theory, proceed in tandem with the adjudication application. But, of course, that would tie up resources in two fora. That is why parties wait until the adjudication is over before proceeding to arbitration. In most cases, "when" a particular method of dispute resolution is used will be a dictate of the contract between the parties. That is partly how and why anti-suit injunctions emerged. A party moving to a particular form of dispute resolution prematurely or without warrant can be stopped and forced to employ the method stipulated in the contract, regardless of its efficacy at that stage of the dispute or difference between the parties.

7. THE "WHY" IN CONSTRUCTION DISPUTES

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John Cock, the chair of the session at which this paper was first presented, posed this question to me: "Is there anything achieved by adjudication that could not be achieved by arbitration given appropriately worded arbitration agreement and/or rules?" My answer is: yes, everything. Adjudication can presently provide a quick, cheap and efficient means of resolving disputes. It can be final and binding. It is enforceable in most cases with the weight and authority of statutory provisions behind it. It does not suffer from the tyranny of discovery/disclosure/document production.[17] But, it is interim, rough and ready justice and not open to judicial review. Where arbitration wins is in the complex hard fought acrimonious dispute involving vast amounts and possibly credit issues, where the parties have become entrenched in their opposite corners and involving international contracts.

As the findings of QMLU/PwC report confirm, the major perceived benefits of international arbitration are the enforceability of arbitral awards, the flexibility of the procedures and the ability to select experienced arbitrators. In addition, an appropriately worded arbitration agreement that mirrors adjudication may well still be successful in knocking out adjudication. Institutions could help in the process by making rules amenable to a limited form of arbitration which is dealt with in the sort of short periods fashionable in adjudications. At the moment only an ad hoc arbitration could deal with that. If it is not stipulated in a contract or imposed by statute, why would parties choose arbitration over adjudication?

8. CONCLUSION

There are two important factors contributing to the killing off of arbitration: first, time is of the essence; time costs money and parties do not have time to devote to endless legal arguments. They want a quick solution/resolution to problems/disputes. The second is the fact that parties have not been challenging the determination in another forum as is contemplated by the legislation. To some extent, adjudication was foisted upon parties to a construction contract because of the community's perception that a process was needed that could primarily be directed at safeguarding the continued financial viability of contractors who were victims of payment delays or disputes in bad faith perpetuated by upstream contracting parties. From this perspective it makes no sense to draw artificial distinctions between one process and another.

[17] Dressing it up does not change its tyrannical nature. Arbitration has found no easy way through the quagmire. The intranet discussion that raged over the early part of September 2008, from an innocent reminder by Richard Kreindler for members of the IBA Arbitration Committee to complete his on line survey, was an example of the passion and fury that the area raises in otherwise rational human beings. The area is equally enraging and confusing.

Any method of dispute resolution that deters or weeds out the potentially deleterious effect on cash-flow which in turn affects other ongoing construction projects is to be applauded. The hijacking of the quick, cheap and efficient banner by adjudication has been systematic and relentless. Its success will be tested with the economic maelstrom sweeping through all world markets.

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Maritime Disputes: Now and in the Future

by BRUCE HARRIS

1. INTRODUCTION

I do not greatly believe in the past as a guide for forecasting the future but it is necessary to look at it in order to understand where we are, and to have some idea as to where things might be going. So the first parameter of this paper is that, despite the title, I will look, albeit very briefly, at the recent history of maritime arbitration.

The second parameter is that inevitably my view will depend predominantly upon my experience of London maritime arbitration: whilst I have some knowledge and a little experience of maritime arbitration in other centres, that is of necessity limited. However, it has to be said that London is the centre for maritime arbitration and is used in possibly three-quarters of all cases, so this limitation may not be of enormous impact.

Thirdly, what I say reflects my own opinions: colleagues of mine in London may disagree with them. Above all, nothing that I say can be taken as reflecting the views of the London Maritime Arbitrators Association.

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2. THE PAST

I have been involved, one way or another, in maritime arbitration in London for some 45 years. For the first 25 or 30 of those years I was often asked questions along the line of, "What is the secret of London maritime arbitrations?", such questions coming from people involved in arbitration in other disciplines, particularly construction, where matters were perceived as being cumbersome and expensive, whereas maritime arbitration was seen as being quick and cheap. On more than one occasion I was asked to give a talk on this topic.

These things no longer happen, quite simply because by and large, whilst London maritime arbitration remains, in my opinion, extremely effective, equally generally it can no longer be described as being particularly quick or cheap. What has happened? A number of factors, it seems to me, explain this change.

For one thing, today's cases are often much more complicated, both on the facts and on the law, than they were previously, that no doubt being a reflection of changes in the industry.

Secondly, the conduct of our arbitrations has become far more elaborate and legalistic; 45 years ago, most arbitrations were conducted by the parties themselves, their brokers or agents, but not by lawyers. Each would appoint an arbitrator. The claimant would send its nominee a short letter setting out its claim accompanied by the documents it relied on. The claimant's appointed arbitrator would send that on to his counterpart who, in turn, would pass it to the respondent asking for comments by way of defence and any documents the respondent relied on, and those would then be sent back via the arbitrators to the claimant who would have a right of reply; and the arbitrators would then proceed to their award.

In this very quick and simple (and cheap) procedure there were no, or at least very few, requests for further information and no real question of any type of discovery. Procedural questions were happily ignored, as very often were the subtleties of legal argument. Whilst the arbitrators were bound to apply English law as best they could, they normally reached a commercially sensible decision which, happily, would usually be in line with the law.

In the absence of something going seriously wrong, no one would challenge the arbitrators or their proceedings; and there would be no question of the arbitrators' conclusions being reviewed by the judiciary unless one party thought there was a real question of law involved and asked the arbitrators to state their award in the form of what was called a "special case" for the opinion of the court.

This meant that the arbitrators did not generally need any legal expertise either to run these informal proceedings or to reach their conclusions. If they found themselves in difficulty on the law, they would often consult a solicitor or appoint a lawyer as third arbitrator or umpire.

3. THE POSITION NOW

Nowadays most cases are handled on both sides by solicitors who often employ barristers in addition. Why has that come about? I think it is due in part to the increasing complexity of the matters. But it is also because at some point, in about the 1970s, parties stopped replacing a whole generation of in-house insurance and claims managers who had, until then, run most arbitrations on behalf of their principals. And at much the same time the P&I clubs who had also helped in preparing cases for arbitration started to farm work out to solicitors. Consequently lawyers became involved in almost every case. That in itself need not have made arbitration less informal or more procedurally complicated, but of course lawyers inevitably tend to believe that the procedures with which they are familiar, i.e. court procedures, are the best, and thus want to introduce them into arbitration.

Arbitrators might have resisted this but, on the whole, I suspect that, to the extent they considered the matter, they took the view that parties should have their disputes resolved in the way they chose and, if that meant legalistically, then so be it. Parties, in their turn, probably thought that they had better follow the advice given to them, i.e. the advice of their lawyers.

These factors in turn affected the type of people who became appointed as arbitrators. Formerly maritime arbitrators had been, almost exclusively, purely commercial people. Now, the parties' lawyers realised that their procedural quirks were more readily understood and tolerated by legally-trained arbitrators. They also took the view that such arbitrators were likely to produce more consistent and predictable decisions. So they started to appoint more and more people who had some kind of legal background. Thus it is, that nowadays the substantial handful of prominent, busy arbitrators dealing with London maritime cases have, to a man (there is, unfortunately, not one woman amongst them), some kind of legal background.

What happens elsewhere? My impression is that, as in London, cases are mostly handled by lawyers rather than by the parties or lay representatives. On the other hand, however, in centres such as Paris and New York where, traditionally, the greatest competition from London's point of view was to be found, the bulk of the arbitrators are still non-lawyers. It is, though, perhaps relevant to record in this context that judicial review of arbitrators' decisions is very difficult in both those jurisdictions.

It is also right to observe that whilst, traditionally, Paris and New York were London's main competitors, in recent years the amount of maritime arbitration work going to those cities has, I think very sadly, dwindled very considerably indeed. The result is that, in fact, they currently do not really pose any serious threat to London's pre-eminence. Believing, as I do, that competition is always a healthy phenomenon, I do not regard this as being a very satisfactory situation, but the only people who can really change it are the parties who decide where to have their disputes arbitrated. At some stage I imagine the pendulum will swing, or a cycle will turn, and some place or places will take away a share—perhaps a substantial one—of London's present workload. That, of course, assumes that maritime arbitration worldwide continues at the level at which it presently is. This, in turn, is a matter regarding the future, with which I now deal.

4. THE FUTURE

It seems to me that it would be unwise for any of us who are involved in maritime arbitration to assume that the work that presently keeps us so gainfully employed is likely to continue at anything like the same level in the future. There are a number of reasons for my scepticism in this regard.

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For one thing, I think it is necessary to acknowledge that, looking at the worldwide picture, there has, over the past 10 years or so been a substantial decrease in the total amount of maritime arbitration taking place. One can see this simply from the fact that the numbers of cases being referred to and decided in Paris and New York have decreased very substantially, whilst the numbers for London have been subject to a gradual, but constant, decline. Further, so far as I know, no other centre has picked up any appreciable amount of work.

I cannot see any reason to suppose that this decline is likely to stop in the immediate future, let alone that it will be reversed. On the contrary, I can see reasons why it should continue. For one thing, those who presently make decisions in the world of shipping (and tramp shipping in particular, which provides the bulk of our cases) are not like their predecessors. Those who came before them often did deals on the back of a cigarette packet or some equally scruffy piece of paper, and were very often creatures of instinct and gamblers. The present generation, in contrast, have been to business school, they have got their MBAs, and they take a completely different approach from their forefathers.

Whereas the latter enjoyed arbitration as part of the fun of the business in which they were, members of the present generation take a much more rigorous approach to things. Faced with the prospect of arbitrating a dispute over a period of 18 months or more for a result that cannot be guaranteed, and for which they have to pay substantial sums which they may or may not recover, all the while also investing and spending valuable management time, energy and nerves, they often prefer to settle; 50 per cent *now* of what is in dispute may well be seen as a good deal, compared to an uncertain and expensive result at some unknown point in the future.

Another factor concerning the parties is that more and more shipowners are doing repeat work with the same charterers, reckoning that a long-standing solid relationship is better than constantly working the spot market, with all the uncertainty and risks that involves. And of course, a pattern of repeat business is likely strongly to reduce the possibility of disputes being arbitrated or litigated, as both parties have every incentive to settle in order to maintain a good working relationship.

In addition, we cannot ignore the way cases are now handled. For whatever reasons, and I will not seek to go into them here, most lawyers now seem to fight every single point in a case, whether it is procedural or substantive, as hard as possible. Almost daily I read submissions which contain, say, 20 separate arguments of which perhaps 15 are more or less rubbish. Nonetheless, the other side feels it incumbent upon them to respond in detail, and the proponent then wants to reply in equal detail, all resulting in an incredible waste of energy, time and—above all—costs. Again it is hardly surprising if, against this background, parties feel impelled to settle wherever possible.

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5. CAN WE AFFECT THE FUTURE?

The question inevitably arises whether we can do anything to arrest or slow what I perceive as being a decline in the amount of maritime arbitration work. Let me make a few very brief suggestions. First, I think arbitrators should be far more forthcoming in expressing—with the appropriate reservations—preliminary views. That of course means that they need to get involved in cases earlier than they might otherwise, but if doing what I suggest is fruitful, that can be no bad thing.

In any event, I do advocate (and this is the second suggestion) that arbitrators should take a far more hands-on approach to the management of cases, and I say this notwithstanding that the LMAA terms under which we operate in London actually encourage the parties to agree procedural matters: in other words they take the opposite approach.

Thirdly, I think we should look actively to discourage the pursuit of bad points, whether they be procedural or substantive.

Fourthly, I think that, rather than have the parties' lawyers tell us how long they think should be reserved for a hearing, we should get much more involved and set rather more restricted periods. My experience is that lawyers respond well to strict timetables and to

limitations on hearing time. By way of example, in a recent international non-maritime case, my colleagues and I, the tribunal having been completed in February, laid down a procedural timetable in March with a view to a hearing starting in early June. That hearing took place on time, and although we had reserved two working weeks in fact we only used eight working days: in that time we heard full argument and a large number of witnesses. Within another six weeks or so we were able to publish a unanimous award. And this was for a dispute involving hundreds of millions of dollars.

What I think we need to focus on is what I believe parties really want in their dispute resolution procedures, namely speed and efficiency, even at the cost of some exactitude if that is necessary. In some cases this may mean that we should encourage settlements. In others, as I have suggested, it may mean that we should express provisional views and/or discourage the argument of what seem to be bad points. We may also need to encourage—as arbitrators do in some countries—mediation.

Indeed, I believe that many parties are now tending to go to mediation, even though an arbitration may already have been started. As a procedure in maritime disputes, mediation has been slow to take off and even now, at least in London, it seems to me that it has not yet got a very serious grip. However, I believe the signs are that it is on the increase, and I suspect that at a certain point the curve of the number of mediations will go up rather steeply.

Certainly, as I said some six months or so ago in New Orleans, if I were now starting out—as I did 28 years ago—to make a living helping shipping people find solutions to their disputes, it is on means such as mediation and early neutral evaluation that I would be focussing my attention.

6. NOTE

Since writing this paper, the financial turmoil has produced a considerable increase in the number of maritime disputes being referred to arbitration in London. Nonetheless, the author holds to his views as to the prospects of an overall diminution of such work in the longer term.

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(2009) 75 ARBITRATION 2

Adjudication and Arbitration: The When and Why in Construction Disputes

by JOHN TACKABERRY

1. INTRODUCTION

A construction project, of whatever sort, is far more of a slice of life than most if not all other commercial contracts. There are a number of reasons for this. First of all, it takes time—a few months to many years. Secondly, it involves a number of people coming from very different backgrounds and with disparate and often conflicting aims and desires. Thirdly, the ramifications of the project, legal, economic, social will often (and always with a major infrastructure project) reverberate out from the site to impact a wide area both physical and metaphysical—from the impact of the construction traffic to the work generated by the project and the stimulating effect of the moneys expended, to the short and long term inspirational effect such a project may have,[1] to the social benefits it can deliver. In consequence, the management of a construction site involves all the mechanisms that we use in society; of which the resolution of disputes is a particularly important and particularly difficult one.

Throughout the ordinary day in any social community, there are events which surprise, disappoint, even annoy people. The responses will vary greatly, but most of the time people do not immediately rush to court. They surmount the problems in a variety of ways, which include ignoring it, on the great principle that most problems, if ignored for long enough, go away of their own accord.

If the surprise, disappointment, annoyance is repeated often enough, however, their initial reactions may mutate into something different or ramp up from the original low key response. This will be particularly the case where the social unit is closed or tight knit. In such an environment, repeated upsets are at risk of having a pressure cooker effect—they have the potential to generate stronger responses than would be the case in an open grouping—and the responses get ever stronger with time. Pressure cooker effects are harder to control.[2]

Disputes will always occur on building sites as they do in society. It is for those in charge on site to manage them. It follows therefore that those with responsibility for managing the site of a major project face heavy tasks in ensuring that the disputes do not get a head of steam, or that passions do not take over.

The traditional manager, 100 years ago, was the engineer. As well as being responsible to the owner to achieve the desired end, and to oversee the project as it went forward, he (it was always a "he") had the task of independently holding the balance between the competing interests of owner and contractor when it came to disputes. In those days matters

[1] And it is important that the media are kept on side. When the British Government built the Millenium Dome it failed to ensure that the representatives of the fourth estate had an untroubled path to their seats on the night the Queen attended the Gala opening. Many of them found themselves standing in the rain for 20 or 30 or more minutes after the show had started—security of course, a "dry" run for Heathrow. Consequently they panned the Dome and all that went on there. In its new role as the 02 Arena it is doing brilliantly, as a concert hall albeit of a popular rather than a classical inclination. No doubt because it actually has superb acoustics, really good public transport links with the rest of London, and seats some 22,000.

[2] A monk was once asked if from time to time he found the early mornings and the highly structured day of the monastic life frustrating and infuriating. "No", said he. "What is really infuriating and may one day drive me to violent action is when the person I have been sitting next to in the refectory for ten years still offers, at every meal, to pass me the salt when, for 10 years, three times a day, I have said 'No thank you, I don't take salt.'"

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were relatively simple and straightforward; and if they did go beyond the Engineer under the contract then, at least in the common law world, they went to arbitration, which itself would be presided over by an engineer, and be fairly rough and ready.[3] Such engineer arbitrators were disinclined to motivate their awards, and indeed were often discouraged from doing so by the courts,[4] which found the factual detail of a construction dispute very boring. The result was a speedy arbitration with an award which often had only one line of substance[5] and was especially difficult to challenge in court. Thus both at site level and when the matter was in arbitration, the process had a high potential to be quick. And I offer a somewhat controversial proposition—the speed and manner of the delivery of an answer is generally more important to disputants in the construction field than the high precision of that answer.

To see how one gets to this proposition, it is convenient to look at the development of common law arbitration in the last 150 years in England, a jurisdiction with a long tradition of non-lawyer arbitrators in specialist commercial disputes. The first step on that road was the introduction to the arbitration process of techniques more apposite to criminal trials than to commercial dispute resolution. The insistence on proper detailed evidence; the importation of court rules as to admissibility; the growing frequency with which counsel appeared in the hearing room; decisions in the courts that enforced upon lay arbitrators the obligation to listen to counsel[6]; and the use of techniques such as requiring arbitrators to formulate their awards by reference to differing answers to issues of law, so that the matter could in any event be taken further.

There was a belief in the legal profession that the industry would like detailed and precise answers; and the industry must to some extent have thought that it agreed with this approach. The bodies that drafted the standard forms of contract for the industry ensured that the arbitration clauses were couched in terms that maximised the opportunity to take matters on to court.[7] The result was longer and longer arbitrations, until one was sometimes looking at hearings running for a hundred days or more. The costs had the potential to exceed by a factor of two or more the sums at stake.[8] And settlement often

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[3] And rough and ready it was. A 19th century case—possibly the one about Blackfriars Bridge in London, which developed a caisson problem—which made it all the way to the law reports records the contractor as asking about payment for the very considerable extra work he had just been instructed to carry out to deal with unforeseen underground conditions. In a memorable response but one which of course did nothing to improve relations, the Engineer responded: "Just get on with the work—the inquest comes later." The choice of "inquest" was unfortunate to describe an investigation to establish entitlement. And, on another site, the resident engineer only left his office once in the latter part of the job and that was to enforce an instruction not to do some slab laying. Standing in front of the machine, he said, "You will have to lay me in concrete to lay slabs today". "Well," said the contractor's site manager, "that sure as hell will improve the administration of the contract," and told the machine operative to start the machine. These are not good examples of dispute management.

[4] An approach encouraged by the courts. Thus, in 1922, the Appellate Division of the High Court of India, having set aside an award by particular arbitrators, was reviewing a further award by the same arbitrators and noted that they had put no details of the dispute in it "having learnt better".

[5] And about two pages of pro forma material—the arbitration clause, the appointment, etc.

[6] One arbitrator, addressing a purely technical dispute, memorably, but in the view of Sir William Stabb, wrongly, allowed the lawyers to be in the room but did not permit them to speak.

[7] Although this was in part to ensure that issues that came up on different projects would get the same answer each time and that the parties whose disputes came after the reported decision would not need to go far to resolve it.

[8] The professional litigators—the classic example is an insurance company—did not make the mistake of going for long hearings. Having acted for 10 years for an insurance company, I still recall that the rule was simple. All cases were to be fought tooth and nail up to the first hearing day (unless a particularly good settlement offer came from the other side); but they must have been settled by the end of the second hearing day.

occurred only because the mountain of costs that would otherwise face the disputants was unacceptable.[9]

At about the same time, the contractors began to jib at the role of the engineer. More and more he was seen as the employer's agent and was therefore suspect; and interestingly, the attacks ultimately resulted in the precise situation that had been assumed when the attacks started to be made. Owners became aware that the engineer was indeed their agent in respect of a considerable part of his job; and they began to be readier to sue him for problems that they could not load onto the contractor. This in turn made the engineer less willing to embrace the role of independence.

And so people started to look for different dispute resolution mechanisms. One of the more successful ones has been the dispute board. This comes in various guises but typically the substance is to have a single person or a group of two or three (often of different disciplines—the Hong Kong airport had a lawyer, an engineer and a quantity surveyor) who visit the site regularly and conduct discussions with the parties to identify and either to resolve on a temporary basis, or to offer a recommendation as to the resolution of any disputes that might have surfaced since the last visit. The temporary basis for a resolution parroted the old engineer's decision—it was binding unless appealed or otherwise challenged, usually at the end of the job. The philosophy was the excellent one that one has to get on with the job without delay and the final conclusion on the impact is postponed. The mechanism retained other aspects of the engineer's decision approach. For example, the process happened on site and the board would have an understanding of the project, enhanced by their exposure to it on their visits.

The industry has also become enthusiastic about mediation and conciliation—methods of disposing of disputes that have the potential to find resolutions outside the limited types of relief that courts, arbitrators and adjudicators can offer. Even unsuccessful mediations produce benefits. Part of the dispute may be settled; and if nothing is settled, each party should come away with a much more focused picture of the grievance on the other side.

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2. ADJUDICATION

Adjudication in England operates either under a contractual provision or under the statutory scheme. It was developed as a right and not an obligation. The parties are free to call for adjudication or to proceed to either arbitration or litigation. The former choice depends on the terms of the contract and, in the absence of express provision, upon the commercial assessment of the advantages that the adjudicative process might bring. The latter choice depends on whether there is an arbitration clause in the contract.

The background to adjudication

One possible scenario is that adjudication has its origins in a combination of circumstances in the 1980s.[10] There had been an economic slump then which impacted the construction industry and led to a massive shift from a directly-employed workforce towards a system of project managing sub-contractors. At the same time, it was felt that the climate in the UK field of construction had become adversarial to an excessive extent (a feature which some

[9] Mechanisms designed to enhance the chances of settlement such as the sealed offer might not help. An offer of substance, made sufficiently early in the case, might not lead to settlement, even though the offeree had come to realise that it was a good offer. The costs consequence of accepting it belatedly was such that the offeree preferred to press on and take the chance of a decision against the odds.

[10] Other scenarios put the problem back to the early 1960s when government lawyers brought great formality to an arbitration process that had much resembled adjudication—indeed the architect and the engineer under the standard forms gave decisions that were even freer of formality than those of adjudicators today.

attributed to the use of complex standard forms) and indeed to such an extent that it was impacting on the United Kingdom's competitiveness when measured against that of other countries.

These commonly-held concerns surfaced in a number a ways—for example, one committee recommended to the ICE that a fundamental review of alternative contract strategies be undertaken with the objective of identifying the needs of good practice (which became the New Engineering Contract (NEC)).[11] Later, the construction industry as a whole joined with the Government of the day in appointing Michael Latham (as he then was) to undertake a complete review.

What adjudication was intended to be

As has often been pointed out, the concept of adjudication is not new. It already existed in a small way in a number of contracts such as the brown and later green forms, and indeed the first edition of the NEC (which pre-dated Latham) provided for adjudication.[12] What was perhaps the root cause of the re-invigoration of adjudication was the Latham Report. Latham was highly critical of the adversarial climate existing within the United Kingdom which he attributed in part to the use of a complex series of standard forms. Also he was not a fan of the procedures under which architects/engineers made decisions. Holding such views, Latham returned to first principles and set out what he believed were the constituents of a modern construction contract that would achieve the "Holy Grail" of being all things to all men and truly multidisciplinary. The Latham Report then noted that the NEC (with a few changes) came closest to this "Holy Grail" and concluded with a number of recommendations (one of which was improved procedures for adjudication).

The final Latham Report, *Constructing the Team*, was a fulsome report with a large number of inter-locking recommendations but, despite entreaties in the Report[13] itself that it not be treated in the same way as all previous Government-commissioned reports on the construction industry, that is exactly the fate which befell it, with two exceptions—payment and adjudication.

An added complication at that time was a change of government. However, the various lobbies managed to make clear to the incoming government that it was unacceptable to continue the existing system whereby payment—the "life-blood" of the construction industry—was not making its way down the chain to the sub-contractors who were failing in droves whenever a main contractor collapsed. Accordingly, the brand new Government of the day chanced upon a passing bill dealing with housing grants, regeneration (and architects) and instructed its civil servants to cobble together provisions aimed at regulating payment and adjudication in the UK construction industry. After a somewhat rough passage through Parliament, there emerged onto the Statute Book an Act entitled, "The Housing Grants, *Construction* and Regeneration Act 1996" which contained essentially inter-related provisions aimed at payment and adjudication. So far as adjudication is concerned, its purpose was described in the House of Lords as follows[14]:

[11] An earlier root and branch redraft (which was actually written) of the standard ICE form was rejected because it made too many changes in the form and might have led to a root and branch re draft of FIDIC with a consequent loss of influence by British engineers.

[12] And of course the construction industry has always sought speedy informal methods of dispute resolution carried out by informed parties—this is how we got the role of the engineer and the architect in the first place. As do other industries—look/sniff and the reputed methods of dispute resolution among Texas oilmen.

[13] As did many of the other reports that also fell by the wayside. People who write reports must expect that, as a general rule, civil servants will only implement what is seen in government as both useful and politically expedient.

[14] Lord Ackner, *Hansard*, HL Vol.571, cols 989–990.

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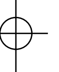
> "Adjudication is a highly satisfactory process. It comes under the rubric of 'pay now argue later' which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up completion of important contracts."

That is probably as good a summary as any of what adjudication was *intended* to be.

What adjudication has become

The concept of adjudication can mean different things to different people. For example, the drafters of the NEC are convinced that their new approach of simplicity, flexibility and stimulus to good management makes disputes highly unlikely and that adjudication is in their contracts only as some form of ultimate fall-back provision. Sir Michael Latham may have had a more practical view of the concept of adjudication. He appears to have envisaged getting away from the concept of architects/engineers wearing two hats towards a concept whereby, when the inevitable disputes arose throughout a project, a fully independent adjudicator would step in regularly to make temporarily binding decisions which would allow the works to keep moving.[15] Inevitably, however, the modern concept was always going to become what practice and the decisions of the courts put upon the bare bones of the Act and schemes.[16] We have now had that process for a number of years and the outcome can perhaps be described as quite spectacular.



From the gusto with which the new concept of adjudication was seized upon within the UK construction industry, it seems clear that there was a substantial dissatisfaction with the then existing methods of dispute resolution. After the seminal case of *Macob v Morrison*,[17] the new concept of adjudication got the bit between its teeth with a vengeance. A temporarily binding decision which requires a party to "pay now and argue later" it most certainly is, and expeditious it may be (28 days or as extended provided that no protracted enforcement dispute ensues) but what adjudication perhaps cannot now be described as is "inexpensive". As Judge Toulmin pointed out in *CIB Properties Ltd v Birse Construction*[18]:

> "I was told that CIB's costs of the two adjudications amounted to £973,732.41 and Birse's costs to £1,161,341.70 in each case excluding VAT. To this must be added the Adjudicator's costs in the two adjudications. The Adjudicator's costs in the second adjudication amounted to over £150,000. This could not be described as inexpensive."

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Another feature which seems to have emerged from adjudication in practice is that it has not, in fact, been used as the works proceed to determine temporarily a number of minor disputes. Instead, it appears mostly to be used after completion and the submission of the final account. Far from adjudication being invoked during the course of the works, disputes over extension of time and liquidated damages for delay, payment for extra works and the like are being stored up by the parties until the presentation of the final account. When this is unpaid, adjudication is commenced upon the contention that the dispute is over the sum to be paid in the final account. The practical effect of this attitude is to maintain and increase hostility over the course of the contract. This undermines any attempts at partnering between the parties.

Another aspect is the way in which the players in the industry adjust their positions to maximise or minimise the impact of adjudication. A good example of this is the importation into contractual schemes of a provision that the party who invokes adjudication should

[15] And, of course, compare the DAB or DB.

[16] The civil servants propose, the courts dispose.

[17] *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] C.L.C. 739; [1999] B.L.R. 93.

[18] *CIB Properties Ltd v Birse Construction* [2004] EWHC 2365 (TCC); [2005] 1 W.L.R. 2252.

pay all the costs of the proceeding.[19] The proposal is thus somewhat different from the statutory regime in arbitration. In arbitration, agreements as to costs made in advance of a dispute arising—typically an agreement that each side bear its own costs in any event—are unenforceable, s.60:

> "An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen."

A further consequence appears from the statistics to be that adjudication is not producing decisions that the parties treat routinely as temporary. Instead, it would appear that there are very few adjudicated conclusions that are taken onto a final determination (whether by agreement, arbitration or litigation). Whether this is due to the expense of the processes or to the parties simply having had their day in court, it does certainly appear that adjudication in becoming a de facto form of final determination.[20]

How might this system of dispute resolution be assisted generally?

Thus, in the circumstances that now exist, the arrival upon a person's desk of a letter threatening adjudication is likely to be a matter of concern to them. They will know that it cannot be ignored; they will know that it will probably have to be fought; they will know that it will probably turn out to be a final determination; and they will know that it is probably going to be expensive and consume a lot of man-hours of staff who could be better employed elsewhere.

A while back Richard Anderson and I[21] looked at the possibility of something comparable to a pre-action protocol as used in the courts. But we concluded that it was not really possible although one of the standard forms—as noted above—had had a preliminary stage which seemed to us to have been a good idea. It was scuppered by the courts.

What is clear is that parties—even at great expense—prefer a quick answer however rough and ready. It does rather reinforce the day in court syndrome. That said it does not seem unreasonable to seek to introduce some element of quality into the decisions; and therefore the need is to maintain some part of the element of speed while delivering more ordered decisions.

Three mechanisms suggest themselves—the 100 day arbitration promulgated by the Society of Construction Arbitrators in London; expert determination; and a return to a form of the original mechanism which is appearing in jurisdictions in this part of the world.

I have attached the rules for the 100 day arbitration and have refrained from commenting on them since, in my present role as President of the promulgating society, it might be thought that I had a conflict position; the rules are there for the reader to evaluate free of any persuasive comment from me.

Expert determination is a process with which everyone is familiar. It can be as speedy as you like; but of course the speedier it is the rougher and readier it is; and the slower it is the more it costs—although presumably still far less than other possibilities. But the decisions are not enforceable as judgments; and that is a real concern.

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[19] Heavily criticised by the Latham Working Group reviewing the operation of the legislation. In consequence, one of the Working Group's proposals is to amend the legislation so that parties to adjudication would bear their own costs and so that the adjudicator has the power to determine which of the parties should bear the adjudicator's costs and the costs of the nominating body. The consultation paper suggests outlawing terms that require the referring body to pay all the costs. It also suggests that after a dispute has arisen the parties can agree to give the adjudicator the power to decide who should bear their costs.

[20] Whether this approach will survive the current economic downturn remains to be seen. And this aspect of the matter may explain the movement in favour of 100 day arbitration.

[21] And with the considerable help of Declan O'Mahony.

Lastly, on this topic, some contracts in the Far East have introduced the one person permanently resident Dispute Board, whose decisions are binding pending the completion of the work. Such a person is of course independent, remains on site all the time; and therefore has the potential to be completely familiar with the works and the problems. Just as the engineer used to be. That wheel has turned nearly full circle.

Other thoughts

The UK Government put into its arbitration clauses a six-month period for the whole of the dispute from notice of dispute to award. When the mechanical and electrical contract on the British Library went pear shaped, the contractors complained about the time limit, which was very tight indeed for the entire resolution of such a dispute. But it would have been possible. The arbitrator would have had to appoint experts of different disciplines to review, on a very short timescale, the various elements of claim and defence; publish a provisional conclusion and invite very speedy responses. It would have been demanding but possible; but it was not put to the test, as the parties settled (which, no doubt, was one of the aims of putting the six-month time limit in in the first place!).

And the UNCC—dealing with claims from the first Iraq invasion—adopted what was effectively a paper only approach to resolving construction disputes—hearings were possible but were almost unheard of. In order for there to be transparency as to what we were doing and what we expected, my panel produced a procedural protocol.[22] I believe that the process worked and worked well, producing answers of some quality, particularly given the fact that many of the claims, having been lodged when the UNCC was first set up and when there was little or no belief that anything of substance would come out of it, were sketchy in the extreme. But it worked. Hundreds of disputes involving hundreds of millions of US dollars of claims were disposed of reasonably efficiently.

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3. THE SOCIETY OF CONSTRUCTION ARBITRATORS JULY 1, 2004: 100 DAY ARBITRATION PROCEDURE

For use in England and Wales and Other Jurisdictions

1 Where the parties and the appointed arbitrator agree to adopt this procedure the arbitrator shall have an overriding duty to make his Award deciding all matters submitted (excluding liability for costs) within 100 days from either; (a) the date on which the statement of defence (or defence to counterclaim, if there is one) is delivered to him or to the other party (whichever is later); or, (b) if the statement of defence (or defence to counterclaim) has already been delivered), from the date on which the arbitrator gives his directions.

2 Reference to days are calendar days unless otherwise noted. Any period set by this procedure that would end on a Saturday, Sunday or any public holiday at the seat of the arbitration will be deemed to end on the following working day.

3 The arbitrator shall, as soon as he is appointed or on the adoption of this procedure if later, contact the parties' representatives by the most rapid and practical means (such as email or fax) to give them the opportunity to comment on the periods and dates to be ordered for the procedural steps in Rule 4.

4 Within 7 days of his appointment or of the adoption of this procedure if later, the arbitrator shall by directions establish a procedural timetable to include an overall period of no longer than 100 days to run from the service of the statement of defence (or defence to counterclaim, if there is one) or from the date that the arbitrator gives his directions (whichever is later) that shall provide for:

[22] Available at *http://www.uncc.ch/reports.htm#* [Accessed March 12, 2009].

(1) service of any outstanding pleadings (including replies if considered necessary) and statements of witnesses and experts' reports, if not already served with the pleadings, within 7 days;
(2) service of all further documents relied on by a party, replies to statements of witnesses and experts' reports and service of any requests for disclosure of specific documents by the other party, within 14 days thereafter;
(3) subject to any ruling by the arbitrator on any issue as to disclosure of documents, service of copies of documents specifically so requested within 7 days of the request;
(4) no further documents or other evidence to be served by either party unless requested or permitted by the arbitrator;
(5) a date for an oral hearing or hearings not exceeding 10 working days, to commence not more than 28 days after conclusion of the foregoing steps;
(6) final written submissions (if ordered by the arbitrator) to be served simultaneously within 7 days from the end of the hearing;
(7) the arbitrator to make his Award within 30 days of the end of the oral hearing.

The arbitrator may, if so agreed by the parties, direct shorter periods for any of the foregoing steps (and the period in Rule 8) and the period of 100 days may be reduced accordingly.

5 For the purpose of achieving the foregoing maximum time periods, the parties agree to cooperate and to take every opportunity to save time where possible.

6 The arbitrator, for the purpose of achieving the foregoing time limits, may do any of the following at any time:

(1) order any submission or other material to be delivered in writing or electronically;
(2) take the initiative in ascertaining the facts and the law;
(3) direct the manner in which the time at the hearing is to be used;
(4) limit or specify the number of witnesses and/or experts to be heard orally;
(5) order questions to witnesses or experts to be put and answered in writing;
(6) conduct the questioning of witnesses or experts himself;
(7) require two or more witnesses and/or experts to give their evidence together.

7 The parties may agree to extend the period of 100 days. The arbitrator has no such power save that the arbitrator or any party may apply to the Court under Section 50 of the Arbitration Act 1996 (Extension of time for making award) or under other powers available at the seat of the arbitration.

8 Not later than 14 days before the Award is due, the arbitrator shall send to the parties his reasonable estimate of the total fees and expenses incurred and likely to be incurred up to the making of the Award (including VAT if applicable). Provided the parties have paid this sum to a stakeholder acceptable to the arbitrator with the monies held to the arbitrator's account (or to the arbitrator himself) the arbitrator shall have no lien over the Award.

9 Unless they agree otherwise the parties shall make simultaneous submissions on costs to the arbitrator within 14 days of the date that the Award is published and the arbitrator shall make his Award on costs within 14 days of receipt by the arbitrator of the submissions.

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Standard Adoption Clause

Arbitration between **Claimant**
and **Respondent**

(1) The parties hereby agree to adopt the Society of Construction Arbitrators' 100 Day Arbitration Procedure for the following[23]:

(i) any dispute which may arise out of or in connection with the Contract between the parties dated;
(ii) the dispute referred to in correspondence dated;
(iii) any cross-claim arising out of the dispute referred to in (ii);
(iv) the dispute referred to in Notice of Adjudication dated;
(v) any cross-claim arising out of the dispute referred to in (iv).

(2) The parties by entering into this Agreement further agree not to refer or continue to refer to adjudication any dispute falling within the matters to be referred to arbitration above until the arbitrator has delivered his Award on the matters referred to him.
(3) Where there is no other mechanism for appointment and the parties are unable to agree, the arbitrator shall be appointed on the application of either party by the President of the Society of Construction Arbitrators.

Signed by:

Claimant
Date
Respondent
Date

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[23] The arbitrator must also agree to adopt the 100 Day Arbitration Procedure.

Conference Overview

by ANTHONY CONNERTY

1. ABOUT THE CONFERENCE AND THE ORGANISERS

Members of international law firms and representatives of commercial organisations such as major oil companies, together with Middle Eastern delegates, were amongst those who attended a conference in London in October 2008 at the Institute of Advanced Legal Studies (IALS) organised jointly by IALS and the IDR Group. The theme was resource nationalism and the problems that it poses for international dispute resolution. The conference sponsor was Sullivan & Cromwell and supporting organisations included the British Institute of International and Comparative Law.

IALS was founded in 1947.[1] It was conceived and is funded as a national academic institution within the University of London, serving all universities through its programmes, facilities and national legal research library. Its functions are to promote, facilitate and disseminate the results of advanced study and research in the discipline of law, for the benefit of persons and institutions in the United Kingdom and abroad. The Director is Professor Avrom Sherr.

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The IDR Group[2] is a small group of international dispute resolution specialists launched in April 2008, made up of arbitrators, lawyers and other professionals from a number of countries around the world. The experience of the Group reaches into the state level of international dispute resolution—various members have sat as judges and arbitrators in the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA) in The Hague, the International Tribunal for the Law of the Sea in Hamburg (ITLOS) and the International Centre for Settlement of Investment Disputes in Washington DC (ICSID). Members also act as advocates and arbitrators worldwide in international arbitrations conducted under the Rules of the major international commercial arbitral institutions. Attached to the Group is a panel of consultants—experts in areas of significance to international dispute resolution such as petroleum, mining, metals and international affairs.

Members of the IDR Group participating in the conference were Lord Anderson of Swansea, Andrew Berkeley, Professor Munir Maniruzzaman, the Rt Hon Donald McKinnon (whose paper for the conference was spoken to by Matthew Neuhaus, Director of the Political Affairs Division of the Commonwealth Secretariat), Judge Thomas A. Mensah, David Branson, Johan Gernandt and Professor Derek Roebuck. Other speakers were John Hardiman, partner in Sullivan & Cromwell's London office and John A. Trenor, partner in the London office of Wilmer Hale.

Divided into three sessions chaired by Lord Anderson, Sir Henry Brooke and Sir Anthony Evans, the conference speakers considered the theme under three heads: the issue of resource nationalism; whether "good offices" can assist in relation to resource nationalism; whether established international dispute resolution bodies have a role to play in resolving disputes between resource-rich countries and consuming countries; can these traditional "Western" bodies satisfy non-Western countries that they will receive a fair and unbiased hearing?

2. RESOURCE NATIONALISM

Resource nationalism is a term that has come into general use in recent years. But it refers to a perennial tension between the sovereign possessors of natural resources and foreign

[1] Information at *http://ials.sas.ac.uk/* [Accessed March 12, 2009].
[2] Information at *http://www.idrgroup.org/* [Accessed March 12, 2009].

enterprises which, historically at least, had a monopoly of the technical and economic competences efficiently to exploit them. This tension can work constructively, resulting in the formation of national corporations which can enter into long term mutually beneficial partnerships with the foreign enterprises and which, in time, develop their own competence. But, sometimes, it manifests itself as conflict. Although resource nationalism is not confined to oil and gas resources, it is the energy industry that plays a prominent role in resource nationalism issues—and oil and gas featured significantly in the conference.

The resource nationalism struggle is seen in fairly stark terms in the efforts of oil-rich producing countries to revise the basis of agreements made with nationals of consuming countries. The issue of resource nationalism raises a number of problems including state sovereignty, fair compensation in the event of expropriation, stabilisation clauses—and the method of dealing with claims arising as a result of the breach of stabilisation clauses.

Resolution of such claims might be by way of litigation in national courts or arbitration under the rules of one of the international commercial arbitral institutions: or by ad hoc arbitration or arbitration under the provisions of an investment treaty such as the 1995 ICSID Convention.

Mobil Cerro Negro v Petroleos de Venezuela[3] came before the English courts in early 2008. It is an example of a dispute involving a stabilisation clause; expropriation; ICC arbitration; ICSID arbitration and proceedings in a national court. The underlying dispute involved claims by Mobil against Venezuela's state-run oil company, Petroleos de Venezuela, for breaches of a participation agreement to explore the Cerro Negro oilfield in the Orinoco Belt in Venezuela. The Venezuelan Government took control of Mobil's 41.7 per cent stake in the project in accordance with new Venezuelan legislation which "migrated" oil interests held by foreign companies to companies which were at least 60 per cent Venezuelan-owned.

In response, Mobil commenced an ICC arbitration against Petroleos, in addition to an ICSID arbitration against Venezuela. In January 2008 Mobil obtained a worldwide freezing order in the English courts under the Arbitration Act 1996 s.44. The order was claimed in support of an ICC arbitration in New York.

On a subsequent successful application by Petroleos to set aside the freezing order, Walker J. said that it was convenient to refer to the Venezuelan legislation dealing with the migration of non-Venezuelan oil interests to companies which were at least 60 per cent Venezuelan owned as the "expropriation legislation". The judge commented on the sums of money involved: the book value of the national oil company of Venezuela was US $56 billion:

> "[I]n the sense of thousand million. I am not aware of any previous freezing order made by the courts of England and Wales against a company which said that its net assets had a book value of this size."

He went on to say that the order had frozen assets worldwide up to a value of US $12 billion:

> "I am not aware of any previous freezing order made by the courts of England and Wales for a total sum of this size."

Problems raised by resource nationalism

Andrew Berkeley's paper (below) illustrates the type of difficulties which can be raised by resource nationalism:

[3] *Mobil Cerro Negro v Petroleos de Venezuela* [2008] EWHC 532 (Comm); [2008] 1 Lloyd's Rep. 684.

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> "[S]hould, or could, a profit-sharing agreement made in respect of new discoveries when the price of oil was $10 per barrel still apply later, when the developments have been made and the price of oil has increased six or tenfold?"[4]

"Good offices" and resource nationalism

Session 2 of the conference was chaired by Sir Henry Brooke: can "good offices" assist in resolving resource nationalism problems? Thomas Mensah J., the first President of the International Tribunal for the Law of the Sea in Hamburg, stressed that international law places an obligation on all States to settle their disputes through peaceful means. He gave an example of the use of good offices in relation to a land and maritime border dispute between two states: the *Cameroon–Nigeria* case. A century-old dispute over the oil-rich Bakassi peninsula and other areas prompted military clashes in the early 1990s between Cameroon and Nigeria. Turning to international law and the UN to prevent further conflict, both sides agreed to abide by a 2002 decision of the International Court of Justice (ICJ), delineating the 1,600km land and maritime border between the countries. The UN had provided good offices and technical assistance in helping to ensure that the parties peacefully implemented the ICJ decision.

3. THE ROLE OF ESTABLISHED INTERNATIONAL DISPUTE RESOLUTION BODIES

The third conference session, chaired by Sir Anthony Evans, a former judge of the English Court of Appeal, now Chief Justice of the Dubai International Finance Centre Court, produced some lively debate. Whilst most speakers were of the opinion that established international dispute resolution bodies *do* have a role to play in dealing with issues of resource nationalism, David Branson took a different view. He took Latin and South America as his example:

> "In 1868, Argentine jurist Carlos Calvo asserted that South America should require foreign investors to adjudicate their disputes in the local courts. The point was simple: foreign courts or 'diplomatic protection' favoured powerful nations over weak nations."

He said that the position in 2008 is:

> "South American governments have formed UNASUR, a dream to form the South American equivalent of the European Union. They no longer want to submit natural resource decisions to arbitration in ICSID or 'Northern' countries. They want to have decisions made in the region—the resumption of the Calvo doctrine."

4. FUTURE DEVELOPMENTS IN THE RESOLUTION OF RESOURCE NATIONALISM DISPUTES?

All three of the conference sessions provoked questions and discussions between speakers and the audience: discussion which is likely to continue given the re-emergence of resource nationalism issues in various parts of the world. The overall view was that the existing international dispute resolution bodies—both those at the inter-state level, such as the ICJ, PCA, ITLOS and ICSID, and those in the field of international commercial arbitration such as the ICC, the London Court of International Arbitration, and the Arbitration Institute of the Stockholm Chamber of Commerce—do indeed have a role to play in resolving resource nationalism disputes.

[4] Crude oil prices fluctuated considerably during 2008, collapsing from $147 per barrel in July to $34 in December.

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The dispute resolution process most discussed was international arbitration: but it was clear from the session chaired by Sir Henry Brooke that good offices can have a significant role to play, particularly in disputes between states.

We must wait to see whether other international dispute resolution organisations and other dispute resolution processes will emerge to assist in the resolution of resource nationalism disputes. For example, will the creation of UNASUR result in (amongst other things) the provision of a dispute resolution system catering for Latin and South America?

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The Changing Political Environment for Investment Agreements

by ANDREW W. A. BERKELEY

1. INTRODUCTION

On August 1, 1975, the US Ambassador to the United Kingdom, Elliott Richardson, came to see Tony Benn, the Minister in charge of North Sea Oil and of the Petroleum and Submarine Pipelines Bill, then before Parliament, which would implement the Government's policy of taking a 51 per cent stake of all oil produced in the UK sector by setting up a new state corporation, the British National Oil Corporation (BNOC) which would become a party to oil licences. The major initial North Sea discoveries, Forties, Brent and Ninian, had already been made and they were subject to licences already granted, several to US companies. These licences were to be retrospectively altered by the legislation to reflect the new policy. The Ambassador said: "The Bill raises the question of its compatibility with international law regarding the regulation and taking of foreign property and contractual rights." The Minister replied:

> "We have looked into this most carefully and we have concluded that questions of international law do not arise, because every nation state has the right to change the environment in which companies operate in its territory."

There is nothing more on the public record about the international law aspects.[1] However, the application of the state participation policy was developed during the passage of the Bill so as to assure the licensees that they would be no worse off financially. They would be invited to enter into voluntary negotiations for participation agreements which would ensure BNOC's right to lift 51 per cent of produced oil and to sit on all operating committees and to provide that the oil and the companies' activities were directed to the benefit of the United Kingdom, as the Government saw it.[2]

The Chairman of Exxon said on February 3, 1976 that, if negotiations were voluntary, Exxon was not volunteering. About three months later, Exxon and its partner, Shell, signed participation agreements in a form satisfactory to the Government and went on successfully to develop the Brent field, the oil from which became the marker crude for the North Sea.

That UK story encapsulates the themes of this part of the Conference. It shows the interplay of a political imperative, the role of international law and the persistence of experienced operators in the exploitation of a discovery and in shaping the deal to produce a reasonable return. These factors are always present but their preponderance varies. We are now in a time when the domestic political demands in producing countries are central. Law, in the sense of a contract for the exploitation of a resource which will remain fixed and inviolable for the life of the resource, is on the wane—indeed, we shall suggest, international law itself is undergoing a process of development in our context, which is adding add fresh nuances to the old maxim *pacta sunt servanda.* But one thing is unlikely to change, the overwhelming attraction for an oil man of a good economic prospect and his determination to construct a deal which will enable him to exploit it.

[1] Save for some contributions by members of the Conservative opposition in the committee stage of the Bill.

[2] For an account of the participation process and policy see Peter Cameron, *Property Rights and Sovereign Rights* (Academic Press, 1983).

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The relevant legal field is vast and there is now a plethora of books about international investment law and arbitration. Recent scholarship about stabilisation clauses rivals that devoted to angels in medieval times and sometimes, in the absence, so far, of important awards directly in point, is equally ethereal. Here, I shall not attempt even a survey. Rather I select four topics which go to setting the "environment"—as Tony Benn used that word in his meeting with the Ambassador—in which companies must operate in a foreign territory. They are governmental attitude, taxation and the right to tax, change in relevant international law and circumstances and overriding law which may modify existing agreements.

2. GOVERNMENTAL ATTITUDE

There has been an explosion in the number of bilateral investment treaties (BITs) over the last decades. It has been said that they owe their origin to a reaction of Western governments to the attempts in the United Nations in the 1970s to cut down the protections available to foreign investors or, at least, to emphasise the absolute sovereignty of a state over the natural resources in its territory.[3] Most Western governments have produced model form BITs for use as a starting point in negotiations. They bear a family resemblance to one another and they almost inevitably contain provision for settlement of disputes by impartial international arbitration. Although BITs have become common, they remain the product of the civil service mind and only in recent years have they become reasonably well known to businessmen. There have been occasions when quite sophisticated companies have not, initially at any rate, prayed in aid a BIT which applied between their country and the country of investment. Further, there has sometimes been a reluctance amongst large, well established, companies to use a BIT in dispute settlement with a foreign government. This is because their interests may well extend beyond the immediate area of dispute and because they look to a long-term relationship not only with the current government of the country but also with its successors.

Partly because of the perceived inadequacy of the BITS network but, perhaps mainly, for political reasons, some multilateral investment agreements have been made. Perhaps the most important is the investment part of the NAFTA. There has been political argument about the genesis of NAFTA and it is by no means accepted as a benefit by all strands of opinion in the United States, Canada and Mexico. Not unexpectedly, NAFTA has given rise to many of the best known recent arbitration awards dealing with investment. It became clear after a year or two that the three Governments had not anticipated what they had wrought in the Treaty when the NAFTA Free Trade Commission in July 2001 felt it necessary to issue an interpretation, binding on tribunals, that the NAFTA terms, "fair and equitable treatment" and "full protection and security" do, "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens". Thus, even in North America, we see some government reconsideration of original, rather idealistic, positions.

The fundamental political motive for the Energy Charter Treaty (ECT), another important multilateral instrument of the 1990s, is clear. It was to recruit Russia, with its important gas and oil resources, as a member of a pan-European system. The provisions of the Treaty go further than NAFTA. International law is explicitly made a minimum standard: "In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations."[4] The Treaty was made when Russia was in a period of rapid and sometimes chaotic political transition. It probably represents a high watermark of investment protection and co-operation which is unlikely to be attained again in the near or even medium term future. It was signed by Russia but it is unlikely that Russia will ever ratify it. It is also unlikely that Western governments will accord to Gasprom or

[3] Eilenn Denza and Shelagh Brooks, "Investment Protection Treaties: United Kingdom Experience" (1987) 36 I.C.L.Q. 908.

[4] ECT art.10(1).

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other hydrocarbon arms of Russia the full rights of ownership, operation, establishment and protection in their territories, which some interpretations of the Treaty would concede.

The knell of liberal hopes for all-embracing liberal investment agreements was, however, sounded by France when it terminated the attempt in the OECD to produce a "Multilateral Agreement on Investment". It had already become clear in the negotiations that the OECD governments had lost enthusiasm for the project because they had come to fear that the Agreement would fetter their "right to regulate" and also that the support of multinational companies was lukewarm at best. They did not believe that the Agreement would add value to what they could themselves achieve in bilateral negotiations with host governments. Non-governmental organisations had become vocal in opposition to the Agreement but this was not a material cause of its failure. In his announcement to the Chamber of Deputies on October 14, 1998, which killed the project, the Prime Minister Lionel Jospin said that France's opposition to the project was not founded on sectoral or technical aspects of the draft but on fundamental problems concerning the sovereignty of states. His peroration may, perhaps, find an echo in 2008:

> "When one sees the recent extreme and irrational shocks which have shaken the markets, it does not seem wise to us to let private interests intrude too much on the sphere of sovereignty of states. They must remain the major actors in international life."[5]

He received powerful applause from all quarters of the Chamber.

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3. TAXATION

The right to levy taxes is, of course, one of the attributes of sovereignty. It usually receives some special treatment in investment treaties. Thus, in NAFTA, questions as to whether a taxation measure may contravene, or be inconsistent with other provisions have to be referred initially to a special instance, which is constituted, essentially, under the control of the treasury authorities of the countries concerned. The provisions of the Energy Charter Treaty are not to apply to taxation unless it amounts to "expropriation"—which is then defined at some length. UNCTAD states in its 2000 analysis that such a qualified exclusion of taxation matters is a common approach.[6] It is there observed that it may fetter the use by the host country of tax measures as an instrument of economic policy and that much will depend on how an expropriation is defined and on whether a distinction is made between legitimate taxation measures and those whose effect is the economic neutralisation of the investment with the aim of expropriating it. In the current and foreseeable environment in which investment agreements will have to work, the element of the use of tax as an instrument of economic policy may well prevail over broad interpretations of the definition of expropriation.

Mention has been made earlier of the ingenuity of oil companies in constructing deals with their state hosts. In the taxation sphere, one of the mechanisms which have been invented is the so-called "taxes in lieu" provision.[7] Here, in certain production sharing contracts, taxes are paid "for and on behalf of the company" by a state partner, usually the National Oil Corporation (NOC). Thus, the company has the expectation that it has insulated itself from changes in taxation. But, as with the definition of "expropriation" in the more general case, much here depends on the definition of taxation. The provisions have to be most carefully drafted to include all possible governmental imposts within the definition of taxation and to exclude onerous obligations on the sale of the oil accruing to the company, such as

[5] Author's translation: *http://www.syti.net/AMI_Jospin.html* [Accessed March 12, 2009].

[6] UNCTAD IIA Issues Papers series (1970).

[7] See, e.g. Daniel Johnson, *International Exploration Economics, Risk, and Contract Analysis* (PenWell, 2003). For a well-drafted example of the clause see Qatar Model PSA 2002.

obligations to sell in local markets at an artificially low price, etc. There have been signs recently that some governments, because of rising oil prices, have been reconsidering such provisions and that they have even contemplated the reconstitution of their NOC in order to circumvent them.

4. CHANGES IN LAW AND IN CIRCUMSTANCES

One of the earlier arbitrations to which reference is made when considering the effect of investment agreements is *Aminoil*.[8] The tribunal recognised that stabilisation agreements could have a valid and effective existence. But the key reasoning begins at para.97 of the award. The tribunal recognised the full value of the principle of *pacta sunt servanda.* But they also recognised that the contract had undergone great changes between 1948, when it was made, and the seventies when the dispute occurred. They referred to piecemeal changes accepted by the company and to:

> "[A] profound and general transformation in the terms of Concessions in the Middle East and, later, throughout the world... These changes brought about a metamorphosis in the whole character of the concession."

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Here, therefore, we have an example of change of circumstances affecting the character of a contract and of legal changes, external to the contract, having an effect upon it, as it were, by osmosis.

Should, or could, a profit sharing agreement made in respect of new discoveries when the price of oil was $10 per barrel still apply later, when the developments have been made and the price of oil has increased six or tenfold? There are negotiations and arbitrations on this point under way at this time. We do not yet have the findings of the tribunals.

In order to take account of the possibility of change, many investment agreements have so-called "economic equilibrium clauses". They say that, if circumstances change, then the parties will make such changes to the contract as will preserve the economic balance between them. Some are couched in general and unspecific terms, others attempt to specify the changes which will be accepted as material and also the adjustments. The effect of these clauses, other than as an occasion for renegotiation, is doubtful—especially in the face of a global and fundamental change such as a massive price increase. The question of the legitimate expectations of the parties at the time of the contract is bound to arise. Is the equilibrium to be ascertained by reference to those expectations or is there to be some attempt to construct a new equity of equilibrium in the light of unexpected circumstances? As a practical matter of litigation tactics, what disclosures will tribunals require from the parties when the question of expectations is considered?

The inter-temporal law principle of public international law may have some relevance here. It states that a juridical fact must be appreciated in the light of the law contemporary with it.[9] So, if there is new law, or if new facts come into existence, the original treaty or agreement may not be decisive. The point is illustrated in an unreported arbitration, which took place in 2002 between a Mongolian state entity (respondent) and a Russian joint stock company (claimant). The contract contained a standard ICC arbitration clause providing for arbitration in Paris. The Mongolian respondent argued that the tribunal had no jurisdiction because, it said, the dispute was governed by the Moscow (Comecon) Convention of 1970. Neither Russia nor Mongolia had denounced the Moscow Convention, which provided that all disputes between entities of the signatory states were to be decided by arbitration in the

[8] *Kuwait v Aminoil* (1982) 66 I.L.R. 518.

[9] See Award of Huber, "The Island of Patmos" in *UN Reports* (1949), Vol.ii, p.85 and Robert Jennings and Arthur Watts, *Oppenheim's International Law: Peace*, 9th edn (Oxford UP, 2008), p.1267.

Chamber of Commerce of the respondent's state. The tribunal raised the question of the relevance of the inter-temporal law. In an expert opinion, Sir Arthur Watts said that he had no doubt that the provisions of the Moscow Convention could not operate to defeat the jurisdiction of the ICC tribunal. The Convention was designed for socialist states and the entities with which it dealt were not capitalist joint stock companies but rather the various forms of socialist organisation.

It may well be that, with the progress of time, discontented parties to investment agreements may invoke this kind of argument in an attempt to show that the original agreement was of limited relevance for the resolution of contemporary disputes.

5. OVERRIDING LAW?

In 2002 the United Nations Human Rights Commission set up a Sub-Commission under the chairmanship of Professor Weissbrodt of the United States to consider the impact of the activities of multinational enterprises on the human rights of the populations of the countries in which they operated. The Sub-Commission produced an extended set of norms for the operation of enterprises which, it reported, were necessary for the protection of human rights.[10] They covered practically every facet of the operations of a business. The Sub-Commission admitted that the norms were not legally binding but, they argued strongly, there was now a category of international "soft law" which, in practice, governments should procure that enterprises observe. Business was most disturbed by the norms, as were some governments. They cut across, and were inconsistent with, existing elements of international law. The norms were shelved.[11] But Professor John Ruggie of Harvard was appointed by the UN Secretary-General to report. This he has done in a balanced analysis, which rejects the possibility of a code of binding human rights law specific to the conduct of enterprises. But he did identify stabilisation clauses as a matter for further work. He mentioned that there might be some possibility of firms invoking stabilisation clauses so as to impede governments in the reform and improvement of social, environmental, employment and other relevant legislation. Subsequently, reports were presented to the OECD Global Forum on International Investment on March 27–28, 2008. Especially useful are papers by Andrea Schemberg, "Stabilization Clauses and Human Rights", which gives an extended survey of stabilisation clauses now in operation, and by Lorenzo Cotula, "Regulatory Takings, Stabilization Clauses and Sustainable Development", which is a good analysis made from a "progressive" point of view.[12]

Perhaps the best-known recent example of the effect of these kinds of factors has been in the Baku-Tbilisi-Ceyhan pipeline project. The constructing and operating consortium is headed by BP. There is a complex of agreements between the consortium and the governments of Azerbaijan, Georgia and Turkey as well as inter-governmental agreements.[13] The complex contains detailed and carefully drafted stabilisation clauses binding the governments not to alter the fundamental contractual and legal structure governing the project. Several non-governmental organisations and academics objected to these clauses because, they maintained, the provisions would hinder the recognition and development of the human rights of the populations of the areas through which the pipeline would pass and would prevent measures for the protection and enhancement of the environment.[14] In particular, it was argued that the clauses would prevent the governments from adhering effectively

[10] See the UN Human Rights site *http://www.ohchr.org* [Accessed March 12, 2009].

[11] The submissions of the UK Government and of ICC (UK) to the Human Rights Commission were supported by a strong opinion from Professor Maurice Mendelson Q.C.

[12] See *http//www.oecd.org/investment/gfi-7* [Accessed March 12, 2009].

[13] For texts of the agreements see *http://www.caspiandevelopmentandexport.com* [Accessed March 12, 2009].

[14] Much of the academic work was done by Professor Sheldon Leader. See his "Human Rights, Risks, and New Strategies for Global Investment" (2006) 9 *Journal of International Economic Law* 657.

to international conventions in the human rights and environmental fields and might even prevent them from complying fully with future developments in customary international law.

As a result, BP, after consultation with the governments (and with other governments) executed a carefully worded protocol to the project agreements, which promised that the stabilisation clauses will not be asserted so as to prejudice carefully defined public and national rights.[15] This type of challenge to stabilisation provisions is likely to be of growing significance.

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[15] See websites: *http://www.ohchr.org* [Accessed March 12, 2009]; *http//www.oecd.org/investment/gfi-7* [Accessed March 12, 2009]; *http://www.caspiandevelopmentandexport.com* [Accessed March 12, 2009].

Can Good Offices Assist in Relation to Resource Nationalism

by DON McKINNON*

How many of us have heard the phrase, "it's the oil, you know". Whether it was Kuwait, Iraq, Georgia or Saudi Arabia, oil was considered to be the reason for propping up an undemocratic government, or a military intervention, or an internal conflict or a war involving external players. Resources, whatever they may be, oil, gas, gold, silver, copper, bauxite, even rich agrarian areas or just ordinary water itself, can be a source of conflict.

Resources are what many people can identify with, and amongst people with very little they represent more than a commodity, they are seen as a birthright, a heritage, a cultural identity. They are often held out to be worth more than they are worth, and the extent of their value is often unknown. So, wherever these resources are, there will always be uncertainty as to quantity and uncertainty as to value. Previous years have seen tens of thousands of lives lost and many conflicts and wars have been fought over natural resources.

The issue therefore that I am addressing is where the role of "good offices" or assistance can be provided to develop an understandable ownership framework before a dispute arises and legal arguments over uncertain rights, obligations and ownership factors do dominate all.

Those who wish to exploit natural resources traditionally have the upper hand. They usually have considerably more knowledge and backup support as against those who do not—often the owners, or landowners. Those who wish to exploit or capitalise on available resources need to make sure they get everything right at the beginning. There will be many fearful of hidden agendas.

So what do the owners of these much sought-after resources expect? Many of them see these resources as more than just ownership. They would understand or believe that the wealth that the resources could generate is what could deliver to them what others have and they would like to have. So an understanding by all of what is wanted, what is expected and what we can call the rules of the game is critically important. In recognising this audience here today as those who are skilled in the field of mediation and arbitration, I am here to tell you about the role of good offices and how they can be deployed in minimising problems of conflict at all stages of resource nationalism or development.

I have no difficulty in saying that, without a legal framework fully understood by all, the chances of arbitrating your way out of a dispute are very limited. I would also stress that even with a perfect legal framework, if the people at a later stage, as a result of new information feel they have been cheated, rorted, screwed, you will never have peace. No arbitrator could prevent the guerrilla war that could follow. My previous organisation has built up solid expertise amongst its officers, helping sovereign states in developing a legal framework where there is a lack of trust particularly amongst those whose assets are involved.

Let me give you a very good though not recent example. Soon after Botswana became independent, with everyone believing it was just one huge desert 20 per cent bigger than Spain, the biggest diamond mine in the world was discovered. The Botswanan Government came to the Commonwealth to ask for assistance on how to benefit from this incredible find. It was the Commonwealth that worked with the Botswanan people, with highly qualified economists, lawyers, geologists and engineers that developed a statutory and legal framework

* In Don McKinnon's absence, Matthew Neuhaus read his paper, elaborated upon it and answered questions.

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for mining concessions and royalties that was agreed to and benefitted the people of Botswana that remains to this day.

A more recent example I experienced was providing the right good offices to the people of Swaziland to assist those people from the king down to write a new constitution. Without that new constitution, and a greater spread of authority within the kingdom, the possibility of anarchy was a very real and threatening issue.

These examples could be described as using the status, strength and reputation of an international organisation through an intermediary, being a representative of the Commonwealth Secretary General, being a person who was heeded and respected by all parties on all issues of significance.

You would also be aware of conflicts that have occurred in Sierra Leone, Nigeria, Kenya or Zanzibar where there was no comprehensive understanding in advance on the value of resources and how they would benefit the respective parties.

Within our Commonwealth environment my deployment of good offices has often been used for:

- helping set up legal frameworks and re-writing constitutions;
- helping settle disputes and advancing principles of governance; and
- helping renegotiate an existing agreement.

What I have learned about the use of good offices over eight years is that they tend to be dominated by political issues and, as you would know, anything can become a political issue.

Next, they should not have to be defined by restrictive parameters and the envoy so designated for the good offices, be it a former president, prime minister, or senior minister, must be someone who is accepted by all parties. It is only a person who has held such high office who can gain immediate access to a current president, prime minister, or senior minister to get a desired result. And they must be solidly supported by well knowledgeable, enthusiastic professional staff.

I know many of my envoys have stretched legal boundaries to get a solution and I am prepared to say there will no real peace without justice. However the relentless pursuit of justice at the expense of a pragmatic solution can be the source of continuing and unresolved tension.

And a few more pointers we have learned: any envoy appointed to such a task can never be seen to be hostage to any particular party, or hidebound by what is perceived to be the obvious or only solution. They've got to think rapidly on their feet, be open to ideas, and be prepared to listen to all sides.

In respect of natural resources in developing countries there must be a high level of sensitivity and understanding regarding the history, tribal and cultural factors of local people. Also remembering there is often a reluctance to accept the adjudication of outsiders. The envoy must have access to key players at the highest levels, must be familiar with all stakeholders and other interested parties such as NGOs, and must have a full understanding of what civil society will expect and find important. I mention civil society because the role it is playing in many parts of the world is most influential. In many cases it has overtaken the role of political parties. But my sincere advice is to get civil society onside because if it is not with you it will surely be against you.

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The Potential Role of Good Offices

by THOMAS A. MENSAH

1. THE OBLIGATION TO SETTLE DISPUTES BY PEACEFUL MEANS

International law places an obligation on all states to settle their disputes through peaceful means. However, international law recognises that every state is entitled to determine the peaceful means for the settlement of disputes in which it is a party.

The peaceful means of dispute settlement, as listed in art.33 of the Charter of the United Nations, are, “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.

2. GOOD OFFICES DISTINGUISHED FROM CONCILIATION AND MEDIATION

The use of good offices shares many of the characteristics of mediation and conciliation, but there are also differences. In general a conciliator or mediator is likely to be given a more direct role in devising the specific outcome of a dispute than may be permitted to a person or organisation offering good services. Thus, mediation may be seen as a procedure to “facilitate negotiation” and conciliation generally involves a, “thorough elucidation of the issues... followed by a non-binding recommendation”. Indeed, it has been suggested that this distinguishes conciliation from “good offices”.

Further, on the whole both conciliation and mediation have in recent times become rather formalised and special Rules and Regulations have in fact been adopted in respect of both conciliation and mediation by some institutions. Examples of such rules and regulations are those adopted by the Institut de Droit International.

Good offices can make a useful contribution to peaceful dispute resolution where the person or organisation providing good offices is freely acceptable to all the parties in a dispute and if other avenues are not considered to be suitable by one or all of the parties involved.

Good offices may be used mostly in purely “international” disputes, i.e. controversies in which the parties are either states or other international entities. For example, the UN and its Secretary General have offered good services in a number of international disputes, e.g. South West Africa (Namibia); the dispute between the Netherlands and the embryonic state of Indonesia; and the ending of the war in Mozambique. Recently, the UN good offices contributed to the resolution of the dispute between Cameroon and Nigeria regarding the Bakassi peninsula; when the judgment of the International Court of Justice did not settle the dispute, recourse was made to the good offices of the UN in order to reach a resolution that was mutually acceptable to the two countries.

3. GOOD OFFICES IN RELATION TO RESOURCE NATIONALISM

Disputes involving resource nationalism have special features that may make them less susceptible to effective resolution through the use of good offices. In addition to purely legal issues, they will bring into play political and economic considerations. For instance there may be questions regarding the rights and obligations of a state in respect of the, “free exercise of the full and permanent sovereignty over [its] wealth, national resources and economic activities”. Although full sovereignty of a state over its national resources implies the right to “nationalize, expropriate or transfer ownership” of foreign owned property, this right is

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subject to the requirement that, "appropriate compensation should be paid by the State taking such measures".

An agreement between a state and a foreign entity regarding ownership or use of a national resource will usually contain provisions on the settlement of disputes. Generally, this will provide that a dispute will be settled through arbitration, in which the parties will be the state and the non-state entity with which it has entered into the agreement. If there is controversy regarding property that is not covered by a previous agreement, a claim may be brought against the expropriating state by the state of the person or entity whose property has been expropriated.

Whatever may be the parties involved or the basis of the claim, the parties may at any time agree to use good offices to resolve the dispute, provided that they all agree on the person or organisation whose good offices are to be utilised. Good offices may be utilised before recourse to judicial settlement, but the parties may find it useful to utilise good offices even after judicial settlement, especially when a judgment does not give them a workable solution to their problem.

4. SOME ADVANTAGES OF SETTLING DISPUTES THROUGH GOOD OFFICES

Parties in a dispute may see a number of advantages in using the good offices of a respected organisation or individual (either ex officio or in a personal capacity).

Settlement through the good offices of a person or organisation will ensure a measure of confidentiality that may not be obtainable in arbitration, mediation or even conciliation. There will normally be no requirement on the person or organisation providing good offices to maintain formal transcripts of proceedings or records of decisions or conclusions. Confidentiality may be desirable to both the state and the non-state entity which may have a real interest in protecting commercial and industrial secrets.

Recourse to judicial settlement or arbitration may offer the promise of "total victory" for the party that is successful; but it also carries the risk of "total loss" to the losing side. Using good offices could lead to a settlement in which no party loses all or gains everything.

When a government loses a case before a court or arbitral tribunal, it will face the possibility of having to defend itself against internal criticism of its performance, including the choice of venue, formulation of the legal basis of its case and the selection of its legal and supporting team. If settlement is obtained through good offices, the government may find it easier to justify an outcome because it has been brokered by a respected organisation or individual.

For a non-state entity, it may be more comfortable to accept a solution brokered through good offices, especially if the organisation or person providing the good offices is generally respected and has a good reputation for impartiality and independence.

For all concerned, settling a dispute through good offices will in most cases entail less expense and possibly less time. Even when it is necessary to make use of the services of professional legal and technical expertise, the outlay required is likely to be relatively modest. In both mediation and conciliation, the parties may need to have standing teams of their own and also provide necessary legal and administrative support for the conciliators or arbitrators. In addition, it is usual for a fee or honorarium of some kind to be paid to the conciliator or mediator. In the case of good offices, the organisation or person providing good services may not find it appropriate to accept a fee or honorarium, although the parties may be required to make reimbursement for expenses directly arising from the provision of good services.

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Do Established International Dispute Resolution Bodies Have a Role?

by DAVID BRANSON

Do established international dispute resolution bodies have a role to play in resolving disputes between resource-rich countries and consuming countries? Can these traditional western bodies satisfy non-Western countries that they will receive a fair and unbiased hearing? I hope to bring an American view to England today, but not involving English law directly. I wish to discuss the evolving relationship in arbitration practice between North and South America.

I do take note of our prior speaker Andrew Berkeley's comment that European and American companies now must frequently bow down to the demands of resource rich countries. This is now true and an historic reversal from the English practice in the 1850s when the appropriate diplomatic response was to send the Royal Navy to protest against the demands of the Chinese Emperor that Britain's emissaries *kow tow*—bow down in front of the emperor. Perhaps we could label the period "from battleships to bowing".

South America countries did not then demand the *kow tow* but rather both welcomed economic investment and feared economic dominance by North America and its former European colonial masters in Portugal and Spain. The region is rich in natural resources but did not have the capital to develop a competitive industrial base. Dependent on foreign investment, it is a normal emotive response to believe the foreigners abuse the investment relationship and take the profits north. This was a time of course when the powerful Northern countries sent their battleships to collect debts. The South American spirit was captured in Francisco Garcia Calderon's 1913 book:

> "The United States have recently intervened in the territory of Acre...; at Panama, there to develop a province and construct a canal; in Cuba,... to maintain order in the interior; in Santo Domingo, to support the revolution...; in Venezuela...; in Guatemala...; and Honduras.... The New York American [newspaper] announces that Mr Pierpont Morgan proposes to encompass the finances of Latin America by a vast network of Yankee banks; and Chicago merchants... created the Meat Trust in the Argentine."[1]

For most of the past century, South American economists taught that industry should attempt to master intermediate product production, leaving more sophisticated production to the developed countries. This was accompanied by fierce protectionist trade rules to protect local industry, even foreign-owned "local" industry, from competitive pressure from imports. This had the effect of preventing imports of new, cheaper products from the emerging economies of Japan and China.

In the 1980s, as Reagan and Thatcher economic free market theory took hold, an economic doctrine known as the "Washington Consensus" emerged, a free market economic movement that spread across South America. In this period of free market theory, economists generally agreed on common principles that developing countries needed foreign capital to jump start their economies and that foreign capitalists would not invest in countries that would not allow arbitration of disputes in neutral venues. South American nations entered into bilateral investment treaties and agreed to ICSID arbitration, which led to a growing arbitration practice at ICSID.

[1] F.G. Calderon, *Latin America: Its Rise and Progress* (London: T.F. Unwin, 1913), pp.392–393.

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The acceptance of ICSID arbitration was a major policy departure from South American practice of over a century's standing. In 1868, Argentine jurist Carlos Calvo asserted that South America should require foreign investors to adjudicate their disputes in the local courts. His point was simple—foreign courts or "diplomatic protection" favoured powerful nations over weak nations. Many South American countries had not signed the New York Convention until the 1990s, with, for example, Venezuela and Bolivia only joining in 1995, and Brazil in 2002. Likewise in keeping with the Calvo spirit, many South American countries had not acceded to the Washington Convention in the 1960s or 1970s. Argentina and Chile did not accede to the ICSID convention until 1991. Colombia and Venezuela did not join until 1993.

Since the Argentine Peso devaluation in 2001, multiple claims have been made at ICSID against Argentina and other South American countries. Presently there are 122 cases pending at ICSID and 56 involve countries from Latin America. ICSID decisions are generally posted on its website and thus can be examined by scholars. There is no published scholarly article that concludes South American countries receive biased results from ICSID tribunals. There is also no empirical evidence that South American governments lose a disproportionate share of cases. Further, there is no evidence ICSID appoints biased tribunal presidents, because it appoints almost none. The vast majority of tribunal presidents are appointed by agreement of the parties. ICSID staff reported recently they could not recall a case involving a South American country where ICSID had appointed the tribunal president. Jan Paulsson wrote two decades ago that the "dice are no longer loaded" and the evidence since comports with that view.[2]

Notwithstanding the actual experience of those who experience ICSID arbitration, including the Government of Argentina and its legal experts, the fear of economic dominance and abuse does not disappear just because economists convince governments to free their markets and experts involved in dispute resolution agree the ICSID process is extraordinarily fair. Two years ago, Bolivia denounced the Treaty and has withdrawn from ICSID. Equador has restricted ICSID jurisdiction to exclude energy disputes and Venezuela's Government has passed a resolution authorising withdrawal from ICSID but it has not yet done so.

There is a case from that period that is representative of these backward trends. An American company with very large, long-term investments in South American businesses saw the investment climate change under the influence of the Washington Consensus. Their "local" products were for the first time forced to compete against Japanese products that were newer designs and cheaper. They sought an investment by a local partner and sold 25 per cent of the shares to a local firm. Over the few next years, having limited ability to change staff or work rules, the American company made several large cash infusions into the subsidiary. The local partner investor refused to match the investments required to maintain their corporate share. After six years, the company was worthless and the American firm "sold" the shares to a European firm for a few dollars and that company was able to shut down the local firm. The local investor then filed an ICC arbitration to recover as damages the full value of the original investment. The venue was in Latin America while the governing law was New York law. The local company appointed a retired South American jurist as the party-appointed arbitrator and the chair was a South American corporate lawyer. The American firm's defence was simple—when a shareholder refuses to meet capital calls, under New York law their share is diluted. The dilution meant the investor had no remaining interest in the company. The tribunal heard arguments, received briefs on New York law and then retained a New York law professor as an expert to advise it on New York law. The arbitrators awarded the full amount of the investment, with interest, to the claimant.

The New York professor had given an opinion that the investor's shares had been diluted and it was entitled to nothing on the sale. The American company's party-appointed arbitrator later explained that the arbitrators from South America acknowledged the expert opinion but

[2] Jan Paulsson, "Third World Participation in International Investment Arbitration" (1987) 2 Foreign Inv. L.J. 19.

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said that the American company should have known the company was going to be worthless when they took in the investment and they didn't tell the local investors. They also noted a few million was not significant to a multi-billion dollar company but was a large sum to the local investor. It was economic theory meeting local prejudice.

Arbitration within some South American countries can be risky as well, due to local court concerns about national justice norms. In Colombia, an American company arbitrated in Bogata under the ICC Rules against a state party. The arbitrators made an award in favour of the American firm. The Colombian party moved to set the award aside and the local court agreed. It vacated the award on the grounds that the ICC Rules did not afford the Colombian party due process. The American party nonetheless moved in a federal court in Washington DC to confirm the award. The federal court refused and the Court of Appeals for the District of Columbia Circuit upheld the refusal to confirm.[3]

The current problem is that the 1980s free market economic ideas didn't bring prosperity to South America. Fifty years ago, South America was well behind the United States in rates of economic growth but well ahead of countries in Asia. But, after adopting free market policies in the 1980s and 1990s, they saw Asian countries average 6 per cent real GDP growth, while South American growth between 1998 and 2003 was 0 per cent in most countries. Chile was a major exception. The Argentine peso crisis of 2001 was the nail in the coffin of free market economic theory in South America. The Washington Consensus was no longer the flavour for South America.

The failure of free market policies gives rise to economic nationalism seen in Venezuela, Bolivia and other countries. This is particularly true with respect to natural resources. It is easy to act the demagogue over the "patrimony" of the country. While oil reserves in Latin America are estimated to be 12 per cent of the world total, oil is a depleting source of wealth and scaring citizens in difficult times that the nation's wealth needs to be protected by the government is a well-trodden path for politicians.

South Americans are moving now to create new regional alliances to protect their natural resource decisions and to encourage intercontinental trade. South American governments have formed UNASUR, a dream to form the South American equivalent of the European Union. The structure is being laid with a goal of full implementation in 2019.

While UNASUR's effects are far in the future, there is a movement to create a new Energy Council for South America that will provide "relief" in the near term. In May 2008, 11 Energy Ministers of the South American states attended a meeting that set up a committee to design a legal mechanism to settle investor-state disputes in the energy sector. The committee was given the task of finalising an Energy Security Treaty. This programme could, if adopted, end South American participation in ICSID and European arbitration for the energy sector. The Ministers want to have decisions made in the region—a resumption of the Calvo doctrine.

There is also a new and powerful economic reality in South America that will accentuate trade with non-Northern countries. There is competition for South American natural resources from the ever-growing Chinese market's insatiable demand for natural resources. This new player in the region may change the economic trading patterns irreversibly and the dispute resolution picture completely.

China's trade with South America is growing exponentially every year. It was virtually nonexistent in the 1990s. It was $50 billion dollars in 2004. It grew to $110 billion in 2007. China buys oil, copper, soy, tin and many other natural resources from South America. The Chinese have purchased the Cuban nickel mines and will develop Cuban offshore oil reserves, 90 miles from Florida.

China also has an ability Western private companies don't share. When President Hu visited South America a few years ago, he could promise China would invest $20 billion in Argentina in railways and oil and gas exploration. Western companies don't have government

[3] *Thermo Rio SA ESP v Electrification Del Atlantico SA ESP* 421 F.Supp. 2d (D.D.C. 2006), affirmed 487 F.3d 928 (D.C.Cir. 2007); Cert.Den. 128 S.Ct. 650 (2007).

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partners that can make long-term capital investments to build infrastructure in return for long term concessions in natural resources.

The Chinese Government will not demand ICSID arbitration or ICC or LCIA arbitration as conditions for their investments. Western private corporations are at a great disadvantage. It is true that Chinese construction companies contracting with Western firms or governments will accept FIDIC conditions with the ICC arbitration clause and have participated in ICC arbitrations but it is not clear whether the Chinese Government's investment pledges will utilise standard FIDIC conditions.

The arbitration community must recognise that the normal prejudices that motivate the developing countries to seek to avoid dispute resolution in the "northern countries" will be aided and abetted by the alternative offered by China. If China does not demand ICSID arbitration, why does your country? And what is the answer?

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Talking Points

by JOHN L. HARDIMAN

What is the best forum for private litigants in the midst of an international dispute over natural resources? The answer to this question is not straightforward. Many factors need to be considered before jumping into any form of arbitration or litigation, including the nature of the dispute, the jurisdictional options available and the potential consequences of starting adversarial proceedings.

1. SIZING-UP THE PREDICAMENT

At the outset, it is important to size up the predicament in which a private litigant finds himself. Is the dispute one that is relatively narrow, such as an interpretation of a contract clause? Or is the dispute more general, such as one where the opposing party is trying to cut your client out of a deal? If the dispute is focused on interpretation of a contract that is subject to a broad arbitration clause, there may not be much choice at this stage about where the dispute should be resolved.

Another important factor to bear in mind before initiating any proceedings is how the other side has reacted in previous disputes. If the opposing party has a particularly litigious background, filing a suit or arbitration could result in World War III breaking out between the parties, with expensive, multiple lawsuits around the world.

Finally, it is essential to think about whether any fight with the opposing party will be a fair fight. Of the jurisdictional options available, are there any that would give your client a home-town advantage? Or, conversely, are there any forums that may be biased against your client?

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2. SIZING-UP THE AVAILABLE LITIGATION OPTIONS

When faced with an international dispute, private litigants are increasingly turning to international arbitration as an alternative to litigation. International arbitration has many positive features—it is generally considered a fair, sophisticated forum; the parties may be able to select arbitrators who have had experience dealing with similar disputes; limited discovery protects the privacy interests of the parties; and fewer procedural rules can lead to a cheaper and faster resolution of the dispute.

However, arbitration is not without its drawbacks. First, if the dispute requires urgent action to prevent damage to or sale of the natural resource, interim relief may be needed between the time a request for arbitration is filed and an arbitration panel is convened. Interim relief may be available through the courts where the opposing party is located or the courts of the place of arbitration; however, this will require filing an additional proceeding. Secondly, although arbitration is often viewed as a more expeditious process than litigation, it is not necessarily so. Because arbitrations are usually not subject to strict procedural rules, parties to an arbitration have the ability to delay proceedings and can drag out an arbitration for even longer than a court case. Thirdly, although the limited discovery available in arbitration can protect a client's privacy interests, it can also result in limited access to information that is vital to proving a case. Finally, even if a favourable arbitration award is achieved, if the opposing party refuses to comply with the award, the only way to get effective relief may be by bringing a separate enforcement proceeding in the home country of the opposing party.

Another potential avenue for relief is a claim based on corporate governance principles (rather than a contract with an arbitration provision). Where the natural resource is owned by an entity distinct from the disputing parties—which is frequently the case with joint ventures—such a lawsuit can be filed in the place of incorporation of that entity that owns

the natural resources. Because the shares and share register are in the place of incorporation, effective relief can often be obtained in that jurisdiction and it may be a fairer forum (even if not a particularly sophisticated one) than the jurisdiction where the opposing party resides.

United States courts should also always be considered as a potential alternative forum because of the discovery possibilities, such as depositions and more extensive document disclosure, that are a hallmark of US litigation. If the dispute between the parties includes a predicate act that occurred in the United States (such as the use of US mail or wires to advance a fraud), it may be possible to fashion a claim in US courts under the Racketeer Influenced and Corrupt Organizations (RICO) Act. United States discovery may also be used in aid of foreign proceedings pursuant to 28 USC s.1782. This statute allows individuals to request that a US district court (located in the district in which the person from whom discovery is sought resides or may be found) order discovery for use in a non-US proceeding.

3. MULTI-JURISDICTIONAL LITIGATION

Finally, the possibility of bringing simultaneous proceedings in multiple jurisdictions should not be overlooked. Multi-jurisdictional litigation can prove quite strategic because it forces parties to keep their stories straight: inconsistent statements made in one proceeding will no doubt be highlighted in the other proceedings. Multi-jurisdictional litigation is not for the faint of heart. If a multi-litigation strategy is pursued, be prepared for the fact that you may be opening a Pandora's box where *everything* will be litigated.

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Resolving Disputes Between Resource-Rich and Consuming Countries

by JOHAN GERNANDT

1. INTRODUCTION

In 2008, 176 new arbitration cases were filed with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute).[1] This represents an institutional record for arbitration cases received and follows a very successful year in 2007. Roughly half of those 176 were international cases in the sense that they involved at least one non-Swedish party. The SCC Institute also set an institutional record for the number of investment disputes filed with seven. These cases represent nearly one-quarter of the total number of investment disputes administered by the SCC Institute since 2001. The majority of the investment disputes involved parties from the former Soviet Union.

The number of investment disputes filed combined with the international character of the disputes means that the SCC Institute most likely trails the International Centre for Settlement of Investment Disputes (ICSID) as the second most successful arbitration institute for investment disputes. With that fact in mind, this essay will explore how the SCC Institute administers the resolution of disputes between resource-rich nations and consuming nations. In particular, it will highlight some of the qualities that distinguish it as an attractive forum for the resolution of investment disputes.

2. OVERVIEW OF THE SCC AND INVESTMENT DISPUTES

The SCC Institute's success in attracting investment disputes stems partially from its historical position as a forum for resolving various East–West disputes. Between 1977 and the break-up of the Soviet Union, the American Arbitration Association and the USSR's Chamber of Commerce and Industry recommended an optional arbitration clause which provided for arbitration in Stockholm. In fact, it was Soviet policy to choose Stockholm as a neutral place of arbitration if the parties could not agree on Moscow. Even after the break-up of the Soviet Union, former Soviet republics continued to prefer arbitration in Stockholm. Between 1993 and 1996 an explosion of disputes against former Soviet state entities comprised approximately 40 to 60 per cent of the SCC Institute's caseload.

The SCC Institute's popularity among parties from former Soviet countries for the resolution of their general commercial disputes has translated into popularity for the resolution of their resource-related investment disputes. Twenty-seven investment disputes have been filed with the SCC Institute since 2001. The major subject matter involved the exploration or purchase of natural resources such as oil, gas, or gold. There were also a number of disputes concerning co-operation over supplies of electricity.

The investment disputes filed with the SCC have come from three sources. Six of the investment disputes were filed under Pt III art.26 of the Energy Charter Treaty (ECT). The ECT, generally speaking, regulates relationships between energy investors and states or state entities. When a dispute arises, Pt III art.26 permits the investor to choose among a number of dispute resolution options. The investor can, among other things, choose to resolve the dispute in the state's court; or according to any dispute settlement agreements existing between the investor and the state; or through arbitration. If the investor chooses arbitration, art.26(4)(c) names the SCC Institute as a potential arbitration institution.

[1] Arbitration Institute of the Stockholm Chamber of Commerce Statistical Report 2008, available at *http://www.sccinstitute.se/uk/About/Statistics/* [Accessed March 12, 2009].

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Sixteen investment cases were filed with the SCC Institute under the terms of bilateral investment treaties (BITs). BITs are treaties between two states in which the contracting parties undertake to protect the investments of their respective nationals. Like the ECT, BITs provide arbitration as an option for the resolution of disputes between a national and a contracting party. Some BITs explicitly name the SCC Institute as an option for the parties, while other BITs simply allow the parties to agree upon an appropriate arbitration institute. Parties to BITs have chosen the SCC Institute whether their BIT named the SCC Institute or not.

Three investment cases filed with the SCC Institute were based on distinct agreements between investors and a government or state enterprise and included one or another form of governmental guarantee to the investor.

In the context of resource-related disputes administered at the SCC Institute, four common claims and three common defences are worth noting. Common breaches alleged by investors include expropriation, illegitimate taxation, unequal treatment, and ungrounded termination of the agreement after a change in government. The ECT and most BITs prohibit these state actions. Conversely, three common defences forwarded by state parties include that the tribunal lacks jurisdiction due to the limited scope of the arbitration agreement (whether it be in the BIT, the ECT, or other agreement), a public policy challenge, or state immunity.

Challenges to a tribunal related to the scope of a treaty can take many forms. As an example, the respondent contracting party can claim that the claimant is not an "investor" or its business operations are not "investments" under the terms of the relevant treaty or agreement. The ECT and the many existing BITs define these terms differently, but the *Petrobart* case below provides a good example of such a challenge that was ultimately rejected.

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3. THE *PETROBART* CASE

Petrobart Ltd (Gibraltar) v Kyrgyzstan[2] is worth examining because it demonstrates how the SCC Institute administers a resource-related investment dispute and it presents the more common claims and defences raised by parties in resource-related investment disputes. The dispute arose out of a cancelled contract for delivery of gas. Petrobart contracted to deliver gas to a Kyrgyz state entity but stopped deliveries after the entity failed to make complete payments, sought to recover the unpaid portion of the contract, and sought to cancel the remaining portion of the contract. Kyrgyzstan initiated court proceedings and Petrobart initiated arbitration under the UNCITRAL Arbitration Rules. Both proceedings examined Petrobart's claims in the context of the Kyrgyz Foreign Investment Law and both proceedings ended in favour of Kyrgyzstan. Petrobart then invoked the ECT and initiated arbitration with the SCC Institute. Petrobart claimed that Kyrgyzstan breached its duties under the ECT by not providing equal treatment to Petrobart's investment; impairing Petrobart's use of its investment; failing to honour the obligations it undertook in its contract with Petrobart; and subjecting Petrobart to expropriation or measures equivalent to expropriation. The amount in dispute was close to US $4 million.

Kyrgyzstan objected to the jurisdiction of the tribunal and raised res judicata and collateral estoppel defences. It challenged the tribunal's jurisdiction on the basis that, inter alia, Petrobart was not an "investor" and the gas contract could not be considered an "investment" as defined by the ECT. In addition, Kyrgyzstan argued that the Kyrgyz court and the UNCITRAL arbitration authoritatively decided the issues brought before the SCC tribunal, so that these issues were precluded by the doctrine of res judicata. Kyrgyzstan also claimed that, under the doctrine of collateral estoppel, Petrobart was required to raise its claims under the ECT either in the court proceeding or UNCITRAL arbitration.

[2] *Petrobart Ltd (Gibraltar) v Kyrgyzstan* SCC Case No.126/2003.

Petrobart filed the case on September 1, 2003 and the award was rendered on March 29, 2005. In the award, the tribunal found it had jurisdiction. The tribunal rejected the res judicata argument, finding that both the court and the UNCITRAL arbitration's findings were based on the application of Kyrgyz law and not the ECT. After rejecting the collateral estoppel argument, the tribunal found that Petrobart was an investor and it had an investment in Kyrgyzstan.

As a result, the tribunal awarded nearly US $1.13 million to Petrobart. The arbitration costs totalled €150,000. Kyrgyzstan challenged the award in Sweden, but the Svea Court of Appeals rejected the challenge in April 2006.

4. ANALYSING THE *PETROBART* CASE

Petrobart deserves attention for two reasons. First, it demonstrates the complex issues that are likely to arise in disputes between resource-rich nations and resource-consumers. Secondly, it demonstrates that the SCC Insitute is uniquely situated to efficiently administer such complex disputes.

Petrobart's claims represent the first set of complex issues. The claims are common to investment disputes in general and are common to the investment disputes administered by the SCC Institute in particular. They can be broken down into three general categories: unequal treatment; failure of Kyrgyzstan to honour its agreement; and expropriation of Petrobart's investment. Expropriation is a common claim raised by investors, as is Petrobart's claim that the state or state entity's act resulted in the equivalent result of expropriation.

Kyrgyzstan's attack on Petrobart's status as an investor is a not uncommon state defence but that does not make the issue less complex. The ECT and many BITs offer protection to investors and their investments but the terms differ between treaties and give rise to different interpretations depending on which treaty language is being examined.

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5. THE SCC INSTITUTE AND RESOURCE RELATED INVESTMENT DISPUTES

The 2007 SCC Institute Arbitration Rules (SCC Rules) are well adapted to the efficient handling of resource-related investment disputes. There are two areas in particular that are worth noting. First, the SCC Rules enable the SCC Institute to extend the time limits for parties' submissions. Thus, the SCC Institute can accommodate the inherent complexity of resource-related investment disputes. Secondly, the SCC Institute process for appointing arbitral chairs seeks to satisfy the concerns of all the parties to an arbitration. For example, the SCC Rules require that the chair of an arbitral tribunal come from a neutral nationality. When making its selection, the SCC Institute gives special consideration to the parties' views on the appointment, to the qualifications of the potential chairperson, his or her experience, specialisation, and language skills.

A prevailing criticism among resource-rich nations is that arbitral chairs in investment disputes are often selected from a relatively small and homogeneous pool of individuals. Resource-rich nations tend to believe this fact limits their chances of success. In the best case, parties from resource-rich nations can believe that the chair brings too narrow a world-view to the resolution of the dispute. In the worst case, parties from resource-rich nations can believe that the chair is biased toward consumer parties and against resource-rich nations.

The SCC Institute's chair appointment process reflects a long-term vision of the SCC Institute to draw arbitrators and arbitral chairs from a diverse group of well-qualified arbitrators. To that end, it selects as its chairs well-qualified and established arbitrators who are not necessarily members of the small pool so often used in other resource-related investment disputes. The SCC Institute also seriously entertains the views of all the parties when appointing the chair. This is done without sacrificing the SCC Institute's already rigorous requirements regarding a chair's experience and special skills.

6. CONCLUSION

The SCC Institute continues to set institutional records for the number of cases filed. In particular, the SCC Institute has proven itself to be a popular forum for resolving resource-related disputes under the ECT, BITs and other agreements. This is due partly to the SCC Institute's historical position as a forum for resolving disputes between the East and West, partly to the SCC Institute's experience in administering complex resource disputes, and partly to the fact that the SCC Rules are well adapted to the unique and complex nature of resource-related investment disputes. Even more, the SCC Institute's process for selecting a chair attracts parties, because it protects the interests of the parties by valuing experience and diversity.

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Closing Address: The Institute of Advanced Legal Studies, the IDR Group and the Relation of Theory to Practice

by DEREK ROEBUCK

> "ADVERTISEMENT: PRACTICE is in law, what EXPERIMENT is in philosophy, without the knowledge of which, we cannot assure ourselves of the truth of any one single proposition. It is in law, as in every other profession; THEORY ever leaves a bandage on the eyes, which nothing but a practical knowledge can remove. Therefore not only *to* the LAWYER, but as well to the SENATOR, the MAGISTRATE, the private GENTLEMAN, and the TRADER, will this work be found *equally* useful."[1]

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I have only one criterion for a successful conference, that I should have learned something worthwhile. I am sure that even the most experienced practitioners and the most demanding scholars (in our world they are usually the same people) who have listened to the papers presented today will agree with me that that criterion has been satisfied over and over again, in every one of them. Their authors and all who have contributed to the discussion, in the chair and from the audience, deserve our thanks. So too do the organisers, Anthony Connerty from IDR and Avrom Sherr from IALS, with the support of the international law firm, Sullivan & Cromwell. Together we have established a partnership between a new group of practitioners and an established scholarly institution, one best placed to provide the fixed point around which future joint activities can develop.

It has been gratifying to see so many young people here. That encourages a hope that the development of dispute resolution will be in good hands. They cannot have failed to see how the busiest and most successful practitioners make time not only to distil their experience but to pass it on, having held it up to challenge and argument. They seem to be able to make time expand, by working hard, long and efficiently. But such efforts, particularly if they are co-operative, need space too, a place, a home. You have seen today some of the facilities the IALS can offer. It has the finest law library in the United Kingdom, in my opinion. It is a natural centre for our co-operation.

I wish I knew how to put into words my understanding of the relationship between theory and practice. It is more than a symbiosis, because the two are not like separate organisms. It is not a dialectic, because they are not opposed. The nearest analogy, the best metaphor I can think of, is a compound, because when they mix they form something new. Yet even that does not adequately encompass the continuous organic interplay. Except in pure mathematics, and possibly some physics, the only way to test theory is through practice. That is certainly true of our discipline, dispute resolution. All those who have spoken today have illustrated that truth. But it is equally important to keep in mind that they have also shown that their daily practice would be quite different, if it could exist at all, were it not for the theory which they

[1] John Frederic Schiefer, *An Explanation of the Practice of Law: Containing the Elements of Special Pleading, Reduced to the Comprehension of Every One; also Elements of a Plan for a Reform: Showing that the Plaintiff's Costs in a Common Action, which at present amount from £25 to £35 need not exceed £10 and those of the Defendant, which are now from £12 to £20 need not exceed £6* (London: R. Pheney, 1792), p.xxviii. I stumbled on this passage after the conference. It seemed a pity not to include it here. I have taken great liberties in an attempt to produce a coherent text from my memory of what I said.

apply to it. Sharing the processes of discovery and testing and disseminating the results are the continuing commitment of both IDR and IALS and of the new partnership which has begun today.

Disputes of all kinds need to be managed and appear to have existed at all times and places, not just among humans. The techniques of management have differed, though mediation and arbitration appear to be universal. They are likely to remain so, however much our urge to regulate leads us to try to channel them. Our research would do well to seek enlightenment wherever we can find it, stretching geographically to every part of our planet and diachronically as far back as we can see.

I am here not only as a consultant to IDR and a research fellow of IALS but as editor of *Arbitration: the International Journal of Arbitration, Mediation and Dispute Management*, the quarterly journal of the Chartered Institute of Arbitrators. I'm delighted to tell you that the papers from this conference will appear as a special section of the May 2009 number. Early last year, we devoted one number to mediation. Of all the riches it contained, one remains special for me. My wife had heard Sarah Rainsford, the BBC correspondent in Ankara, talking about blood feuds in south-east Turkey. Sarah Rainsford generously allowed me to use her text and photographs. A butcher, now retired, had successfully mediated 400 disputes.[2] We would probably call them family matters but they were expected to lead to bloodshed, tit for tat, and for generations. What could we learn from him? Should we insist he be instructed, examined and subject to a professional body? He probably never earned in a year the cost of a week-long mediation course. Even if he had the language, he has not had the education to benefit from one.

Some of our speakers have given us similar insights into the realities of arbitration. They have spoken of the problems of enforcement of awards. There is local protectionism in many countries, not just in China for which we coined the term. We know that the rule of law demands that awards be enforced without further debate on the merits of either of the award or of the enforcement. That may not be easy in Mississippi, let alone in a remote town in China, where the enforcement would require the sale of the assets of a factory which not only employs but provides housing, education and the only medical services for almost the entire population.

It is hardly surprising that courts in other cultures do not always see enforcement as we do. As an advocate I have always practised, and as a teacher I have taught, the rule that you must get the court to think you have the merits on your side. Many judges have let me know that they are more than capable of sorting out the law. But my merits may not be theirs.

In a case in which I took part and I hope to have disguised, three arbitrators in London found against us and awarded the claimants $1 million, pretty much what they asked for, and similarly their lawyers $0.5 million in costs.[3] We were a company set up in, let's say, Taiwan, because it was not. Our managing director had made the contract with the claimants for services. We were sure he had taken a kickback, reflected in the price, but we could not prove it. The local law provided that a company could only make a valid arbitration agreement—such as the arbitration clause in this contract—if the director signing on its behalf was given a power of attorney. We argued that the reason for this provision was based on Taiwan's public policy, specifically to avoid the kind of corruption we could not prove. That did not impress the London tribunal, which found the clause valid and accepted jurisdiction.

The only assets were in Taiwan. We had to enforce there. The court was presided over by an impressive judge who had, not long before, been a postgraduate student here. He was not moved by our argument on the power of attorney. That is where what I call subliminal advocacy comes in. Once we realised he was scandalised by the size of the award of costs,

[2] Sarah Rainsford, "The Turkish Peacemaker" (2007) 73 *Arbitration* 117.

[3] For obvious reasons, the facts—including the venues—have been altered to ensure anonymity and make a better story.

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we paused and caught his eye every time we mentioned the award and added, "of one million dollars and *half a million costs*". The last I heard was that the enforcement proceedings had run into the ground.

In that matter, we never got close to any merits there might have been. The tribunal managed to convince itself that English law applied, and then that everything turned on the distinction between voidable and unenforceable contracts. Now you will all remember that requires you to have a grasp of the history of doctrines developed as a result of the Statute of Frauds 1677. Such a knowledge is not widespread in Taiwan and it had passed the US claimants by. Of course, the lawyers knew and loved it. But no one had ever started a request to them for advice: "I have this problem about an unenforceable contract." How often does a dispute lose all contact with the merits once it has been transformed by the lawyers into something they can handle?

That is not good enough. This conference has addressed problems in managing disputes about natural resources. Some of them are specific but some apply generally to all international commercial disputes. There is a growing body of anecdotal evidence that the big companies are less happy now to insert arbitration clauses into their contracts. Mediation can take some of its place but by no means all. If litigation could provide the answer, we should welcome it as scholars, however much it cost us as practitioners of arbitration. But we know it cannot. There is much to be done to reinstate arbitration as the preferred process. Some of it is obvious, particularly in relation to cost and delay. But all our reforms should be based securely on good thinking, tested theory, which we can confidently advise our clients will in practice serve them well.

Those of us towards the end of our professional lives, though we have not produced the answers, can still be of help; but the heavier responsibility will lie on the younger scholar-practitioners, so well represented here today. IDR and the IALS are committed to helping, in any way they can. This successful conference is evidence that so much is possible.

[At the reception which followed, a dozen graduate students, from at least four institutions, got together to form a study group, with my Ph.D. student, Mansoor Alosaimi, alosaimimansoor@hotmail.com, as co-ordinator. It has since gone from strength to strength, with the encouragement of Avrom Sherr and Anthony Connerty. Mansoor would welcome expressions of interest from others.]

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Cases

The Enforcement of Adjudicators' Awards under the Housing Grants Construction and Regeneration Act 1996: Part 31

by KENNETH T. SALMON

1. INTRODUCTION

Some of the issues to reach the courts on enforcement of adjudicator's awards under the provisions of the Act traverse old ground but may still be seen as a reliable barometer of the kind of argument regularly encountered in adjudication. Others take adjudication into new territory. The law is stated at December 1, 2008.

2. CONSTRUCTION CONTRACT—EVIDENCED IN WRITING

Allen Wilson Joinery Ltd v Privetgrange Construction Ltd[1] The claimant sub-contractor asked the court to enforce an adjudicator's decision for £12,500 plus VAT, interest and adjudicator's fees. Though modest in value the application raised three issues:

(1) Was the contract in or evidenced in writing for the purposes of Housing Grants Construction and Regeneration Act 1996 (HGCRA) s.107? In the adjudication, P challenged the adjudicator's jurisdiction on this ground. It said that an agreement that the claimant would design, manufacture, deliver and install a staircase, and an agreement varying the time for completion, were each agreed orally; a term prohibiting sub-contracting was implied from a previous course of dealing; the quotation said that costs were to be agreed, and they were not agreed in writing.

The court followed the law on the need for writing as stated by the Court of Appeal in *RJT*[2] and by Jackson J. in *Trustees of Stratfield Saye*.[3] As to the implication of terms, the judge preferred the view that there was no need for writing in relation to terms implied by law, whether that implication was by statute, previous course of dealing or custom.

The judge formed the view, not without some hesitation, that some of the issues of fact were "triable" and that leave to defend should be given on the question whether or not the agreement was in writing.

(2) Should leave to defend be conditional? Some of P's arguments were improbable. P must therefore bring £10,000 into court as a condition of having leave to defend.

(3) Interest. The adjudicator did not have power to award interest in this case. The parties had not agreed or accepted he should have jurisdiction. There was no suggestion that the contract contained a term that permitted or required the payment of interest for late payment. It was not argued that the claim for interest was "necessarily connected with the dispute" under 20(c) of the Scheme.

Order: Application for summary judgment dismissed. Conditional leave to defend. Costs reserved.

[1] *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC), per Akenhead J., judgment November 17, 2008.

[2] *RJT Consulting Engineers Ltd v D M Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270; [2002] B.L.R. 217.

[3] *Trustees of the Stratfield Saye Estate v AHL Construction Ltd* [2004] EWHC 3286 (TCC).

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Comment

There is no mention in the judgment of the Late Payment of Commercial Debts (Interest) Act 1998; s.1 implies into a contract to which the Act applies, generally contracts for the provision of goods or services, a term that any qualifying debt created by the contract carries simple interest subject to and in accordance with Pt 1 of that Act. That Act applied to this contract. Though not obvious from the judgment, it seems that the adjudicator had awarded interest on the basis of a free-standing right and not under the 1998 Act. Thus the court found that the award was without jurisdiction.

3. DECISION—FINAL OR INTERIM

CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Ltd[4] The pursuer Braehead engaged the defender Laing O'Rourke to design and construct a development comprising retail and leisure facilities. A dispute arose about whether Laing was responsible for the collapse of the ceiling in Auditorium 7 of the Odeon cinema complex and the removal, as a precaution, of the ceilings in other auditoria; and if so the quantum of damages. The dispute was referred under an amended Scottish Building Contract with Contractors Design Sectional Completion Edition May 1999, in its January 2002 revision. Article 7 and cl.39.A (as amended) provided that the adjudicator could adjudicate at the same time on more than one dispute under the same contract, with consent of all the parties. No such consent was given in this case.

After four extensions of time the adjudicator, John Campbell Q.C., emailed his decision to the parties at 11.56 on April 7, 2008, four minutes before the expiry of the noon deadline for his decision. Laing intimated they would not comply with the decision as it was a nullity. CSC sought a declarator (declaration) that the decision was valid and payment of the sum of £3.518 million awarded to it. CSC said the decision was invalid, principally for two (overlapping) reasons:

(1) The adjudicator had purported to make interim findings when he had no power to do so. The award was clearly only an interim award which was incompetent.
(2) He was obliged to make his decision in the time limit as extended and had failed to do so. He did not determine the dispute referred but left material matters to be determined later, and therefore failed to exercise his jurisdiction.

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Issue 1: Was the decision final or interim?

The adjudicator had been concerned about the proper figure to be deducted by way of allowance from the total claim of £4.856 million for what was called "the acknowledged saving". That saving/deduction was not more than £490,000 (i.e. approximately 10 per cent of the total claim). He invited the parties to extend his time to "refine" his decision on this point and meanwhile he reached a decision on quantum, to deduct the whole of the possible saving, and he awarded £3.518 million, which he described as "ad interim".

Lord Menzies decided that, read as a whole and on its proper construction, the adjudicator intended his decision to be a final one under cl.39.A.6.3 and indeed it was a final decision. The findings on liability were conclusively and clearly stated. The adjudicator addressed quantum and stated he had enough information to make a decision on quantum. He expressed concern over one aspect which might result in a deduction from the total amount claimed. What he did was to find the minimum sum which could possibly be due. Laing suffered no prejudice by this even if it was rough justice for CSC. He provided a decision on all matters referred to him whilst offering to refine that decision if the parties agreed to give him more time. It was not an interim decision.

[4] *CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Ltd* [2008] CSOH 119; [2009] B.L.R. 49; [2008] Adj. L.R. 08/19 Outer House, Court of Session Scotland.

Issue 2: Assuming the court was wrong on Issue 1, did the adjudicator have power to make an interim decision?

Yes. Clause 39.A.6.3 was wide enough to permit an adjudicator to make a partial or interim decision.

Issue 3: If contrary to the view on Issue 1 the decision was an interim decision, what was its effect?

If it had truly been an interim decision, it would have become final as soon as the time for making the decision had expired at 12.00. If it was interim because (as averred by Laing) it did not deal with all the issues, then the adjudicator would not have exhausted his jurisdiction, and the decision would have had to fall.

More than one dispute?

There was then an issue as to whether there was more than one dispute and if so whether the decision was severable. Lord Menzies held that liability and quantum might be described as "sub-disputes" but in reality were but facets of the same and single dispute and that only one dispute had been referred and decided.

Was the decision in writing?

Matters did not end there. Laing averred that the decision was not sent in writing forthwith as required by the contract. That meant, according to Laing, the actual document not an electronic version. Lord Menzies was satisfied that electronic delivery fulfilled the obligations of the contract.

Adequacy of reasons

Next, Laing challenged the adequacy and intelligibility of the reasons for the decision. Adopting the tests in leading cases,[5] the court did not consider there was any substance in the specific criticisms.

Natural justice

Laing's final throw of the dice was based on alleged breach of the rules of natural justice. Put shortly the complaint was that the adjudicator issued his decision four minutes before his jurisdiction expired; at the same time he invited comments on quantum, but there was no realistic possibility of making submissions before jurisdiction expired. A period of four minutes in which to read the document was in any event insufficient. Lord Menzies accepted that even the possibility of injustice was sufficient to invalidate a decision. Here the adjudicator had not favoured one party at the expense of another. He sent the decision simultaneously to both. The figure brought out in the decision was the minimum found due to CSC, Laing being given full credit for the acknowledged saving. The further procedure envisaged by the adjudicator could not therefore have resulted in any increase in that figure. There was no possible injustice or prejudice to Laing.

Comment

In some ways this is an extreme case. Not only because a decision was published four minutes before the expiry of the adjudicator's jurisdiction, in which the adjudicator invited

[5] *Gillies Ramsay Diamond v PJW Enterprises Ltd* 2004 S.C. 430; *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358.

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the parties to make further submissions on quantum. But because—fortunately no doubt for the pursuer—the adjudicator made the maximum allowance in favour of the defender and awarded the minimum that he found due. Had he done any less, there would have been at least the possibility of injustice. This case explores, albeit briefly, the extent to which an adjudicator can be said to have implied power to make an interim decision. No case law is cited or referred to. The decision rests on the nature of adjudication (as opposed to arbitration), the need for speed, and the breadth of the wording of the contractual adjudication provision. As such this view is open to challenge.

4. DECISION—SUFFICIENCY OF REASONS

Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd[6] This case raises a number of interesting points all dealt with under this heading for convenience. Balfour Beatty (BB) applied to enforce an adjudicator's decision for £180,858 and for summary judgment on an interim valuation (no.29) for £976,265 plus interest in each case. The defendant, Modus, sought a stay to mediation under the terms of the contract, and otherwise opposed both applications. In addition they sought to set off a counterclaim and summary judgment on that counterclaim for liquidated damages of £2,073,300.

The contract was a JCT standard form of building contract with contractors design (1998 edn) with standard and homemade amendments. There were 33 sections and a sectional completion supplement.

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Stay

Modus first asked for a stay to mediation in accordance with the parties' agreement in the contract. This was refused for two reasons. First, the court adjudged that the provision requiring mediation was no more than an agreement to agree. It could not be said BB had brought the proceedings in breach of the contract. Secondly, a stay would only be granted if two conditions were satisfied: that BB was not entitled to summary judgment, i.e. there was an arguable defence with a realistic prospect of success; and the best way of resolving the dispute was by mediation. So, if there had been a binding agreement to mediate, it would have been necessary to consider the merits of the application.

Failure to comply with CPR 24PD.2

Modus's second threshold objection was that the witness statements did not comply with the Practice Direction (PD) to Pt 24 that required that the application or evidence in support state the applicant's belief that the respondent had no real prospect of successfully defending the claim. If true, it was more than a technicality. It was however a procedural error that could be cured, e.g. by ordering BB to serve a statement to that effect. There were two reasons for so saying. First, the statements that had been filed clearly asserted there was no defence, thus complying in substance, if not in form, with the PD. Secondly, the matters were complex and not really susceptible to the sort of detailed analysis in respect of which a statement of belief of the kind contemplated by the PD would make much difference. The omission was not fatal to the application.

Enforcement

In the adjudication before Paul Jensen, BB claimed a declaration that certain shop front works were a change to the employer's requirements, and payment of the prime cost of the change. Mr Jensen found for BB. In his decision he said, "this is not a reasoned decision".

[6] *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC), per Coulson J., judgment December 4, 2008.

The judge, not without sympathy for him (for the contract was voluminous and the entirety of clause, standard amendment and bespoke amendment had to be located in three different places), found that Mr Jensen must not have realised that a reasoned decision was required. But in any case Mr Jensen set out "notes" of the essentials running across five pages and he confirmed he had considered all of the evidence and the submissions. Coulson J. took as his starting point the approach adopted in *Carillion*.[7]

Modus took three points. First, without reasons there was no decision. Secondly, the adjudicator failed to have regard to a particular point they raised. Thirdly, he exceeded his jurisdiction because he failed to give them the chance to put in a rejoinder to BB's reply.

A reasoned decision

The judge referred to *Gillies Ramsay Diamond v PJW Enterprises Ltd*[8] at [31] and *Carillion* at first instance[9] at [5]. The adjudicator's own description of his decision was not conclusive. It was a reasoned decision. It contained many pages of reasons explaining how and why the adjudicator concluded the shop front works were a change. Nothing of significance was omitted and far from being unintelligible, the decision was clear and cogent. The court noted that Modus did not ask for additional reasons or clarification. Nor did Modus contend they had suffered prejudice as a result of the decision being as it was. The absence of prejudice was fatal to this attack.

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Alleged omission

Gillies was also helpful on this aspect. Drawing analogy from arbitration, it was unnecessary for the adjudicator to decide each and every point argued, only those which were genuinely "en route" to the decision. The complaint was in any event unjustified, for the adjudicator clearly had considered the point in question and had rightly rejected it.

Absence of rejoinder

Did Mr Jensen conduct the proceedings in accordance with the rules of natural justice within the limitations imposed by the process? Was any breach significant or causative of potential prejudice? The complaint was that Mr Jensen considered BB's reply without seeking a rejoinder from Modus. When the adjudicator set out the timetable he provided for a reply by BB and no allowance for response or rejoinder to that reply. Modus did not query the timetable or even ask for permission to serve a rejoinder. They could not point to anything new in the reply to which they might have needed to respond or how a rejoinder might have affected the outcome. The point was hopeless. There was no ambush. What was set out in the reply was entirely predictable.

Subsequent claim for payment

The sum awarded was included in a subsequent valuation (no.30) and an invoice for that sum was sent. There was a valid withholding notice. Modus contended BB could not escape the consequences of their electing to include the sum in the valuation. On the facts there was no such election. The employer's agent and the quantity surveyor proposed that the sum awarded be dealt with in this manner. And it was entirely reasonable for BB to submit an invoice as a means of getting paid. In respect of BB's claim for summary judgment on the

[7] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, per Chadwick L.J. at [85]–[87].

[8] *Gillies Ramsay Diamond* [2003] B.L.R. 48, Clerk L.J.

[9] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWHC 778 (TCC); [2005] B.L.R. 310.

sum due under valuation 29, it was common ground there had been no withholding notice. On the face of it BB was entitled to be paid.

Modus raised several arguments including an issue as to the meaning of the words "the amount properly due", contending they must be read so as to take into account the claim for liquidated damages. The judge found against Modus on all their arguments. The meaning of "properly due" was clear. Modus gave a payment notice and cl.30.3.6 applied. Clause 30.3.5, on which Modus now relied, was only relevant if there was no payment notice. Further, Modus's interpretation would allow them to avoid the consequences of their own failure to serve a withholding notice. If this were so, it would flout the Act and mean the JCT contract did not comply with the Act.

Finally on this point, a decision that a sum certified by the employer's agent as being due, and for which there is no notice of withholding, should now be paid without recourse to cross-claims, is entirely consistent with *Rupert Morgan*.[10] Accordingly BB was entitled to summary judgment on its additional claim on interim certificate 29.

Set-off and counterclaim

Modus claimed they were owed over £2 million for liquidated damages for delay. The first issue was whether Modus was entitled without more ado to set off that claim against the sums awarded by the adjudicator or for which judgment was now given. The court relied on *Balfour Beatty v Serco*.[11] Thus in two cases a set-off might be allowed: if the claimed entitlement to liquidated damages followed logically from the adjudicator's decision and a withholding notice had been given; or where the claimed entitlement for liquidated damages had not been determined expressly or impliedly by the adjudicator, but was permitted by the terms of the contract and the circumstances of the case.

The court reviewed case law on set-off, including *William Verry*,[12] where the contractual provisions for compliance were precisely the same as here, and concluded that generally there was an exclusion of the right of set-off from an adjudicator's decision and certainly under this contract there was no such right. The absence of the withholding notice was fatal to the right of set-off.

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Was Modus entitled to summary judgment?

In essence the factual situation was that BB had applied for extensions of time and the employer's agent had asked for further information. In the meanwhile there was clearly a dispute as to such entitlement. Modus's superficially attractive submission was that in the everyday world, when the contract overran and there was no extension of time, the employer simply took the damages. Here Modus had not deducted them but claimed them as a debt. Modus relied on cl.24.2.1 under which it had given notice of intention to claim damages. The argument ran that since BB had given no notice of withholding, the damages were due. This novel argument failed because nothing in the contract, the Act or the Scheme, applied the provisions of ss.110–112 to claims for payment by the employer. All those provisions, the court held, were intended to and did apply to payment due to "the party carrying out the work" namely the contractor. Neither the Act nor the Scheme applies to claims for payment of liquidated damages. The standard forms were amended to comply with the Act. Clause 24 was not so amended.

BB had a realistic prospect of success in defending the claim based on the absence of an extension of time. Modus was not entitled to summary judgment.

[10] *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2003] EWCA Civ 1563; [2004] B.L.R. 18.

[11] *Balfour Beatty Construction v Serco Ltd* [2004] EWHC 3336 (TCC).

[12] *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025 (TCC).

5. DISPUTE—EXISTENCE OF

VGC Construction Ltd v Jackson Civil Engineering Ltd[13] The claimant sub-contractor entered into a construction contract with the defendant main contractor. The sub-contract provided that, if the works were delayed for specified reasons, the sub-contractor would be entitled to a reasonable extension of time.

The works were delayed and the claimant applied for payment of a large sum of money for "delay and disruption". The defendant issued a certificate which however contained nothing on account of delay or disruption. The claimant then wrote asking for an extension of time of 26 weeks and submitted a further request for payment which again included a sum for delay and disruption. Nothing was certified. The claimant referred the dispute to adjudication and was awarded a sum for delay and disruption and now asked the court to enforce the decision.

The defendant contended that the claim for money for delay and disruption was "so nebulous and ill-defined" that no dispute could have existed arising out of either payment application or request. It also said the claim that might have given rise to a possible dispute had been "withdrawn".

Held, the claim had been one of a number of claims within the application and had in fact been put forward as part of a larger claim for variations that formed a substantial part of the applications. It was not so nebulous or ill defined as to be incapable of giving rise to a dispute. Moreover, by the time the defendant had issued the second certificate and in effect rejected the claim for delay and disruption for a second time, a dispute was established as to whether or not the claimant was entitled to the whole of the amount in its application. That essentially was the dispute that had been referred. Nor was the claim withdrawn. There was not even a prima facie case of the existence of a binding agreement to withdraw or abandon the claim. Judgment for the claimant.

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Comment

This underpins the findings of the same judge in *Cantillon v Urvasco*[14] that there need be no overly legal analysis to determine whether or not there was a dispute and what it encompassed.

6. DISPUTE—MORE THAN ONE DISPUTE

See *CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Ltd* above.

7. DISPUTE—SAME DISPUTE

Benfield Construction Ltd v Trudson (Hatton) Ltd[15] Benfield sought enforcement of an adjudicator's decision for the payment of £79,569.79. This was the third adjudication between the parties. Trudson said the adjudicator had no jurisdiction to reach his decision because the dispute was the same or substantially the same as the earlier disputes decided by another adjudicator.

The dispute arose out of a JCT contract WCD 1998 edn, under which Trudson engaged Benfield to design and construct two houses and external works near Hatton, Warwickshire. The contract provided for liquidated damages (LDS) of £1,500 per week. Clause 39A.7 provided that the decision of the adjudicator was binding until the dispute was finally

[13] *VGC Construction Ltd v Jackson Civil Engineering Ltd* [2008] EWHC 2082 (TCC); 120 Con. L.R. 178, per Akenhead J.

[14] *Cantillon v Urvasco* [2008] EWHC 282 (TCC); [2008] B.L.R. 250, per Akenhead J. reviewed in "Part 28" (2008) 74 *Arbitration* 314, 318–20.

[15] *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC); [2008] C.I.L.L. 2633, per Coulson J., judgment September 17, 2008.

determined by arbitration, legal proceedings or agreement and that the parties would comply with the decision.

The works seriously overran and although Trudson's agents, Osbornes, granted a partial extension of time, the works remained incomplete by the extended date for completion: May 25, 2007. On August 17, 2007 Benfield and Osbornes signed a pro forma document confirming that the works were accepted as complete subject only to certain listed outstanding items set out in a list of defects (the handover form). Two weeks later Osbornes wrote to say they could not issue a certificate of practical completion because of a defect in the floor screed. Benfield wrote to disagree, saying the floor screed defect was not on the handover list of defects and that as a result practical completion was effective from August 17. Thus the fact and content of the handover form was central to Benfield's case from the outset.

In the first adjudication, Trudson had sought a declaration that practical completion had not occurred at the date of the referral (April 4, 2008), whereas at that stage, Benfield were saying it had occurred on August 17, 2007. The referral recited what it understood to be Benfield's contention, that the handover form amounted to a statement of practical completion. In its response Benfield did indeed rely on the handover form and alleged that practical completion, "was and is deemed for all purposes... to have taken place". They also referred to the "deeming effect" of the handover form.

No one drew any distinction between cll.16 (partial possession) and 17 (practical completion) of the contract. There was no argument raised in the first adjudication that practical completion was deemed to have taken place by reason of Trudson having taken possession of the works. Even so the judge now thought that the document made it plain that the dispute was whether practical completion was deemed to have taken place on August 17, 2007 as a result of the content of the handover form. The adjudicator decided that practical completion had not occurred on that date, nor even by the date of the referral. He expressly rejected Benfield's case that the handover form could be deemed to be a written statement to the effect that practical completion had taken place.

In the second adjudication commenced April 4, 2008, before the same adjudicator, Trudson claimed LDS for the relevant period and were awarded £75,428.57.

On May 28, 2008 Benfield commenced the third adjudication before a different adjudicator. They now argued that Trudson had taken partial possession of the project on August 17, 2007. Accordingly, notwithstanding the previous adjudicator's decisions, Trudson was not entitled to recover LDS. Benfield claimed a declaration to this effect and payment of the LDS and payment of the first half of the retention.

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Trudson objected and took the jurisdiction point that the adjudicator was being asked to decide the same dispute as had previously been decided in the first and/or second adjudications. The adjudicator rejected Trudson's case and considered that practical completion was deemed to have taken place by reason of Trudson having taken partial possession of the project on August 17. Trudson was not entitled to LDS. On the matter of jurisdiction the adjudicator said that practical completion and partial possession were different aspects of the contract. He was not interfering with the previous decision which dealt only with practical completion. However it was obvious that partial possession could be taken before practical completion occurred. Once partial possession was agreed, the natural consequences must be allowed to flow.

Coulson J. decided:

(1) The starting point was cl.39.A.7.1 of the contract. The provision provided a limit to serial adjudication. Precisely the same effect is achieved by para.9.2 of the scheme. The adjudicator must resign where the dispute is the same or substantially the same as one previously referred to and decided in adjudication.

(2) The judge considered and summarised the pervious authorities from *VHE* to *Quitefield*.[16] He restated the principles espoused by Ramsay J. in *HG Construction*.[17] Essentially whether one dispute is the same or substantially the same as another is a question of fact and degree.

(3) Although the adjudication cases did not go so far as to adopt the rule against successive litigation or issue estoppel,[18] a staged approach was not appropriate.

(4) The first step in the analysis was to adopt the approach in *Sherwood*[19] and ask if there were sensible grounds for concluding that the adjudicator in adjudication No.3 erred on the question whether there was a substantial overlap between the issues he was asked to decide and those already decided by the first adjudicator. The judge concluded such grounds existed. It was difficult to imagine a more obvious case of overlap.

(5) His lordship was in no doubt that the adjudicator in the third adjudication did not have the necessary jurisdiction to deal with the alleged dispute. There were three separate reasons for that conclusion:

   (i) the similarity on the facts between this case and *HG Construction*;
   (ii) the fact that the same or substantially the same disputes were dealt with in adjudications 1 and 2 and adjudication no.3;
   (iii) it was not fair, just, nor appropriate to allow arguments to be raised in the third adjudication that could and should have been deployed in the first, this by analogy with issue estoppel and consistent with the prohibition on serial adjudication. The quick one-off nature of adjudication meant it should not be allowed to become a process by which a series of decisions by different people can be sought every time a new issue or new way of putting a case occurs to one or other parties. This would be an abuse of the process of adjudication.

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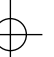

Comment

The bones of the judgment are laid out (at (1)–(5)) above. The meat of the judgment is contained at [40] onwards. But since these cases are decided, more than others, by fact and degree, a full analysis of what is there stated is unnecessary. It is nevertheless worth pointing out that the judge found no different material facts were presented in the third adjudication than in the first and second adjudications. There was no changing factual situation in the time between the adjudications—as happens in extension of time cases and occurred in *Quietfield*. Far from it, adjudication No.3 was based on precisely the same documents as adjudications No.1 and No.2 (the handover form). Likewise the issues were the same—whether practical completion had been deemed to have occurred on August 17 and whether LDS were payable. What had changed was the underlying argument deployed by Benfield—cl.17 and partial possession leading to deemed practical completion, rather than the handover form leading to deemed practical completion. Finally and perhaps most interesting is the conclusion that, whilst issue estoppel provides an imperfect analogy, it may be an apt one. The fact that adjudication provides only a temporary remedy is all the more reason to be vigilant to restrain serial adjudications of matters which could and should have been raised first time round. Now this has been given more prominence, it will be interesting to see if it curtails serial adjudication. Will the issue estoppel analogy apply to claims, for example, for some

[16] *VHE Construction Plc v RBSTB Trust Co* [2000] B.L.R. 187; *Quietfield Ltd v Vascroft Construction Ltd* [2006] EWHC 174 (TCC) and Court of Appeal 2006] EWCA Civ 1737; [2007] B.L.R. 67; see also *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC); [2007] B.L.R. 175, per Ramsay J.

[17] *HG Construction Ltd* [2007] EWHC 144 (TCC), per Ramsay J.

[18] *Henderson v Henderson* (1843) 3 Hare 100.

[19] *Sherwood & Casson UK Ltd v McKenzie Engineering Ltd* [2004] T.C.L.R. 418.

but not all aspects of the final account; or successive adjudications for selected high value variations, or even claims for extension of time followed by a later claim for loss and expense? As ever it will be a question of fact and degree.

8. DISPUTE—SAME DISPUTE

Birmingham City Council v Paddison Construction Ltd[20] Birmingham City Council (BCC) engaged Paddison to construct a new community and training centre at Handsworth. The works were delayed and Paddison asked for an extension of time of 119 days and loss and expense in a first adjudication before Mr Bullock.

The adjudicator granted the extension of time in full and ordered BCC to repay liquidated damages they had deducted. He declined to award any loss and expense, stating that he considered the claim extravagant and exaggerated. He purported to grant Paddison, "leave to pursue this claim via a further Adjudication if they wish to do so".

Paddison did just that. When BCC declined to reconsider the claim for loss and expense, they began a second adjudication for loss and expense alternatively damages, based on the extension of time awarded. The second adjudicator, Mr Jensen, was faced with an objection by BCC that this was the same dispute already decided by Mr Bullock. Paddision said Mr Bullock had made no decision on the loss and expense claim. Mr Jensen declined to resign.

BCC commenced a claim under Pt 8 CPR seeking a declaration that the dispute referred to Mr Jensen was the same or substantially the same as that which had been referred to Mr Bullock. It was the construction of the part of the decision dealing with loss and expense that was in issue between the parties.

The first dispute was referred under BCC's Adjudication Scheme, which provided that the appointed adjudicator shall resign where the dispute arises under the same contract and is the same or substantially the same as one which has previously been referred to adjudication and a decision has been taken in that adjudication. BCC's case was that Mr Bullock had made a decision—he had rejected the claim for loss and expense. There was no new dispute. Paddison argued Mr Bullock had made no decision; alternatively the claim now referred to Mr Jensen was not the same or substantially the same.

Did Mr Bullock make a decision with respect to Paddison's loss and expense claim?

H.H. Judge Kirkham held he did. He had found the claim to be "extravagant and exaggerated". He was not prepared to grant further moneys relating to, "(Paddison's) loss and/or expense claim". That is he decided that Paddison was not entitled to any sum over and above that already certified. He had no jurisdiction or power to give "leave" to Paddison to pursue its claim in another adjudication, still less without first warning the parties of his intention to make such a suggestion.

The court accepted that, where it was not possible for adjudicators to make a fair and impartial decision on a complex issue, they are entitled to make no decision at all.[21] Similarly if an adjudicator found it extremely difficult to deal with the case in the time allowed. An adjudicator in that position would be expected to warn the parties. Mr Bullock gave no warning that he would be unable to reach a decision on the loss and expense claim. He was required to reach a decision and made no request for more time. He expressly considered the claim and decided to refuse to award any money. He decided the information provided was insufficient to support such an award.

[20] *Birmingham City Council v Paddison Construction Ltd* [2008] EWHC 2254 (TCC); [2008] B.L.R. 622, per H.H. Judge Kirkham judgment, September 25, 2008.

[21] *CIB Properties Ltd v Birse Construction Ltd* [2004] EWHC 2365 (TCC); [2005] 1 W.L.R. 2252; [2005] B.L.R. 173.

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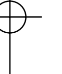
Was the dispute referred to Mr Jensen, the same or substantially the same, as that referred to Mr Bullock?

The claims in both adjudications were for loss and expense based on the whole period of overrun (119 days). In the first adjudication the claim was based on the reports of Faithful and Gould of April and August 2007; in the second upon their report of July 2008. The sum claimed was greater in the first adjudication, because the claim for head office overhead recovery was based on Hudson or Emden's formula, whereas in the second a reduced sum was claimed based on invoices. Neither party suggested there was any material difference between the evidence supporting the respective claims. The judge observed that even a claim based on a formula would have to be rooted in fact. There was no difference in the supporting material. The mere difference in the sum claimed did not turn BCC's refusal to consider the second claim into a dispute essentially different from that in the first adjudication.

The fact that the relief claimed was different, the reduced figure and the alternative claim for damages, did not make it a new dispute. Still less the fact that in the second adjudication the notice conferred power on Mr Jensen to award a lesser sum than was claimed. Indeed the first referral did ask Mr Bullock to award the sum claimed or such other sums as he should decide. It was not an all-or-nothing claim. This purely technical difference, if difference there was, did not warrant a wholly unmeritorious outcome. If this were litigation, such an approach would amount to a clear abuse of process. This approach would impose an even greater burden in adjudication where commonly there was no provision for the recovery of costs. The court should be vigilant to ensure a party is not unfairly subjected to successive adjudications of the same dispute.

This decision was reached in full light of previous cases. The circumstances here were like those in *Quietfield* (above)—Paddison was seeking to make good in the second adjudication deficiencies in its case in the first. The disputes were the same or substantially the same.

Paddison did not argue for the right to proceed on the limited basis of its claim for additional interest only. That was realistic. Such a claim for £781 was uneconomic. Declaration accordingly.



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9. INTEREST—POWER TO AWARD

See *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* under *Construction Contract* above.

10. JURISDICTION—SUCCESSIVE ADJUDICATIONS

See *Benfield* above.

11. JURISDICTION—OVERLAP WITH POWER TO DETERMINE TERMS OF CONTRACT

Air Design (Kent) Ltd v Deerglen (Jersey) Ltd[22] Air Design was a small mechanical services contractor. It entered into a subcontract based on the JCT intermediate form and subject to English law, for works in Jersey. There were agreements to carry out additional works and the parties also made a supplemental agreement as to payment.

The main issue before the adjudicator and later the court was whether there was more than one contract and therefore multiple disputes, at least some of which were not subject to the original contract adjudication provisions (the later "agreements" did not contain an adjudication provision). The other issue that arose on enforcement was the question of whether there should be a stay because of the claimant's financial position.

[22] *Air Design (Kent) Ltd v Deerglen (Jersey) Ltd* [2008] EWHC 3047 (TCC), per Akenhead J., judgment December 10, 2008.

On analysis the judge's view was that it appeared to be one contract with a number of subsequent additions by way of variation, as the adjudicator had found. But for two reasons it did not matter whether or not this was so.

First, the adjudicator was clearly seised of the issue and entitled to decide whether there was one or more contracts and his decision was binding right or wrong. Although he could not determine his own jurisdiction and there was some overlap between the question of his jurisdiction and the number of contracts, he had to decide that matter as part of the substantive decision-making process and it was thus within his jurisdiction. Secondly, on the facts, by the supplementary agreement, the parties had clearly agreed to treat their obligations as stemming from the one contract. The adjudicator had jurisdiction. That being so, Deerglen sought a stay of execution on the grounds that Air Design was a small company whose shareholders' funds had diminished year on year for four years, and who would not be able to repay the amount of the judgment if later found liable. Applying the now well-established factors set out in *Derek Vago*,[23] the court held that Deerglen had not satisfied it that Air Design was insolvent. In any event it appeared to be in much the same financial position as it had been when it entered into the contract.

12. NATURAL JUSTICE

See *CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Ltd* and *Balfour Beatty Construction Northern Ltd* above.

13. SET-OFF

See *Balfour Beatty Construction Northern Ltd* above.

14. STAY

See *Air Design* above. See *Balfour Beatty Construction Northern Ltd* above.

15. WITHHOLDING

See *Balfour Beatty Construction Northern Ltd* above.

16. SUMMARY

Construction contract—evidenced in writing

Allen Wilson Joinery Ltd v Privetgrange Construction Ltd On the facts there was a triable issue whether all the terms were in writing. Because some arguments were improbable, conditional leave to defend was given. Terms implied by a previous course of dealing need not be in writing. There was no jurisdiction to award interest.

Decision—final or interim

CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Ltd The adjudicator had power to make an interim decision under the contract. On the facts, the decision was final not interim. Had it been interim, it would have become final at the expiry of the time for making the decision; or, had it failed to deal with the entire dispute, the decision would have been a nullity. There was only one dispute—liability and quantum were sub-disputes not separate disputes. Publication of the decision four minutes before the expiry of jurisdiction, with an invitation to agree to extend time for making further submissions to "refine" the decision in relation to the amount of a possible saving, caused no injustice or prejudice to the complaining party, who had been given full credit for that possible allowance. The decision had been published in time.

[23] *Wimbledon Construction Co 2000 v Derek Vago* [2005] EWHC 1086 (TCC); [2005] B.L.R. 374, per H.H. Judge Coulson.

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Decision—sufficiency of reasons

Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd A decision with five pages of notes explaining how and why the adjudicator came to his decision was a "reasoned decision" as required by the contract. The failure to seek additional reasons or clarification was relevant and the absence of prejudice was fatal to the attack.

Dispute—existence of

VGC Construction Ltd v Jackson Civil Engineering Ltd Failure to certify payment for discrete sub-claims within a larger payment application gave rise to a dispute over what amount was due under that application.

Dispute—more than one dispute

CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Ltd Liability and quantum were sub-disputes not separate disputes.

Dispute—same dispute

Benfield Construction Ltd v Trudson (Hatton) Ltd Where in a third adjudication the material facts and documents relied on and the underlying issues were the same as those relied on and raised in a previous adjudication, deploying new or different legal arguments did not give rise to a new or different dispute. By analogy with issue estoppel, all arguments available to a party to support or refute a legal contention should be deployed when the dispute is first referred. Serial adjudication has its limits.
Birmingham City Council v Paddison Construction Ltd An adjudicator who rejected a claim for lack of substantiation had decided the dispute. An adjudicator could not grant permission to a party to bring such a claim in a subsequent adjudication. Claims for loss and expense based on the same period of delay and essentially the same supporting documents gave rise to the same or substantially the same dispute, even if the sums claimed were reduced and a different remedy claimed.

Interest—power to award

See *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* under *Construction Contract* above.

Jurisdiction—overlap with power to determine terms of contract

Air Design (Kent) Ltd v Deerglen (Jersey) Ltd The adjudicator had jurisdiction to determine the substantive question whether there was one contract with variations, or more than one contract. Stay refused on *Vago* principles.

Natural justice

See *CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Ltd* and *Balfour Beatty Construction Northern* above.

Set-off

See *Balfour Beatty Construction Northern* above.

Stay

See *Air Design* and *Balfour Beatty Construction Northern* above.

Withholding

See *Balfour Beatty Construction Northern* above.

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*Metropolitan Property Realizations Ltd v Atmore Investments Ltd**: When is an Irregularity neither Irregular nor Serious?

by HEW R. DUNDAS

1. INTRODUCTION

The English courts have adopted a consistent line in respect of ss.68 and 69 appeals, Arbitration Act 1996, in recent years; in particular, they have adopted a robust approach to the twin-prong test in s.68, serious irregularity *and* substantial injustice. Further, "serious irregularity" has been interpreted in the light of the 1995 DAC Report's clear statement:

> "[I]t is only in those cases where it can be said that what has happened *is so far removed* from what could reasonably be expected of the arbitral process that we would expect the Court to take action."[1] (Emphasis added.)

Accordingly, the courts have dismissed appeals arising from minor procedural anomalies and mishaps either because they fail the DAC test or because, even if there were a procedural mishap, no substantial injustice was caused (or both). This journal has carried several articles in recent years addressing such failed appeals but we do not need to review them now.

The present case,[2] a rent review one, appears to diverge from the solid body of s.68 jurisprudence and appears to introduce a new dimension, where the arbitrator considered the parties' respective submissions carefully, rejected one with good reason (rejection accepted by that party), accepted the other and made an award accordingly. So where do "serious irregularity" and "substantial injustice" arise?

2. THE FACTS AND THE ARBITRATION

An underlease (the lease) had been granted in 1964 for approximately 99 years over a small parade of shop units with residential flats above them, in Failsworth, Lancashire (the property); the lease is a full repairing and insuring lease providing for rent reviews to take place every 21 years and Atmore is the landlord, Metropolitan the tenant. The second rent review fell due in September 2006 and the lease provided for arbitration in the event of failure to agree. The formula to be applied on each review:

> "[S]hall be the amount which shall in [the arbitrator's] opinion represent a fair yearly rent for the [Property] at the relevant date having regard to rent values then current for property let without a premium with vacant possession and to the provisions of this lease."

The arbitration was (conventionally) documents-only; SB made written submissions for the tenant, PO for the landlord; both were chartered surveyors. The tenant's submissions followed advice provided by leading counsel as to the proper approach which should be adopted to

* *Metropolitan Property Realizations Ltd v Atmore Investments Ltd* [2008] EWHC 2925 (Ch), per Sales J., November 28, 2008.

[1] DAC Report (1995), para.280.

[2] Note that it arose in the Chancery Division, not in the Commercial Court.

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valuation of a lease of this kind but, at the present hearing before the judge, the tenant was represented by different leading counsel, who made it clear in his submissions that his client no longer accepted the method of valuation it had previously proposed. That method had involved discounting the relevance to the calculation of a fair yearly rent of the rental income which could be achieved upon subletting the units in the demised premises. The tenant put forward no alternative argument as to what the proper position should be if the arbitrator did not accept the fundamental point of principle he was putting forward as to the approach to valuation to be adopted but preferred instead the landlord's approach.

PO's case started from analysis of the rental income which, on the evidence available, he thought could be identified as obtainable for each of the units within the parade of shops and for each of the residential flats. Taking account of rents which had in fact been achieved for such units, he concluded that the yearly rental value of the shops would be £5,000 per annum for each standard unit and that the rental value for the residential flats would be £3,600 per annum each, with some associated garages. He then aggregated these figures to give an overall rental income figure for the whole of the demised premises. He next made three adjustments to the figure given on this basis of calculation: a 9 per cent deduction for a management charge; a deduction (shop units 10 per cent, residential units 15 per cent) in respect of an estimate of the extent to which the various units might be unlet during the new 21-year period; an adjustment taking account of the fact that the new rent would, once established, last for the extended period of 21 years. His view was that it was necessary to make an adjustment for the increasing imbalance from the original bargain as the term progressed and, accordingly, he adopted a commonly-used approach of making an addition of 1 per cent for every year after the fifth, giving a total adjustment of 16 per cent. He concluded with a total rent of £122,870 + 16 per cent (i.e. £19,611) less management charge £10,000 less voids £14,463, net £118,000. This calculation was on the basis of what a notional tenant of the whole demised premises would receive by way of rental income from subtenants but the lease required calculation of the rent that would be payable by the notional tenant to the landlord. On this calculation, equating the notional tenant's income with what that tenant would pay the landlord, it gave the former zero profit. It was difficult, therefore, to see why any prospective tenant would actually wish to take on the lease on these terms. This flaw in the landlord's methodology, however, was not pointed out by SB for the tenant.

The arbitrator decisively rejected the tenant's submission and preferred the landlord's. No criticism of the arbitrator was made in the present case deriving from his decision, based on the submissions made to him, to agree with the landlord on the central principle. The arbitrator reviewed the landlord's calculation in detail and accepted all the proposed adjustments, noting that there was "little opposition" from the tenant thereto. He concluded that the yearly rent value for the property should be £118,000 per annum.

Pause here: the arbitrator had conducted a perfectly conventional rent review arbitration, had accepted written submissions from both landlord and tenant, had rejected the tenant's submissions (which relied on one line of argument only) and accepted the landlord's submissions in respect of which the tenant had made no comment. There was no suggestion at all of partiality, of not allowing a party to be heard, of procedural irregularity. The arbitrator chose one set of submissions and did not engage in a frolic of his own.[3] So where do "serious irregularity" and a s.68 appeal arise from? Let us remind ourselves that s.68(2)(d) refers to, "failure by the tribunal to deal with all the issues that were put to it".

3. THE SECTION 68 APPEAL

The tenant's appeal was based on the arbitrator's adoption of the landlord's calculation which allowed for no element of profit in respect of the lease for the notional tenant. The yearly

[3] *Fox v PG Wellfair Ltd* [1981] 2 Lloyds Rep. 514 CA.

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rent of £118,000 as determined to be payable by that tenant to the landlord simply equalled the monetary value of the sub-lettings.

Counsel for the landlord emphasised that the tenant's particular criticism of its calculation had not been put forward in its submissions in the arbitration, even as a fall-back or alternative case. In such circumstances it could not be said that there had been any "serious irregularity" on the part of the arbitrator resulting in "substantial injustice" to the tenant. As a matter of general approach the court should strive to uphold arbitration awards and,

> "only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process",

may the court intervene and that under s.68(2)(d) this will be, "where the arbitral tribunal has not dealt at all with the case of a party so that substantial injustice has resulted".[4] The tenant lost on its one and only argument in the arbitration (as to which it suggested no criticism of the arbitrator) and it did not present an alternative case that the calculation put forward by the landlord should not be accepted because it allowed for no profit element for a notional tenant. Therefore, counsel for the landlord submitted, the arbitrator did sufficiently deal with the cases put forward on each side in the arbitration and his calculation of the fair yearly rent had not involved any error falling within the scope of s.68(2)(d).

Counsel for the tenant submitted that failure to deal with a substantial issue between the parties fell within s.68(2)(d), and that this is what had happened in this case. He relied upon the decision of the Court of Appeal in *Checkpoint v Strathclyde*,[5] per Ward L.J.:

> "The court should not make its own guess at the rental figure and make a comparison with the amount awarded. Rather, the court should try to assess how the tenant would have conducted his case but for the procedural irregularity. It is the denial of the fair hearing, to summarise procedural irregularity, that must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will."

The judge rejected the landlord's submission that s.68(2)(d) had not been engaged. The basic issue put to the arbitrator for determination was the question of the fair yearly rent as calculated in accordance with cl.1(d) of the lease and that issue had required the arbitrator to determine the notional market rent which a notional tenant would pay in respect of the property for the remaining term of the lease. The Court should not read an arbitration award:

> "[W]ith a meticulous legal eye endeavouring to pick holes, inconsistencies and faults ... and with the objective of upsetting or frustrating the process of arbitration."[6]

Nonetheless, if there is a glaring illogicality contained in the central reasoning in an award, the court may intervene.

In the judge's view, even though the tenant did not present distinct submissions in the arbitration on the question of a flaw in the landlord's calculation, it was still incumbent on the arbitrator to reason through his award in a logical way, satisfying himself that the calculation which he adopted into his award was coherent in light of the commercial approach which he had decided should be applied and sufficient to answer the basic issue which he had to resolve. The judge considered that this is what was reasonably to be expected of the

[4] *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm); [2005] 2 All E.R. (Comm) 312 at [5] to [10], in which Morison J. reviewed the principles applicable and relevant authorities.

[5] *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84; [2003] 1 E.G.L.R. 1 at [58].

[6] *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 E.G.L.R. 14, per Bingham J.

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arbitral process in this case. The arbitrator had, correctly, not merely adopted the landlord's calculation but had examined and decided upon each element therein. However, while his approach had assumed that a notional tenant would take a relevant notional lease at a rate which included a profit element for itself, unfortunately, however, it was clear that the calculation the arbitrator then made did not in fact include any profit element. He had failed to identify the appropriate profit margin and had failed to incorporate it in the calculation of fair yearly rent, despite having identified it as a relevant factor to be taken into account. For that reason, the judge considered that the arbitrator's award was obviously flawed as a matter of the commercial logic which he himself had decided should be applied. It cannot be regarded as a rationally sustainable resolution of, or dealing with, the basic issue which he had to determine.

The judge found support in Colman J.'s judgment in *World Trade Corp Ltd v C Czarnikow Sugar Ltd*[7] where he said that s.68(2)(d) was:

> "[D]esigned to cover those issues the determination of which is essential to a decision on the claims or specific defences raised in the course of the reference."

The arbitrator failed to determine and allow for the profit element, which was on his reasoning a matter essential to his decision on the issue he had to resolve. This failure fell within s.68(2)(d), in that it amounted to a "serious irregularity" by virtue of which he had failed to deal with the basic issue which he had to decide. Further, this failure had caused substantial injustice, in that the tenant had been deprived of the benefit of a rationally sustainable award, and the award which had been made was flawed in a manner which might cause the tenant substantial financial detriment in having to pay an excessive amount of rent under the lease for a very extended period of time.

Counsel for the landlord made a further submission that the tenant should have applied to the arbitrator under s.57 to correct or clarify his award, and that having failed to do so it was prevented from applying to the court under s.68 by operation of s.70(2)(b). Conversely, the tenant had in its pleading and evidence made clear its view that there was no avenue of relief available under s.57, so that s.70(2)(b) had no application. The judge agreed with the tenant since the error in the award was clearly not a typographical error amenable to correction under the usual slip rule. Nor, in his view, was the error in the award a matter of an ambiguity or lack of clarity in the award. The award made was clear but it was founded upon an error of reasoning. The judge concluded that the tenant was not barred from applying to the court under s.68.

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4. COMMENT/CONCLUDING REMARKS

This case is disturbing since it takes s.68(2)(d) into territory it has never been before and where, in my respectful submission, it should not be. The award was appealed on the basis of arguments not put in the arbitration and where the losing party appears to have accepted the outcome by failing to make appropriate submissions. Why should the arbitrator be responsible for that party's failure to put its case adequately? The tenant's basis of argument on appeal directly contradicted the basis it adopted in the arbitration, the latter based on advice from leading counsel; is it fair and reasonable to the other party to permit such a reversal?

The arbitrator appears to have made a mistake in ignoring the profit element but arbitrators (and judges!) can make mistakes—no-one is perfect.[8] To equate a mistake with "serious irregularity" appears a leap too far.

[7] *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm); [2004] 2 All ER (Comm) 813 at [16]; also cited in *Fidelity* [2005] EWHC 1193 (Comm).

[8] e.g. see "Arbitration Agreements and the Jurisdiction of the Court of Appeal: *Virdee v Virdi* [2003] EWCA Civ 41" (2004) 70 *Arbitration* 1, where the judge made a mistake and refused leave to appeal against it; the Court of Appeal concluded that it could not interfere.

Sales J.'s judgment assumes that there is a "right answer" and he upholds the appeal on the basis that the arbitrator did not find it; albeit that the judge does not substitute his own quantified view of the rental, he certainly appears to substitute his view of the principle for that of the arbitrator; but there is a long line of authority that the courts should not substitute their view for that of the arbitrator.

The judgment appears to me to fall way short of para.280 of the DAC Report; "so far removed"? By no means. In addition, the DAC said:

> "[Section] 68 is designed as a longstop only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration."

That is clearly not the case here.

I respectfully agree with Colman J. in *World Trade* that s.68(2)(d) was,

> "designed to cover those issues the determination of which is essential to a *decision on the claims or specific defences raised in the course of the reference*" (emphasis added),

but I respectfully disagree with Sales J. that this is applicable here, since no claim was made in respect of the profit element of the rental and no challenge to the profit-exclusive basis of valuation.

As regards "substantial injustice", the judge refers to "substantial financial detriment"; if we add an additional 10–15 per cent as the profit element, is that substantial? Of course not; there are estimating errors inherent in the valuation process and the rental figures for shop and residential units could easily be plus or minus 10 per cent.

Further, s.57(2)(b) refers to making, "an additional award in respect of any claim... which was presented to the tribunal but was not dealt with in the award", but no claim for the profit element was put, so there was no reason to correct the award (with echoes of Colman J. in *World Trade*).

Even more tellingly, [281] and [282] state:

> "[T]here have been cases [under the 1950/79 Acts] where the Court has remitted awards to an arbitral tribunal because the lawyers acting for one party failed (or decided not to) put a particular point to the tribunal. The responses we received were critical of such decisions on the grounds that they really did amount to interference. . . . We agree."

I respectfully do too and consider that the decision in *Metropolitan* is in direct contradiction.

In summary, this decision is, in my opinion, plain wrong.

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Indtel Technical Services Pvt Ltd v W.S. Atkins Plc

by AAKASH PRASAD

1. INTRODUCTION

The writings on points of conjunction and differences between *lex arbitri* and substantive law have been one of the most engaging themes for discussion in arbitration. And yet, time and again, an unprecedented scenario arises which allows opinions on the subject to be reprocessed in view of the unique factual synthesis. Moreover, this debate also juxtaposes itself to other ancillary issues in such cases, and the outcome of the debate exerts a domino pressure on the subservient themes.

A recent order by Altamas Kabir J. of the Supreme Court of India[1] dealt with the determination of *lex loci arbitri* and identification of the arbitral seat by studying the Arbitration Act 1996 (English Act) and the Arbitration and Conciliation Act 1996 (Indian Act) and their application to the instant case.

The genesis of the dispute lay in the conflicting claims of the Indian appellants and the English respondents who had entered into a memorandum of understanding for a Ministry of Railways contract. On the unilateral termination of the memorandum by the respondents and the failure to arrive at an agreement, the appellants invoked the dispute resolution clause[2] and called upon the court to primarily decide two questions. First, on reading the dispute resolution clause, could one discern an intention to arbitrate and thereby construe the clause to be an arbitration clause and secondly, did the reference to the law of England and Wales give the Indian Court power to appoint an arbitrator under the Indian Act s.11, which amongst other things allows the Chief Justice of India, or the person to whom he chooses to delegate such authority, to appoint an arbitrator where the consensus or willingness to do the same within a time frame is absent.

2. ARBITRATION CLAUSE?

As far as the first question is concerned, the controversy lay in the fact that the terms of the clause did not explicitly mention arbitration or any species of the genre. The presence of an intention to arbitrate is a sacrosanct principle as far as voluntary arbitration is concerned, as many judgments of the Indian Supreme Court have reaffirmed, including *Jagdish Chander v Ramesh Chander*,[3] where it was said that intention was superior to semantics employed in

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[1] *Indtel Technical Services Pvt Ltd v W.S. Atkins Plc* 2008 (3) A.R.B.L.R. 391(SC).

[2] Memorandum of understanding cl.13—“Settlement Of Disputes”:

“13.1. This Agreement, its construction, validity and performance shall be governed by and construed in accordance with the laws of England and Wales;

13.2 Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this Agreement which cannot be settled amicably by the Parties shall be referred to adjudication;

13.3 If any dispute or difference under this Agreement touches or concerns any dispute or difference under either of the Sub Contract Agreements, then the Parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant Sub Contract Agreement and the Parties hereto agree to abide by such decision as if it were a decision under this Agreement.”

[3] *Jagdish Chander v Ramesh Chander* 2007 (5) S.C.C. 719.

framing documents. The court clearly held that where, on due construction, an intention to arbitrate was apparent, whether the word "arbitrator" or "arbitration" was used or not, the dispute resolution clause could be said to have the colour of an arbitration clause. A corollary would be that, where an intention to arbitrate cannot be discerned even though words such as "arbitrator" were mentioned in passing, the parties would not be directed to arbitration.

In this case the decision depended on whether "adjudication" could be read as "arbitration". The court decided that the clause did not suffer from vagueness within the parameters laid down in the earlier decisions of the Supreme Court and that the clause could be read as an arbitration clause. That seems to be correct. Though the order records that the wording implies the intention, it has not clearly laid down why it reached the decision it did. A plain reading of the first and second clauses clearly indicates that adjudication has been used to distinguish it from litigation. Secondly, the terminology employed indicates the implication of the word as a process rather than a forum. "Arbitration" and "adjudication" are not antithetical, as arbitration is ultimately an adjudicative process. Lastly, the fact that the clause does not seem to accommodate procedures of reference and the finality of the award is not laid out in black and white does not render the clause pathological. The test of infirmity of an arbitration clause seems to require high thresholds, such as difficulty of reconciliation in terms of facts, contractual construction or inability to discern the intention to arbitrate.[4] All these factors are absent in this case. Though the order has not explicitly recorded any of these reasons, they seem to be the most probable factors weighing on the judge's mind.

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3. POWER TO APPOINT

The second question, whether Indian courts could grant relief under the Indian Act s.11, was answered in two parts. The first had to determine the law governing the procedural aspects. Redfern and Hunter seem to suggest that there can be up to five distinct jurisdictions of law in an international arbitration contract.[5] Though international opinion is divided, the Supreme Court of India is clearly in favour of the rule of holding the jurisdiction of the substantive law as analogous to the *lex arbitri* where the latter is silent or has not been agreed upon. In the opinion of the judge this is "well settled".

The second part of the question, whether the courts could still appoint an arbitrator, would require the assessment of the impact of the English Act being construed as the *lex arbitri* on the Indian court's power to appoint an arbitrator under s.11 of the Indian Act. The Court considered a plethora of authorities, including cases of the Supreme Court of India[6] and the English courts,[7] besides the provisions of the English and Indian Acts. The primary motivation of the Court to hold that the Supreme Court of India would have power to appoint an arbitrator under s.11, however, seems to stem from the controversial decision of the Supreme Court of India in *Bhatia International v Bulk Trading SA*,[8] which held that, since the Indian Act clearly diverged from the UNCITRAL Model Law, the *travaux préparatoires* for the Indian Act could be consulted to show that the legislature had a different intention. One such divergence concerns the applicability of the Indian Act to arbitrations outside India, and unlike the Model Law, Pt I may continue to apply to arbitrations whose seat is outside India, for the want of an exclusionary clause.

[4] Davis, "Pathological Clauses: Frederic Eisemann's Still Vital Criteria" (1991) 7 *Arbitration International* 365. Also see Milo Molfa, "Pathological Arbitration Clauses and the Conflict of Laws" (2007) 37 H.K.L.J. 161.

[5] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (Sweet and Maxwell, 2004), para.2-04.

[6] *National Thermal Power Corp v Singer Co* AIR 1993 SC 998.

[7] *Naviera Amazonica Peruana SA v Compania de Seguros del Peru* [1988] Lloyd's Rep. 116; *Lesotho Highlands Development Authority v Impregilo Spa* [2005] UKHL 43.

[8] *Bhatia International v Bulk Trading SA* AIR 2002 SC 1432.

The order ultimately held that the judge had power to name an arbitrator in this case. Since the ratio is sketchy again, we must construct the judge's ratio as it is implied by the arguments of respondent. They would suggest first that, even if it was to be accepted that the *lex arbitri* was English law, that law did not exclude the jurisdiction of every other court on *all* matters concerning arbitration, though it would indeed oust jurisdiction in *most* matters of procedure by necessary implication. Thus, though English law was the *lex arbitri* and the seat of arbitration England and Wales, when the parties chose to invoke Indian jurisdiction, following the ratio of *Bhatia*, Pt I of the Indian Act continued to apply because it was not excluded by agreement.

Criticisms of the second part of the judgment are therefore criticisms of *Bhatia* and they are many and well documented.[9] Though there seems to be some logic in agreeing with the court in parts of the judgment, the dangers of *Bhatia* become apparent in cases such as these which create a conflict of laws. The harm caused by applying *Bhatia* can be mitigated by excluding the application of the Act by agreement. This was confirmed by the two-member bench of the Supreme Court, Chatterjee and Sathashiavam JJ. in *Venture Global Engineering v Satyam Computer Services Ltd*.[10] This does not however redress the situation completely. Such conflict of laws occasions continue to give opportunities for abuse, for example to file for appointment of an arbitrator or seek interim relief under the Indian Act, even when the seat of arbitration is outside India and proceedings may be under way. The court should keep in mind the same injunction applicable to grant of interim relief in cases such as these where the shield of *Bhatia* is invoked, that such relief should be given in only the "most appropriate cases".[11]

A party who wanted to frustrate arbitration could argue that the case was an appropriate case or that justice was necessary. However, the appointment of arbitrator was not necessary in this case, as the order could have restricted itself to holding that the arbitration clause was valid and could have left it to the parties to seek relief under the English Act.

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[9] O.P. Malhotra and Indu Malhotra, *The Law of Arbitration and Conciliation*, 2nd edn (New Delhi: Lexis Nexis Butterworths, 2006); S.K. Dholakia, "Case Comment on *Bhatia International v Bulk Trading S.A.*" (2003) 5 S.C.C. (Jour) 22.

[10] *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 S.C.C. 190.

[11] Bhandari J. in *Olex Focas Pty Ltd v Skoda Export Co Ltd* (2000) 1 A.D. (Del) 527.

Book Reviews

The Leading Arbitrators' Guide to International Arbitration

edited by **Lawrence W. Newman and Richard D. Hill**

Juris Publishing, 2nd edn, 2008, 858 pages, US $175, ISBN 978933833156

Reviewed by Chan Leng Sun

Arbitration is enjoying increasing popularity worldwide as a dispute resolution mechanism, sparking corresponding interest in arbitration courses and books.

The Leading Arbitrators' Guide, as its name suggests, is neither a handbook for beginners nor a reference book for principles of law. It is a collection of essays by leading arbitrators organised sequentially by topics. Lord Mustill starts the ball rolling with the opening chapter on the history of arbitration. His essay is modest in length but not in information and insight. This opening Chapter is complemented nicely and appropriately by Professor Böckstiegel's final Chapter offering his predictions on future developments in international arbitration. Between the past and the future lie chapters on the current practice of arbitration, logically starting with the tribunal, through the process of arbitration itself to the annulment and enforcement of awards. In addition, there are sector-specific essays on the particular characteristics of investment disputes, arbitration involving states, international construction disputes and energy. The late Professor Thomas W. Wälde examined issues which might specifically arise in oil, gas and energy arbitration. Many will share the sentiment of regret and sadness that we will no longer have the benefit of Professor Wälde's further thoughts on international arbitration ever since his tragic accident in October.

Readers looking for a textbook to cite precedents and hard law before a court or tribunal may not always find what they want. The focus of the book is very much on practical perspectives at each stage of the arbitration. This is not to say that the contents are mere casual conversations. There is reference to relevant arbitration laws and rules, but these form the backdrop for discussions rather than take centre stage. Sometimes, the authors descend to specific practicalities, e.g. the strategy of cross-examination. Often, there are broader discussions on a comparative, occasionally philosophical level. The editors, themselves leading arbitration practitioners, and the contributors have done an admirable job in maintaining consistency in approach and tone despite the diversity of authorship, background and subject matter. Throughout, the writers bring a wealth of experience and knowledge in identifying issues that can and have arisen in the real world. While there are not always easy solutions, readers will benefit from the cautionary remarks, advice and pointers derived from the writers' many years of actual experience.

The contributors are too many to name. Suffice it to say that the book delivers on its promise, as a guide by leading arbitrators. The editors explain a conscious effort to have a broader representation in this edition. Dana Freyer, Hilary Heilbron Q.C. and Catherine Rogers broke the first edition's male dominance by contributing Chapters on "Assessing Expert Evidence", "Assessing Damages" and "The Ethics of International Arbitrators" respectively. However, the contributors are all from North America and Europe, save for Francisco Orrego Vicuna of Chile who wrote on "Arbitrating Investment Disputes". One might wonder where the Asian arbitrators are. There is on the market a book on *The Asian Leading Arbitrators' Guide to International Arbitration*, by the same publisher. Nonetheless, the preface to the first edition of this book before us says that it provides insights from some of the *world*'s most prominent international arbitrators. Not the Western world. This is, perhaps, an inconsequential question of political correctness. In terms of subject matter and scope, the book does offer both common law and civil law perspectives. Leaving aside

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the public international law domain, international arbitration worldwide is conducted under either of these two systems of law.

Index to Legal Citations and Abbreviations

by **Donald Raistrick**

Sweet & Maxwell, 3rd edition, 2008, 560 pages, £99, ISBN 9781847036049

Reviewed by the Editor

None of us who write legal stuff of any kind can avoid occasionally bamboozling our readers by failing to expand an abbreviation or explain an acronym. We use them all the time and expect our readers to know them too. We should be ashamed of ourselves, though, because we know how frustrating it is when someone assumes we understand what their abbreviations mean. This book is therefore for all of us and this edition's 34,000 legal acronyms include 9,000 that are new since the last. Simply, it's essential. The publisher's claim is justified: "a handier and quicker means of finding an abbreviation than using online sources".

Its range comprehends not only "abbreviations and acronyms to use in legal citations and references" but also items from other areas, "frequently encountered by lawyers—government and public administration, police and probation services". And to that should be added whatever may be found in "Ital.Aff."—Italian affairs. It claims to provide, "a broader geographical range than any other book, covering the legal literature of the UK, the Commonwealth, Europe and the USA". That claim is too modest; for example it covers English-language material in China, Japan and Korea.

No reviewer could be expected to read every word but it has been a joy to flick through. Did you know that BATNA was "best alternative to a negotiated agreement". You probably did. But what about "Irr.N." for *Tasmanian Irregular Notes*? Now that is thorough.

There are slips: it's "*Regula*" not "*Regular Placitandi*" and, under Harr.(Mich.), Harrington's Chancery Reports for Michigan do not end in 1842. I have an 1845 volume. There are oddities. It lists some textbooks: "Kyd Aw" is there for Kyd's *Law of Awards* and "Russ.Arb." for the 1978 edition rather than all of them or the latest; but not Marsh Aw or any other text on dispute resolution, except for "Bill.Aw", which, as you all perhaps already knew, was Billing's *Law of Awards and Arbitration* 1845. Though continental journals are well represented, there are few continental texts, no Bartolus or Voet but A. Rolin, *Principes de Droit International Privé Belge*. So, try as I may, I haven't been able to work out any rule by which abbreviations of textbooks are included, other than being superseded.

I would have thought there could be room for FOSFA and GAFTA. CEDR is there but not CIArb, presumably because we are just too well known.

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three faiths forum

The Three Faiths Forum and the Institute of Advanced Legal Studies

Prizes for Essays in Dispute Resolution

The Three Faiths Forum and the Institute of Advanced Legal Studies are offering three prizes for the best essays on a subject related to dispute resolution in one or more of the Abrahamic faiths. The essays will be of publishable quality in a scholarly journal and will be judged by Farmida Bi, Solicitor, Lord Justice Rix and Professor Derek Roebuck.

Prizes: £1,000 for each of three essays.

Essays (with a 10,000 word limit) **should be submitted electronically to:**

Professor Avrom Sherr, Director, Institute of Advanced Legal Studies at: **Eliza.boudier@sas.ac.uk**

Closing date for submissions: 30th June 2009

Notes:

The prizes will only be awarded if there are essays of sufficient quality. Priority will be given to the quality of the essays. It will not therefore be essential that one essay only is awarded in each of the three faiths.

These prizes are awarded in Memory of Sidney Shipton OBE, Solicitor, the late co-ordinator of the Three Faiths Forum who worked tirelessly in the cause of promoting understanding and goodwill between the faiths.

The Three Faiths Forum lawyers' group arranges lectures and events within the profession to provide a stimulating and informal setting in which issues of common interest to the Muslim, Jewish and Christian faiths can be explored. The general aims of the Three Faiths Forum itself are:

- To encourage friendship, goodwill and understanding amongst people of the three Abrahamic monotheistic faiths in the United Kingdom and elsewhere.
- To promote support for and public recognition of the importance of groups where people of the Muslim, Christian and Jewish faiths meet and share common interests and experiences.
- To encourage respect for religious differences between the three faiths on a basis of equality and exploring and enjoying those differences where appropriate.
- To promote training of ministers of religion of the three faiths in their common roots, understanding of their differences and to encourage respect for each other on a basis of equality.

For further information about the Forum see **www.threefaithsforum.org.uk**

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