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The Changing Role of the High Court in Relation to Supervision of Commercial Arbitrations

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See table of contents

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Article abstract

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The Changing Role of the High Court in Relation to Supervision of Commercial Arbitrations

Frank MEISEL *

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(1984) 25 *Les Cahiers de Droit* 653

Introduction

Commercial arbitration in England (including Wales but not Scotland) had until recently, two distinctive features which distinguished it from the regimes operative in most jurisdictions other than those derived from England. Those features concerned the extent to which the law supplied a bridge between commercial arbitrations and the ordinary courts of law in that, first the ordinary courts provided a relatively high degree of support to ensure the proper conduct of arbitrations (whilst not interfering overmuch with purely procedural questions) and, second, in that the courts retained an unfettered and unousterable jurisdiction to review questions of law arising out of arbitrations. This second feature may have been to some extent the *quid pro quo* of the first but behind it lay also historical and policy reasons.

Judicial review of arbitration awards took two distinct forms: (1) a power in the court to set aside an award for error of law on its face [1] and (2) the right of a party to insist that the arbitrator state his award in the form of a special case for adjudication by the court.

For reasons which will appear later, the first form rapidly became a dead letter but the second, the procedure for appeal known as « case stated » or « special case » proceedings became entrenched in English arbitration law by the middle of the nineteenth century. However, quite suddenly in 1979 both forms of judicial review were abolished by the Arbitration Act of that year [2]. They were replaced by a restricted form of appeal based on reasoned

1. On questions of fact the arbitrator's decision is final. For an attempt to categorise matters as conclusions of law, primary and secondary findings of fact and mixed conclusions of fact and law see MUSTILL and BOYD, *The Law and Practice of Commercial Arbitration in England*, Butterworths, London, 1982, p. 532-534. And see something of a cri de cœur from Robert Goff L.J.: « An innocent turns to crime », [1984] *Stat. L.R.* 5, at p. 10.
2. There is some argument that the power to set an award aside for error on its face was, in effect, inadvertantly abolished by s. 44(3) Arbitration Act 1950, which, being intended merely as a consolidating statute, was not the subject of debate in parliament.

awards, with certain categories of arbitration dispute having the potentiality of excluding appeal to the courts absolutely. It is the purpose of this paper to consider the policy reasons underlying this dramatic change and the possible consequences of it.

It is perhaps necessary to make one or two preliminary observations.

— English Commercial Arbitrations

There are many thousand[3] arbitrations conducted in England each year. The majority arise out of standard London arbitration clauses in international contracts in the fields of commodities (since many of the leading trade associations are based in London), and in respect of shipping and insurance activities in which the City of London has long pre-eminently been concerned. As a result London has traditionally been the forum chosen by parties to international contracts for the resolution of disputes by arbitration and, as a corollary (though not a necessary one) English law has frequently been adopted as the law governing the contract concerned. In addition, much more recently, a new type of international contract has come into prominence : supranational contracts (sometimes referred to in England as « one-off » contracts), the features of which have been described extra-judicially by Lord Diplock as follows[4]

> the kinds of international contract for which the parties to it are said to be scouring the world for a convenient arbitral haven are « one-off » contracts in the fields of construction or supply across national frontiers involving enormous sums of money entered into by multi-national companies or consortia and to which governments or enterprises controlled by governments are often parties or in which they are intimately involved.

Thus, in addition to domestic arbitrations English law governs a large number of disputes where neither the subject matter of the contract nor any of the parties thereto have any connection with England, and yet, by virtue

3. Lord Justice Kerr speaking in 1979 suggested a round figure of 10 000 p.a. (see [1980] J.B.L. 164, 178). Whether this figure includes all the arbitrations, quality and otherwise conducted by the various trade associations is doubted ; in *Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co. Ltd.* it was stated in evidence that in the particular trade concerned (soya beans) alone there were in 1913 6 000 disputes disposed of by arbitration in London. See [1917] 1 K.B. at p. 324 per Scrutton L.J.

4. See the Alexander Lecture delivered by Lord Diplock to the Institute of Arbitrators in February 1978, « The Case Stated — its Use and Abuse », 14 *Arbitration* 107, 112. Again there are no official figures for these arbitrations but in the House of Lords debates on the Arbitration Bill Lord Cullen stated that in London there were held some 5 000 arbitrations on major « one-off » international contracts each year (H.L., vol. 392, col. 99). This category of arbitration represents but a small element in the total number. See also Lord Hacking, H.L., vol. 392, cols. 89-90.

of the case stated procedure, points of law relating to these disputes fall to be decided by the English courts.

— *English Commercial Law and the Courts*

For historical reasons which are beyond the scope of this paper, English commercial law, which had originally been developed by merchants at specialist commercial courts and by the Court of Admiralty was gradually brought within the purview of the ordinary courts during the 18th and 19th centuries [5]. A body of commercial law which had hitherto been cosmopolitan in character and shaped by merchants themselves became but part of the ordinary law of the land administered by the ordinary courts. Commercial customs had specifically to be proved before recognition was given to them and the courts attempted to mould principles applicable equally to international and domestic transactions. There is therefore in England no phenomenon similar to that found in civil law countries of a separate commercial court staffed in whole or in part by representatives of a separate class of commerçants [6]. There is, it is true, a Commercial Court but in truth this is merely (save for some important procedural differences) part of the Queen's Bench Division of the High Court staffed by judges with some (and often very great) expertise in commercial matters. There is no separate commercial code with the result that the law applied in commercial arbitrations and appeals therefrom to the courts, whether the arbitrations are domestic or international in character, will be the ordinary common law of contract or tort. The judges have several times stressed the importance of developing principles which apply comprehensively to all branches of the law of contract and have warned of the dangers of « compartmentalisation » [7].

In reiterating that the law to which parties to international commercial contracts are subject when they choose English law as the *lex causae* is thus the ordinary common law and not a body of law which has been specifically developed in a commercial code, it is important to bear in mind, what is the other side of this coin, namely that the ordinary English common law has developed to a considerable extent [8] as a result of a steady stream of appeals from arbitrations involving foreign parties. In examining, therefore, whether

5. On the early development of commercial law in England see HOLDSWORTH, *History of English Law*, vol. 5, pp. 60–154.
6. SCHMITTHOFF, *Commercial Law in a Changing Economic Climate*, 2nd ed., 1981, ch. 4.
7. A recent example is *National Carriers Ltd. v. Panalpina Ltd.*, [1981] 1 All E.R. 161, where the doctrine of frustration was held to apply to a lease of land. See e.g. per Lord Roskill at p. 185. As regards this desideratum in connection with the analysis of a contract for the international sale of goods see the « *Hansa Nord* », [1976] 1 Q.B. 44.
8. See Lord Diplock in the Alexander Lecture (*supra*, note 4, at p. 114).

the damming up of this stream is beneficial, it is justifiable to consider not only the effects on the parties but also the effect on the law. In doing so it will be necessary to consider first the development of judicial review and its perceived defects and, secondly, the ambit and potential effects of the changes wrought by the 1979 Act as operated by the courts.

1. Development of Judicial Review

It is necessary to point out at the outset that arbitrations took three distinct forms until the middle of the 19th century. Originally the only form was a voluntary submission by the parties out of court. The court exercised some powers of intervention but of an unsystematic kind. During the 16th century an entirely new method evolved wherein during a court action some or all of the issues could be ordered to be tried by an arbitrator. This was a form of delegated adjudication, the action remaining extant and the court thus had inherent powers of control. What was lacking was a form of pre-action reference to arbitration which nevertheless gave the parties recourse to the courts on certain matters. This was provided by an act of 1698. The powers of control exercisable by the courts depended, to some extent, on which type of arbitration was involved but as regards mistakes of law and the development of the court's power of review, a fairly general description can be given. I shall look first at the power to set aside an award for error on its face and second at the case stated procedure.

1.1. Power to set aside

Prior to the 17th century there are traces of a jurisdiction exercised by the courts to interfere with an award which appeared on its face to have been founded on a mistake of law by the arbitrator but doubts persisted as to whether the courts really had such a power of review until the decision of the Court of King's Bench resolved them in the case of *Kent v. Elstob*[9]. Lord Parker suggests three possible reasons for the court's intervention: first the traditional jealous guarding of jurisdiction; second the fear that a separate system of law would develop in parallel to that provided by the courts; third the extraction of a *quid pro quo* for the assistance the court gave in enforcement of awards[10].

9. (1802) 3 East 18.

10. « The History and Development of Commercial Arbitration — Recent Developments in the Supervisory Powers of the Courts over Inferior Tribunals », Lionel Cohen Lectures, 5th series, Jerusalem, 1959, p. 13. An extract of this lecture is reproduced in [1959] *J.B.L.* at p. 213 *et seq.*

The power to set aside an award came in time to be invoked by parties in a consensual way, the parties requesting the arbitrator to state his award in such a way as to disclose his reasons so that they appeared on its face. However, the power to set aside was defective in one important way: the court could only uphold the award or quash it. If it did the latter the arbitral process had to be begun again. There was no power to remit the case. There were two consequences of this. Arbitrators ceased to give reasons from which errors of law could be found, save in a separate document if requested by the parties, the separate document not forming part of the award. One thus had the disadvantage of « unmotivated » awards with enforcement difficulties overseas. Secondly, parties began to ask that the award contain a decision on the issues of law but also an alternative decision if the court was of a different opinion on the law. Thus we had the germs of a quite separate system of review, a decision on a case stated.

1.2. Case Stated Procedure

Statutory force was given to this practice in the Common Law Procedure Act 1864. Section 5. There was no compulsion on the part of an arbitrator to state a case and his power to do so could be excluded by express provision in the contract containing the arbitration clause. In 1889 the Arbitration Act provided a new power, for the arbitrator to raise a consultative case on a question of law during the reference and in 1934 statute rationalised the position by making both forms, the consultative case and the case stated procedure subject to the same regime ; a discretion on the part of the arbitrator to state his award in the form of a case stated or to state a consultative case if requiested to do so, and a duty to make his award in the form of a case stated if required to do so by the court at the request of a party. These provisions were reproduced in section 26 Arbitration Act 1950. The question whether the parties could validly prohibit themselves from requesting a special case was answered in the landmark case of *Czarnikow v. Roth Schmidt and Co.*[11] In this case there was a contract for the sale of sugar subject to the Rules of the Refined Sugar Association. The rules provided for arbitration of disputes by the Council of that Association. Rule 19 provided that :

> neither buyer, seller... shall require, nor shall they apply to the Court to require any arbitrators to state in the form of a special case for the opinion of the court, any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed.

11. [1922] 2 K.B. 478.

Disputes arose and were referred to the Council for arbitration. The buyers requested the arbitral body to state a case or raise a consultative case in connection with certain points of law. The Council refused, believing themselves precluded by Rule 19 and the buyers sought to have the award set aside for misconduct. The Divisional Court set aside the award and the sellers appealled to the Court of Appeal (the judges then comprising it being « the greatest Court of Appeal in commercial matters that this country has ever had » according to Lord Diplock [12]). These judges unanimously held that Rule 19 provided a contractual provision which was contrary to public policy. Bankes and Atkin LL.J. grounded their objection on the need to avoid the development of a « home-made » law of the particular arbitrator and Scrutton L.J., the master of commercial law, uttered his time-honoured dictum : « there must be no Alsatia in England where the King's Writ does not run ».

Now this case had two important features. First, the exclusion provision emanated from a standard term in a Trade Association contract form which was effectively a contract of adhesion and, second, the ouster agreement was entered into *ab initio* i.e. prior to the dispute. Together these features provided a consumer consideration which might be absent in other cases. Whilst the rule laid down in that case was universally applied, when later the courts came to give effect to changes in the law, distinctions were made turning on these consumer considerations.

Thus the parties cannot fetter their right to request that the arbitrator state a case for the court on a question of law and if he declines, the court will normally order him to do so.

1.3. Defects of the Procedure

The case stated procedure had a number of inherent defects. The request for a case to be stated had to be made before the award was given — before the arbitrator became *functus officio* — and the practice developed whereby the parties themselves submitted the question or questions which they wished stated. This, as one judge observed, was « like aiming at a moving object in the dark » [13]. The difficulty was recognised by the courts and it became established that narrow questions should be avoided and that more general questions should be raised. This in turn led to the disadvantage

12. Alexander Lecture, 44 *Arbitration* 107, 108.
13. Ormrod L.J., in *Ismail v. Polish Ocean Lines*, [1976] 1 Q.B. 893. In this case the « gunman » shot himself having lost in the Court of Appeal on a point he requested to be stated, which the arbitrators eventually found in his favour.

that parties could effectively pose such wide questions that points of law could be raised in the appeal which had not specifically arisen in the arbitration. Thus the procedure on a case stated before the court became more of a new hearing than an appeal on the award.

Moreover whilst the courts had a discretion whether to demand a case stated from a recalcitrent arbitrator, the precondition imposed by the Court of Appeal [14] that the point of law be « real and substantial and such as to be open to serious argument and... of such importance that the resolution of it is essential for the proper determination of the case » was easily met by counsel skilled in drafting such questions. In the result it became almost impossible for the arbitrators to resist a request for a special case to be stated. The disinclination of the courts to be unduly restrictive is explicable in terms of the view, still current in 1973, that, in the words of Lord Denning in « the *Lysland* » « when the parties agree to arbitrate it is, by our law, on the assumption that a point of law can, in a proper case, be referred to the courts » [15]. Whether such an assumption is in tune with the desires of the parties is open to some doubt. Arbitration is said to have five major advantages over litigation [16]: privacy, availability of technical expertise in the adjudicator, finality, speed, and cost saving.

It is fairly obvious that all five of these advantages are lost once appeals to the courts are liberally permitted. It might be thought, therefore, that parties, at least those who voluntarily agree to submit their dispute to arbitration, would not envisage a protracted appeals system through the courts being available without restrictions. On the other hand, it may be questioned whether international arbitration is likely to accomplish these desiderata. Mr. Justice Kerr in a lecture given to practitioners in Hong Kong [17] in the watershed year of 1979 suggested otherwise and he instanced two causes celebres involving I.C.C. arbitrations where the delays and expense rivalled some of the worst excesses occasioned by the English case stated procedure. Furthermore in any assumption about the desires of the consumers it is surely fair to see what puddings they eat: Christopher Staughton, then a leading practitioner and now a commercial judge, writing also in 1979 observed: « there remained a large class where evidence as to discontent with the old law was conflicting — shipping insurance and commodity contracts. Certainly discontent was voiced, sometimes loudly.

14. *Halfdam Grieg and Co. A/S v. Sterling Coal Corporation* (« The Lysland »), [1973] Q.B. 843.
15. *Ibid.*, at p. 862.
16. See e.g. Lord Hacking, « A New Competition — Rivals for Centres of Arbitration », [1979] 4 *L.M.C.L.Q.* 435.
17. An article based on this lecture is published under the title « International Arbitration v. Litigation », [1980] *J.B.L.* 164. See p. 164-165.

But actions speak louder than words and year after year tens and even hundreds of thousands of contracts were being made, providing for arbitration in London, although neither the parties nor the performance of the contract had anything to do with England... it was at the very least consistent with the evidence that they approved of the special case procedure, because it ensured that English arbitrators decided according to law, and not in accordance with any ephemeral notions of justice that might be held by the tribunal »[18].

However all this may be, it is undeniable that the case stated, and to some extent the consultative case procedures, combining as they do both specialist arbitration and ordinary court hearings, can provide the parties with the worst of all worlds at least in so far as such a combination is potentially productive of long delays. Just one illustration (admittedly extreme but by no means unique) will suffice ; in 1912 the Olympia Oil and Cake Company bougt 6 000 tonnes of Soya Beans from the Produce Brokers Company. This was part of a string contract, the sellers having bought a cargo from a third party conforming to the contractual description. After hearing that the ship in which the cargo was laden had sunk the sellers duly declared the cargo under their contract with the buyers. The buyers objected and the case was submitted to arbitration. The following steps then were followed :

(i) three arbitrators of the IOSA heard the case and on appeal it went to the Board of Appeal of that association. The Board raised a consultative case, *inter alia*, on the question whether on construction of the contract the seller's appropriation was effective.

(ii) This consultative case went before the Divisional Court which held that the appropriation was ineffective on the terms of the contract.

(iii) The case was thus remitted to the Board with that question answered and the Board accepted it but held that, notwithstanding, there was a custom in the trade that buyers would accept the original shipper's appropriation if passed on without delay.

(iv) Buyers sought to have this award set aside for error of law on its face on the basis that the arbitrators were not entitled to find customs contradicting the contract. So the question came before the Divisional Court a second time.

18. C.S. Staughton Q.C., « Arbitration Act 1979 — A Pragmatic Compromise », (1979) 129 *N.L.J.* 920. Similar sentiments were expressed by Lord Roskill in an address as President of Birmingham University Law Faculty's Holdsworth Club in 1981, (1982) 7 *Hold. L.R.* 2-3.

(v) The Divisional Court held that they were bound by two Court of Appeal decisions which held that arbitrators were not entitled to find customs but merely to construe the contract as expressed.

(vi) This decision was appealed to the Court of Appeal which held that the Divisional Court was correct.

(vii) This was appealed to the House of Lords which overruled the Court of Appeal and held that the duty to construe the contract must, *ipso facto*, involve consideration of any custom of the trade since such, if found, is implied into the contract unless it contradicts the express provisions thereof.

(viii) Existence of the custom was accepted but the question remained whether the custom was indeed incompatible with the contract or whether it supplemented it. The House of Lords was prepared to consider this but preferred not to act as a court of first instance without the aid of considered judgments of lower courts. Thus the question was duly remitted to the Divisional Court (for its third hearing on this case) and that court held that the custom was compatible with the contract and upheld the original award.

(ix) The buyers duly appealed this decision to the Court of Appeal which upheld the Divisional Court.

As Scrutton L.J. trenchantly observed [19] : « this is a very expensive cargo of soya beans ». Whilst it is difficult to demur from Lord Loreburn's strictures in the House of Lords [20], it should be noticed that the mischief was, at least in part, caused by the earlier decisions of the Court of Appeal (inexplicable though they now appear) and that it required the highest court in the land to rectify matters. As we shall see later, this ultimate resort to the House of Lords may now be much less easy to achieve in similar cases. Nevertheless, it is undeniable that this procedure is potentially conducive to disadvantageous delays and, more to the point, may be blatantly used by a party solely to achieve such.

Judicial disquiet first arose as regards this consideration in the early decades of the 20th century but then subsided. However it again manifested itself in the 1970s and rapidly reached a crescendo [21]. The reasons for this are not very hard to find. The quadrupling of the price of oil with the resultant inflation and high interest rates obtaining in the major trading countries made delay both especially advantageous to the party achieving it and

19. [1917] 1 K.B., at p. 327.
20. [1916] 1 A.C., at p. 320.
21. See the examples cited in D. Rhidian Thomas, « An Appraisal of the Arbitration Act 1979 », [1981] 2 *L.M.C.L.Q.* 199, at p. 205-206.

damaging to the party exposed. When « cash is king » being out of one's money for several years can damage a company to a degree not easily compensated for in simple interest awards. Nor does the imposition of interest or the burdon of costs suffice to deter a party intent on delay by successive appeals since these will not generally outweigh the advantages of the extended credit the procedure allows.

Calls for reform were made by both academics[22] and judges[23], an informal committee was set up by a leading practitioner, Mr. Mark Littman and in July 1978 the Commercial Court Committee, with members drawn from the legal professions, banking, shipping, arbitral associations and the Department of Trade, with commercial judges *ex officio*, reported to the Lord Chancellor on Arbitration. Before publication of this report, but doubtless not coincidentally, Lord Hacking in the House of Lords initiated a debate with a question to the then Labour government as to what assistance they were willing to provide « for the re-establishment of London as a forum of international arbitration »[24]. In this debate a major theme emerged : that if the case stated system was not replaced and if supra national contracts could not be made exempt altogether, this new form of international arbitration would be irretrievably lost to England with an attendant significant loss of invisible export earnings to the detriment of the balance of payments. (A figure of §500,000,000 per annum was mentioned but it has been suggested that this is an overestimate by a factor of 100![25]). Thus two separate considerations were brought to bear on the problem ; the need to limit the delaying power of parties to arbitrations generally and thus to restore the apprehended advantages of arbitration, and second to enable certain kinds of international arbitration to place themselves beyond the scope of judicial review altogether.

2. Recommendations for Reform

The Commercial Court Committee took on board both these considerations and made the following recommendations.

(i) The obstacle to reasoned awards should be removed by abolishing the power of the courts to set aside an award for error of law on its face. If awards could then be, in most cases, reasoned the way would be open to

22. Clive M. SCHMITTHOFF, « The Reform of the English Law of Arbitration », [1977] *J.B.L.* 305.
23. Lord Diplock, in the Alexander Lecture, *supra*, note 4.
24. H.L., vol. 392, cols. 89 *et seq.*
25. Lord Cullen in the House of Lords first suggested this theme : H.L., vol. 392, col. 99. MUSTILL and BOYD, *supra*, note 1, register their doubts about the figures in fn. 15, p. 405.

innovate an entirely new system of judicial review based on reasoned awards. The award would be final and enforceable save to the extent that the court reserved the right to impose a stay of execution pending an appeal. In sum these reforms would improve the standard of awards and render them more easily and speedily enforceable [26].

(ii) The new right of appeal would be confined to questions of law and appeals could only be brought by consent of all parties or with leave of the court. Such leave should only be given if the court is satisfied that the question of law in issue could affect the rights of the parties and conditions could be imposed upon the parties seeking leave. Right of appeal to the Court of Appeal from the High Court should be more restricted — being allowed only if the High Court or the Court of Appeal certified that the question of law was one of general importance [27].

(iii) Despite being « greatly impressed » by the public policy arguments in *Czarnikow v. Roth Schmidt and Co.* different considerations should apply to post-submission exclusion agreements. Parties to all types of arbitration should be entitled to contract out of appeals altogether. As regards pre-submission exclusion agreements the following distinctions should be made :

(a) *Domestic arbitrations* — judicial review should be entrenched.

(b) *Supra national arbitrations* — no entrenched right to judicial review.

(c) *Special category disputes* — This third category of arbitration gave rise to certain difficulties. It encompasses maritime matters, insurance, and commodities dealt with on established U.K. markets. This category is « special » only really in that the types of disputes comprised within it form the bulk from which, traditionally, cases are prosecuted in London. The committee recognised that the parties here are usually foreign but that, first, there was no great desire to contract out within this category (unlike the supra national category), second that whilst the parties are usually of relatively equal bargaining power so that entrenchment was not required as a consumer protection measure (here unlike the domestic category) the interest in maintaining English law as the first choice in international commerce weighed in favour of entrenchment. A number of comments may be made in connection with this recommendation.

— *Absence of desire to contract out*

Hardly a convincing argument for entrenching judicial review ! This seemed to be recognised by the Committee itself for it recommended that the

26. Commercial Court Committee, *Report on Arbitration*, Cmnd. 7284, paras. 25–31.
27. *Ibid.*, paras. 32–38.

entrenchment be kept for two or three years to prevent a stampede of contracting out while the parties see how the new regime works. In the debate in the House of Lords on the bill some expressed concern that in fact many in this category wished to contract out [28].

— *Little consumer protection element*

This again can be doubted. Where parties contract on elaborate standard forms as is the case in shipping (whether under bills of lading or charter parties), insurance or in the major commodities it cannot be said that whether the parties be equal or not, they have any real opportunity of negotiating about any arbitration clause, including any provision as to contracting out. That was expressly a decisive consideration in the *Czarnikow* case itself [29] and Lord Diplock in parliament referring to this category said :

> Why, then, was it necessary to have the special category contract in which recourse to the courts under the reform system of appeal should not be allowed to be excluded? I was intimately concerned with the discussions and negotiations which took place and which resulted in the report of the Committee. My reason for accepting this special category and indeed for thinking it desirable that, for the time being — because this is capable of alteration later —we should retain the case stated was that those contracts unlike the one-off contracts are not in practice freely negotiated between the parties to the contract.
>
> What I wanted to exclude for the time being was what I should describe as the standard term contract. There are many branches, or at any rate several branches of commerce in which it is impossible in practice to trade, or to enter into a transaction, except upon a standard form prepared by a trade association, customarily on the Baltic, or whatever it may be. If you want to enter into that kind of contract, that kind of transaction, at all, you are, for practical purposes, forced to contract upon the standard terms. The danger is that the standard terms will include an exclusion term to which the other party to the contract, or indeed neither party to the contract, has an opportunity of saying « no, we want to reserve our normal rights ». That was the reason why I, at any rate, took the view that the special category contract ought to be excluded for the time being.[30]

— *Maintenance of English law as the first choice of law in international commerce*

The Committee's suggestion (in paragraph 48) that it was necessary in special category disputes to entrench judicial review in order to maintain

28. See e.g. Lord Hacking : H.L., vol. 392, col. 453.
29. See [1922] 2 K.B. 478, per Bankes L.J., at p. 484.
30. H.L., vol. 397, col. 450.

English law at the forefront of international arbitration is, to say the least, difficult to comprehend. The argument for *excluding* judicial review was advanced on the basis that parties would be (or already had been) driven away from London because of the existence of a convoluted court appeal system superimposed upon the arbitral process. And yet here, entrenchment of that system is argued for on the grounds that without it, London would lose its pre-eminence. Are these special category disputes brought by foreign parties, the subject matter having nothing to do with England, so different from the so-called « one-off » supra-national contracts where judicial review is apparently an anathema ? Perhaps the real point is that if judicial review is excludable in these special category disputes, there will be little left to fill the commercial court list or at any rate it is recognised that these disputes provide the seedcorn of the staple crop from which English commercial law is in the main developed.

There is another possibility : that there is, after all, a tacit acceptance that a large number of parties in this category do indeed see the availability of a procedure of appeals through the courts, with its attendant achievement of the correct result and thence certainty in commercial transactions, as desirable and, in general, preferable to early finality. Many of the parties to disputes in this category do, after all, contract on similar form contracts again and again so that the undoubted cost of protacted litigation is effectively spread. However this analysis so completely contradicts the fundamental assumptions on which the act is based that it cannot really be maintained.

It may be concluded that the separation out of this category may have no great logic but simply provides a compromise between the competing aims of developing a system of arbitration which gives the consumers what it is thought they want whilst at the same time protecting the interests of the common law in ensuring that its traditional staple is maintained. However, that maintenance may only be temporary. It was emphasized both by the Committee and the Lord Chancellor in the debates in parliament that the entrenchment for this category was intended to be temporary and there is a provision in the Act for the entrenchment to be removed altogether or modified by order of the Secretary of State. Given the policy underlying the Act, the Secretary of State will presumably be prompted to exercise this power if, either, the parties show no desire to contract out (though this will be difficult to ascertain) or if the demand to do so is so strong that the parties en masse opt for a different forum or choice of law to the financial detriment of England.

3. The Act

The Commercial Court Committee stressed the need for urgent action and by a happy circumstances of timing it was possible to process the Bill through both Houses of Parliament within a very short space of time [31]. The Act substantially gives effect to the main proposals of the Committee. Section 1(1) abolishes the case stated procedure and the power of the court to set aside an award for error of law. Subsection 2 provides :

> Subject to subsection (3)... an appeal shall lie to the High Court on any question of law arising out of an award made on an arbitration agreement.

Subsection (3) states that :

> An appeal under this section may be brought by any of the parties to the reference.
>
> (a) with the consent of all the other parties to the reference ;
>
> or
>
> (b) subject to section 3 below, [the exclusion provisions] with the leave of the court.

Under Section 1(3)(a) the court has no discretion whether to hear an appeal. If all the parties agree to the bringing of an appeal the court must hear it. It will be interesting to see over the next few years how frequently parties will avail themselves of this provision [32].

The key provision is, however, section 1(3)(b) where an appeal can only be brought with the leave of the court. How were the courts to construe their powers thereunder ; did they have a discretion whether to give leave and, if so, how was it to be exercised ? First indications were that the courts would grant leave in those cases where right of appeal was preserved subject only on being satisfied, as they were required to be under s. 1(4), that the determination of law could substantially affect the rights of one or more of the parties. Goff J., who had been a member of the Commercial Court Committee said in one early case :

> I can find nothing in the Act which, as a matter of construction, suggests that the court should give leave in the case of some questions of law but decline to give leave in others [33].

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31. The Bill was introduced into the House of Lords on 12 December 1978, concluded its third reading by 15 February 1979 and was passed speedily and unamended by the House of Commons under pre-dissolution of parliament arrangements made between the government and opposition. The Act received the Royal Assent on April 4th 1979 — within 10 short months of the report of the Commercial Court Committee. It was brought into force on August 1, 1979 : *Arbitration Act (Commencement) Order 1979* (S.1. 1979, No. 750. (C. 16)).
32. One reported instance is *Finelevet A.G. v. Vinava Shipping Co. Ltd.*, [1983] 2 All E.R. 658.
33. The « *Oynoussian Virtue* », [1981] 1 Lloyd's Rep. 533, 538.

In other words, where no exclusion of judicial review was permitted, and in cases where it was permitted but the right had not been exercised, the selection of cases fit for judicial review was to remain based much as before under the case stated procedure. Only the procedure itself had been reformed. This view cannot be regarded as having been wholly untenable if one looks at some of the statements made during the debates on the Bill [34]. It has, however, now been decisively repudiated by the House of Lords which gave leave to appeal in the leading case of the « *Nema* »[35] in order to lay down guidelines as to the grant or refusal of leave to appeal under s. 1(3)(b).

Lord Diplock gave the leading judgment and pointed to a number of provisions in the Act which in his view, indicated that the courts were to be sparing in exercising their discretion to grant leave, viz : the abolition of the court's power of judicial review for error on the face of the award, the absolute prohibition on granting leave to appeal unless the point of law may substantially affect the rights of a party, and the reversal of public policy with regard to exclusion agreements now generally permitted by section 3. The conclusion was that the parliamentary intention was to « give effect to the turn of the tide in favour of finality in arbitral awards... »

However, the House of Lords drew a distinction between a question of law in a « one-off » case and one which arose under a standard term clause or a common event. In the latter class of case there was greater usefulness in retaining the court's function of preserving the comprehensiveness and certainty of English law. Here, therefore, the courts should be less reluctant in granting leave to appeal. The use of the expression « one-off » requires a comment. It is somewhat unfortunate in that it bears a different meaning here to its use in discussions of the need for reform where it denoted supra-national disputes. A « one-off » case in the present context means one involving a point which does not arise from a widely used standard contract. In can include a clause in a special category situation such as a term in a standard but lesser known charterparty [36] and, on the other hand, a specially drafted clause may be treated as a standard term where the question of construction involved is set against a factual background which might affect a large number of parties in future disputes [37].

34. See e.g. Lord Diplock, H.L., vol. 397, col. 1201.
35. *Pioneer Shipping Ltd. and Ors. v. B.T.P. Tioxide Ltd.*, [1981] 3 W.L.R. 292.
36. *Marrealeza Compania Naviera S.A. v. Tradex Export S.A.*, [1982] 1 Lloyd's Rep. 52.
37. *Phoenix Shipping Corporation v. Apex Shipping Corporation*, [1982] 1 Lloyd's Rep. 476. (entry of a vessel into the war-torn Persian Gulf).

3.1. The Guidelines [38]

(1) Where the point is « one-off » the court should only grant leave if it is apparent to the judge on a mere perusal of the reasoned award [39] without the benefit of adversarial argument [40] that the arbitrator has gone obviously wrong. Even where such a case is apparent, there may be circumstances militating against the grant of leave to appeal. In the « *Nema* » itself, where the parties had sought arbitration to obtain a quick decision as to whether a charterparty had been frustrated so that they would know where they stood as regards future employment of the vessel, Lord Diplock regarded this factor as by itself a sufficient ground for refusing leave.

(2) Where the point involves the construction of a standard term Lord Diplock indicated a less stringent test. Provided the decision would add significantly to the clarity and certainty of English commercial law it would be proper to give leave to appeal if, but only if, a strong *prima facie* case [41] had been made out (here suggesting that some oral argument is desirable) that the arbitrator had gone wrong.

(3) The final category relates to questions of law arising from common events. Lord Diplock specifically referred to the problem of events of a general character such as war, which might affect a large number of contracts and raise issues of frustration and the like. The Iraq-Iran war has, in fact, already given rise to a number of cases where the date, although not the fact, of frustration of charterparties concerning vessels stuck at Basrah has been crucial. Arbitrators in several different arbitrations have arrived at different dates with regard to substantially similar facts. In the « *Wenjiang* » [42] the arbitrator fixed the date at 24th November 1980, being the date on which a diplomatic attempt to free the sixty or so vessels failed. The charterers sought leave to appeal that finding. Goff J. granted leave although the arbitrator had not misdirected himself in law nor had he reached a conclusion which no reasonable arbitrator could reach. The ship owners appealed to the Court of Appeal. The Court of Appeal upheld the judge's

38. For a more detailed discussion see MEISEL, « Finality versus Uniformity and Certainty in Arbitration Awards », (1983) 2 *C.J.Q.* 12.
39. The court has power under the act to order reasons or further reasons to be given : s. 1(5).
40. For the difficulty with this aspect of the formulation see *B.V.S. S.A. and Anor. v. Kerman Shipping Co. S.A.*, [1982] 1 W.L.R. 166 per Parker J. at p. 171 and see also the discussion in MUSTILL and BOYD, *supra*, note 1, at p. 563 on the procedure envisaged under R.S.C. Ord 73 ; r. 2(1)(d).
41. The appropriateness of this test has been doubted : see the « *Eastern Saga* », [1982] Com. L.R. 151. But the House of Lords has reaffirmed it see *Antaios Compania Naviera S.A. v. Salen Redevierna A.B.* [1984] 3 All. E.R. 229.
42. [1982] 2 All E.R. 437.

decision. Where one was faced with a situation such as this it was wrong to view each award in isolation. The trade required uniformity. This sort of case had been specifically instanced by Lord Diplock in the « *Nema* » where his Lordship said that in a common event situation leave to appeal should be granted if « the judge thought that in a particular case... the conclusion reached by the arbitrator although not deserving to be stigmatised as one which no reasonable person could have reached was in the judge's view not right ».

It has frequently been emphasized that these are only guidelines and that they should be applied with some flexibility (a point accepted by the House of Lords itself in the very recent case of *Antaios Compania Naviera S.A. v. Salen Redevierna A.B.*[43]). Thus despite that the particular tests have not been satisfied the courts have given leave to appeal where the point of law involved European Community Law[44] and in *Filia Compania Naviera S.A. v. Cameli and Co.*[45] Legatt J. gave leave to appeal on a subsidiary question of law notwithstanding that the arbitrators were not obviously wrong, because leave to appeal had been given on the main point and it would be wrong to deprive the party of the opportunity of raising the point if an appeal was to be heard in any event.

The net result of all this is that there is at the stage of an application for leave :

> a filtering process, at which the court gives effect to the policy embodied in the 1979 Act and enunciated in the « *Nema* » whereby the interests of finality are placed ahead of the desire to ensure that the arbitrator's decision is strictly in accordance with the law. Some examination of the merits takes place at this stage because the stronger the applicant's case for saying that the arbitrator was wrong the better his prospect of obtaining leave to appeal... The exercise is discretionary throughout, the mesh of the filter is fine, and it must, I think, be recognized that some cases will be caught in the filter which would, if the appeal had been allowed to go forward, result in a decision that the award could not stand.[46]

3.2. The Filtering Process

A word or two needs to be said about how the filtering process works. There are two quite separate aspects concerning appeals from arbitral

43. *Supra*, note 41.

44. *Bulk Oil (Zug) A.G. v. Sun International Ltd. and Sun Oil Trading Co.*, [1983] 1 Lloyd's Rep. 655 affirmed by the Court of Appeal [1983] 2 Lloyd's Rep. 587.

45. [1983] *Com. L.R.* 139.

46. *Finlevet A.G. v. Vinava Shipping Co. Ltd., supra*, note 32, at p. 662, per Mustill J.

awards and it is important that they be kept separate. The first relates to the grant or refusal of leave to appeal and the second relates to the substantive appeal itself once leave is given.

3.2.1. Leave to Appeal

The Arbitration Act 1979 said nothing about the possibility of appealing the grant or refusal of leave to appeal. If that decision by the High Court could be freely appealed the result might well be that, whilst the number of appeals from arbitral awards would be reduced by the other provisions of the Act and the guidelines laid down by the House of Lords, the appeals which did get through the filter might take longer to prosecute than under the old system where no leave to appeal was required. This would run counter to the policy underlying the Act. The omission was made good by the Supreme Court Act 1981, section 148(2) of which provides a new subsection (6)(a) to section 1 of the Arbitration Act. This provides:

> Unless the High Court gives leave no appeal shall lie to the Court of Appeal from a decision of the High Court —
>
> (a) to grant or refuse leave under subsection (3)(b)...

It has now been clearly stated by the House of Lords that leave to appeal the grant or refusal of leave should only be given where a decision was required to amplify, elucidate or adapt the guidelines and that unless the judge does give such leave he should not normally give reasons for his grant or refusal [47]. It is apparent, therefore, that the House of Lords is astute to ensure that save in the most clear cases of error, leave to appeal should not be granted and that the grant, but more particularly the refusal, of leave should not, save in very limited circumstances, be appealable.

3.2.2. The Substantive Appeal

If, however, leave to appeal is granted the High Court will hear it. On hearing the appeal, the High Court has powerto: confirm, vary, set aside or remit the award for reconsideration.

The policy of early finality is again in evidence in that appeals from the High Court to the Court of Appeal on such orders are circumscribed. S. 1(7) of the 1979 Act provides:

> No appeal shall lie to the Court of Appeal from a decision of the High Court on an appeal under this section unless —

47. *Antaios Compania Naviera S.A. v. Salen Redevierna A.B., supra*, note 41.

> (a) the High Court or the Court of Appeal gives leaves;
>
> and
>
> (b) it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.

The refusal of the High Court to certify under s. 1(7)(b) is not itself appealable because it is not a judgment or order of the High Court for the purposes of s. 16 Supreme Court Act 1981[48].

The restriction on the right to appeal to the Court of Appeal on the substantive issue places the party to an arbitration in the position of a « second class litigant » in having to satisfy the matters set out in s. 1(7)(b)[49]. In a « one-off » case the test is rarely likely to be satisfied. In a standard term construction or common event situation, however, the question whether the point in issue is of general public importance will already to some extent have been decided favourably in granting leave to appeal initially.

4. The Policy Considered

The policy of the Act as interpreted by the House of Lords is clear. The question remains whether it is good. Essentially the question resolves itself into this: Is the desideratum of early finality achieved at too high a price? How high the price is should not be underestimated. Lord Diplock himself in his influential Alexander Lecture said:

> In this country we have the most fully developed of all national systems of commercial and maritime law. In English decided cases are to be found more detailed answers to questions of law that are likely to arise in the course of international trade than are to be found in any other system or ever could be found in any system in which the doctrine of *stare decisis* does not play so large a role. This development of commercial and maritime law and its comprehensive character, are largely due to decisions of the English courts (particularly those of the Commercial Court itself) on points of law raised in special cases stated by arbitrators under the successive Arbitration Acts since 1889. If I look back over the many years that I have been upon the Bench at first instance and at two appellate levels my strong impression is that all but a small minority of questions of commercial law that I have played any part in answering have originated from Special Cases stated by arbitrators in London arbitrations.

It would be unprofitable to test Lord Diplock's impression but one or two notable instances may be illustrative. For the sake of argument I have

48. On what may or may not be a « question of law... of general public importance... or other special reason » see the discussion in MUSTILL and BOYD, *supra*, note 1, at p. 584–586.

49. See the comments of C.S. STAUGHTON, « Arbitration Act — A Pragmatic Compromise », *supra*, note 18, p. 923.

limited myself to decisions of the House of Lords over the last few decades. It is probably safe to assume that as the filter operates over the years only a very few points of law will procede from arbitration all the way to the apex of the English judicial system.

4.1. *President of India v. La Pintada Compania Navagacion S.A.* [50]

This is the latest, and perhaps the last old style case stated decision to find its way to the House of Lords and provides quite a useful example in a number of respects. The question raised in the dispute between the parties was whether interest could be awarded on payment due to owners for demurrage under a charterparty, the sums having been paid belatedly but before any award was made. The arbitrators appointed by the parties disagreed and an Umpire thereupon entered in to the arbitration. He found for the Owners but stated a case by consent of both parties. Two hearings were held before Staughton J. In October 1982, 6 months after the award, he remitted the case to the Umpire to consider the effect of the Owner's conduct in having earlier refused the payment proferred. Then in July 1983 the judge upheld the award. However he did so, being bound by a Court of Appeal decision in the case of the *Techno-Impex* [51]. Having certified that a point of general importance was involved, the parties were permitted to « leap-frog » direct to the House of Lords. The House of Lords promptly overruled the Court of Appeal decision and reversed Staughton J.'s decision and, thereby, the award. A number of observations may be made.

(a) The House of Lords handed down this judgment within 18 months of the High Court being seized of the question. The dispute had arisen in May 1977 so of the seven years the case had taken, five involved the arbitral process. The case stated procedure could not, therefore, here be condemned as the cause of delay.

(b) This was a special category type dispute involving payments due under a charterparty. Appeal to the courts cannot (yet) be excluded but this entrenchment is supposed to be temporary.

(c) The appeal of this award made it possible for the court expressly to overrule a Court of Appeal authority and, at the same time, press that legislation be brought in to plug an unfortunate gap. Whilst an appeal would still be possible under the post-1979 regime there is no certainty that it would have been permitted in this case. Although it was a point of general public importance, Staughton J., in agreeing with the award, was bound by an authority of recent vintage of a superior court and thus was unlikely to have

50. [1984] 3 W.L.R. 10.
51. [1981] Q.B. 648.

been persuaded that « a strong *prima facie* case » had been made out that the arbitrator had been wrong !

A charge of lack of candour could be levelled if I did not confess that the actual decision of the House of Lords is likely to be immensely unpopular amongst the international commercial community. It is clear, therefore, that the certainty achieved by the decision may not of itself guarantee satisfaction with English commercial law but presumably, their Lordships would not argue that appeals should be restricted to avoid the risk that the House of Lords would achieve the « wrong » result. Here the arbitrators were eventually overruled. But the availability of further appeals is also necessary in order to uphold correct arbitral decisions.

4.2. *E.L. Oldendorff and Co. GmbH v. Tradex Export S.A.* [52]

The question was whether a vessel had « arrived » for the purposes of demurrage. The Umpire had held for the Owners that the vessel had arrived. He had stated quite expressly and honestly that he knew of the House of Lords decision in the « *Aello* » which precluded him from finding for the Owners as a matter of law but that he preferred the dissenting judgment in that case and proposed to follow that. A case was stated for the opinion of the court and both at first instance and on appeal the alternative award in favour of the charterers was, not surprisingly, upheld. The case came eventually to the House of Lords which promptly overruled its own previous decision in the « *Aello* » and held for the Owners. No doubt the House of Lords thereby recharted the law as to arrival of a ship. The decision vindicated the courageous (or foolhardy) arbitrator but the point is that only the House of Lords could achieve this within our judicial system and it is again questionable whether the case would have proceeded from the High Court to the Court of Appeal and thence to the House of Lords had the new regime been operative. True the High Court would almost certainly have given leave to appeal, the arbitrator obviously being wrong in law, but with both High Court and Court of Appeal being bound by a House of Lords decision would appeals from the High Court have ensued ? Perhaps the High Court would have certified under s. 1(7)(b) but it is by no means certain that leave to appeal would have been given by either the High Court or the Court of Appeal.

There are numerous other cases where the House of Lords has been enabled to develop the commercial law as a result of appeals from arbitrations. Almost every area of the English law relating to international sales of goods and carriage of goods has been fashioned by the House of

52. [1974] A.C. 479.

Lords from appeals from arbitrations. However, as previously stated, it is also the general principles of commercial law that have been developed through this medium and I take by way of small sample only a few decisions of the House of Lords over the past couple of decades [53].

It may be accepted then, to put it at its lowest, that if the Arbitration Act is to dam up this steady flowing stream, the development of commercial law will be hindered. Of course it may be immediately countered that parties do not litigate in order to develop the law ; the latter exists for the benefit of the former and not *vice versa* but two points must be made in this connection. First, the framers of the Act and the courts already recognise the notion that the interests of legal development should be protected and, where necessary, tip the scales in favour of allowing appeals to proceed. Second and more fundamentally the accurate and conclusive answering of questions of law *is* to the benefit of the parties. The apprehension that the parties who chose arbitration desire early finality and are prepared to accept, for better or worse, the decision of the arbitrator may not contain by any means a universal truth. Apart from the fact that parties are better served by a system of law which is comprehensive and certain it is also erroneous to regard all litigation as being designed to settle, for the particular litigant, a one-off question in one isolated dispute. There are many who contract again and again on standard from contracts, under the auspices of trade organisations such as G.A.F.T.A. etc. or on standard charterparties who can, by pursuing litigation, obtain an authoritative ruling which enables them as well as hundreds of others, to arrange their business affairs for the future. The costs of the particular litigation including the effects of delays, is off-set by the gain of certainty as to future arrangements. The danger is that if these guidelines are to be strictly and narrowly observed and applied expressions of concern for the well being of the corpus of commercial law may amount to little more than lip service.

Conclusion

There can be no doubt about the disquiet, heard on all sides, concerning the case stated procedure. What was objected to I suggest was not the procedure itself but rather the abuse of it and the fact that the courts seemed unable to check that abuse. There are it is submitted ways of preventing or restraining abuse which fall short of abolishing the procedure. Some devices have in fact been introduced by the 1979 Act which should by themselves

53. *Bunge Corporation v. Tradex Export* [1981] 2 All. E.R. 513 ; *Koufos v. Czarnikow* (the « Heron II ») [1969] A.C. 350 ; *Scruttons v. Midland Silicones* [1962] A.C. 446 ; The « *Suisse Atlantique* » [1967] 1 A.C. 361 ; *Tsakiroglou and Co. v. Noblee Thorl GmbH* [1962] A.C. 93.

make delay less advantageous; thus the courts have power now to impose conditions on the grant of leave to appeal such as the payment into court of the amount awarded or the requirement that security for costs be given. There seems no reason in principle why such could not have been imposed as a precondition to the hearing of cases stated in appropriate situations. Other deterrants to the abuse of the procedure include modification of the law relating to the award of interest on awards and judgments so that delays can be more properly compensated for. Moreover, as a more general remedy the courts could, and more than one judge has suggested in the past that they should, develop a discretion to decline to order a case stated where it has been sought in order to create delays or where otherwise the application is not sought *bona fide* [54].

There is a danger that, by simply abolishing the case stated procedure and substituting for it a system of appeals subject to an increasingly fine-meshed filter, the baby will have been thrown out with the bath water. The risk of this will be exacerbated if the special category contracts are permitted to exclude recourse to the courts after a short period. The trial period of two to three years has already expired but there is no evidence at present that such a step is imminent and it is interesting to note that Sir John Donaldson, the Master of the Rolls and Chairman of the Committee which proposed it has since revised his opinion. In a lecture given last year he suggested that the trial period should now last for five to ten years [55]. It may be that the robust attitude of the House of Lords and the guidelines for granting leave to appeal will have to be reviewed by then also.

54. See e.g. per Kerr J., in the « *Lysland* », [1973] 1 Q.B. 843.

55. Sir John DONALDSON M.R., « Commercial Arbitration — 1979 and After », (1983) *C.L.P.* 1.