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NOTES OF TALK ON ARBITRATION BY

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My talk will include a potted history of arbitration, culminating in the Arbitration Act 1979; the workings of the Chartered Institute of Arbitrators and its educational and training programmes and conferences; and the formation and workings of the Commercial Court Committee. I will also deliver a written message from the President of the Chartered Institute of Arbitrators, Lord Diplock.

Arbitration as a means of settling disputes is probably as old as litigation itself, and it is not difficult to imagine members of even the most primitive tribe trying to find a less painful way of settling disputes than wielding a club, and deciding to abide by the decision of an elder of the tribe or even of the Chief himself.

But I would jump to more modern times, at the end of the 16th Century and beginning of the 17th Century. During that period there were two forms of arbitration; one which was ordered by the Court, where the Court took the view that a question of fact could be decided more conveniently by an arbitrator than by a jury, and the other form, a voluntary agreement of the parties. In the latter case, the Court originally had none of the powers of enforcement and control which it possessed in the case of arbitration stemming from an order of the Court, and a party to an arbitration agreement could frustrate the conduct of the reference by refusing to play any part at all, by revoking the authority of the arbitrator, or by refusing to honour the Award. This was recognised as a serious defect, and by an Act of 1698, this defect was put right. As early as 1802 the Court claimed the right to interfere with an Award for an effor of law on its face. The procedure for a stated case came to be viewed as a corollary of that right and, by a further Act of 1854, the powers of the Case Stated procedure were conferred upon the Court in all cases, irrespective of whether or not they were provided for in the arbitration agreement. There was further legislation in 1889, in which the parties were given an express power to preclude the arbitrator by agreement from stating his Award in the form of a Special Case, and this Section was repealed in a further Act of 1934. Finally, all the earlier legislation was consolidated into the Arbitration Act 1950.

There are, of course, many active arbitration centres in the world today, but what made London one of the main centres? Originally this undoubtedly arose because of the presence in London of world recognised markets in shipping, insurance, and commodities, and of London's importance as a world centre for trading and commerce over so many years. In this connection, one only has to think of the two great Exchanges with which I am proud to be connected - the Baltic Exchange and Lloyd's of London.

Business on these markets is generally done on standard form contracts which in the past have invariably contained a London arbitration clause and have been governed by English Law. This is changing a little: when new forms of contract are produced, and I refer particularly to new charterparty forms either produced by, or agreed by, such organizations as BIMCO, there is a tendency to leave the place of arbitration and the law governing the contract blank, to be filled in after negotiation between the parties. Sometimes, there is an alternative, such as London or New York, one of which is to be deleted after negotiation. On the face of it, this could lead to a weakening of London's position, because so many in the past were committed to arbitration in London simply through having agreed a charterparty or contract which had a printed London arbitration clause; whereas, when a blank space has to be filled in, one's mind has to be applied to it.

Nevertheless, I have always taken the view that this is inevitable and a healthy development because, in any walk of life, unless one produces what the customer wants, one should not get the business. This philosophy was instrumental in producing the recommendations of the Commercial Court Committee, about which you will hear later.

London's traditional role as a maritime and commercial centre ensured the availability of a pool of maritime and commercial talent which I have heard described as second to none! My first exposure to arbitration was actually forty years ago when, as a very young assistant to one of the then leading London arbitrators, I marvelled at the way that two foreign parties would quite happily leave their disputes to gentlemen in London who, although eminent, well respected and highly experienced in their field, usually had no training in arbitration procedure or law. In complex cases they would often disagree and go before a legal Umpire when, more often than not, they left it to him without the presentation that we are used to today. Often these gentlemen had taken up arbitration either because they were coming towards, or had indeed reached, retirement and thought it a dignified and interesting way to add to income, or even because, towards the end of the Thirties, after a terrible slump in shipping similar to the one we have just been passing through, business was bad or had failed completely.

This situation, of course, could not last: after the Second World War other shipping centres were gaining experience and, quite rightly, would not continue to accept what London decided simply because it was London.

Fortunately in the last twenty years or so London has woken up to the fact that it is not good enough simply to leave disputes to gentlemen who are experienced and well known in their respective trades. Accepting that perhaps the most important attribute an arbitrator can possess is a judicial capacity (one takes it for granted that he is highly experienced in his own field), there is still a

lot to learn, and the training that is now available in London is, like the pool of talent in the old days, second to none.

Although there is training available with other bodies in London, I suppose the main body concerning itself with training is the Chartered Institute of Arbitrators, which for many years, has had the unstinted support of the leading members of the London Maritime Arbitrators Association, both as lecturers and as tutors.

The Chartered Institute's merger three years ago with the London Court of Arbitration set the seal on this, and its training programme now takes the form of :-

1. A yearly course from October to May consisting of twenty-five evenings at the London Chamber of Commerce and Industry which covers lectures on the English legal system, the law of contract, evidence, arbitration procedure, including the agreement, the preliminary proceedings, directions and pleadings, the Hearing, the Award, and post Hearing proceedings, plus tutorial sessions, Award and Reasons exercises, and finishing with a written examination.

2. Residential preliminary, and medium level courses, at three different universities around the U.K.

3. An advanced residential course twice yearly at Selsdon Park Hotel, run on a tutorial basis, with a ratio of one tutor to three participants.

4. Courses for technical experts in the giving of expert evidence before Tribunals of all types.

5. A correspondence course.

6. Lectures, talks, mock arbitrations, and a yearly Alexander Lecture given by an eminent lawyer. They have included the Master of the Rolls, Lord Denning, Lord Scarman, Lord Justice Roskill and, this year, Lord Diplock the President of the Institute.

I think that the Branches, helped by the Chartered Institute and the London Court of Arbitration, must work towards the provision of this type of training.

Now for what is perhaps the most important part of my talk, the relationship between the English Courts and arbitrators, and the Arbitration Act 1979.

It is no exaggeration to say that historically there has been a kind of tug-of-war between litigation and arbitration as a means of resolving commercial disputes. The English Courts have traditionally been jealous of the power they exercised

and wary of what they regarded as home-made systems of law or the ad hoc justice of a Solomon sitting under a palm tree. Judges, therefore, always tended to believe that their instinctive reaction in favour of litigation as against arbitration was in the best interests of the parties: that it was in the best interests of the certainty and development of the law and, therefore, of the community as a whole.

As you will all know, mainly through the experience and expertise developed by specialist arbitrators and arbitration tribunals, this attitude became increasingly outmoded until today it is virtually non-existent. Never in our history have the Courts and arbitrators had a greater respect for each other, and never have the Judges been more willing to assist the commercial community.

One only has to think of Lord Diplock as President of the Chartered Institute; Lord Denning as an Honorary Member; the Lord Chancellor as a Fellow; the frequency and willingness with which Commercial Judges speak at Seminars and Conferences (Sir Michael Kerr spoke for the Institute of Chartered Shipbrokers recently, and Lord Justice Donaldson is a regular speaker) and the formation of the Commercial Court Committee a couple of years ago.

Business men, on the other hand, traditionally tended to favour arbitration as against litigation for a variety of reasons, some real, but some illusory. After all, when businessmen make a contract, they do not like, at any rate openly, to envisage the possibility of a dispute leading to litigation. But the insertion of an arbitration clause among the final p-ovisions of a contract does not suggest the anticipation of a rift between them; on the contrary, it is taken as a mutual expression of willingness to dispose of any dispute in a manner which is as friendly and informal as possible.

So the Courts have been faced with two basic considerations: the first is that nothing, it seems, would deter business men from inserting arbitration clauses in their contracts; also, subject to considerations of public policy and illegality, freedom of contract has been a fundamental principle of our law.

But Parliament and the Courts have nevertheless always been unwilling to surrender to arbitration tribunals the Court's power and duty to be the ultimate arbiter of issues of law, whether as to its interpretation, its application to individual disputes, or its development.

The fear was that, without the ultimate sanction of the Court, arbitrations would be liable to develop into a kind of free for all, with the Courts administering one system of law and arbitral tribunals a variety of others, or merely acting on what is regarded as fair or expedient in individual cases.

I will repeat a few paragraphs from a talk I gave recently at a two-day Conference :-

" It is well known that an English arbitrator is obliged to decide a dispute in accordance with the general substantive law of the land. During the next two days you will, I think, hear views from the supporters of the "lawyer-free" system of arbitration, and of the "uncontrolled decision", as the 17th Century commentators conceived of arbitration; but let us for a moment consider the alternatives. Conceivably the arbitrator could approach the dispute with an entirely fresh mind, uncluttered with authority from the Courts and previous decisions of other arbitrators, and decide the dispute by applying the unwritten rules of "good conscience and equity" or, as they say in one major arbitration centre, "with logic and fairness". This is certainly an appealing concept, but one must remember that almost all contract disputes are concerned with the distribution of risk between the parties, and that this distribution is closely linked with the fixing of the price. When the parties are negotiating their contract, they cannot make a sensible and balanced contract without knowing in advance what the legal consequences will be if various sets of events take place. It is not enough to know that any dispute will be decided logically and fairly; for who is to set the standard of logic and fairness? What they need is certainty, which cannot be obtained by general appeal to equity.

Without the arbitrator being required to apply the general law of the land, there would grow up a variety of contract laws, in fact, different laws for different trades. There is no room for this. I doubt that it could be put better today than in the words of Lord Justice Banks fifty-five years ago, when he said :-

" .....Amongs commercial men what are commonly called commercial arbitrations are undoubtedly and deservedly popular. That they will continue their present popularity I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the Arbitrator, and to secure that the law that is administered by an Arbitrator is in substance the law of the land and not some home-made law of the particular Arbitrator or the particular Association. To release real and effective control over commercial arbitrations is to allow the Arbitrator, or the Arbitration Tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not

according to law as he or they think fit, in other words to be outside the law ....."

I would suggest that essentially the Court's supervision has been a strengthening element for arbitration in London. The contractural element of leaving the parties to the bargain which they have struck is broadly respected, but the judicial element is also recognized that no one is beyond the protection of the law. In the well known and oft repeat words of that great lawyer, Lord Justice Scrutton, "there must be no Alsatia in England where the King's Writ does not run".

This is the traditional view, and the recognition of its advantages, as stres by this view has, I suggest, perpeuated the procedure. If we were only concerned with domestic arbitrations, I suppose there would be few complaints. But we, of all countries, have a vast and ever growing international arbitration business, and what do these international customers have to say about it?

Clearly there are many who do not approve of the traditional view. There are many who feel, to a lesser or greater extent, that England is losing out because of this dislike of the procedure. "

By the Arbitration Act 1950 which, in the Arbitration Act 1950 which, in the Arbitration Act 1979, is referred to as the Principal Act, the Courts exercise control over arbitrators in many ways, and the way in which the Courts exercise control in relation to issues of law is by means of the procedure of "Case Stated" or the "Special Case". Its effect is that if either or both of the parties desire that any or all of the legal issues should not be decided finally by the arbitrator but by the Courts, then they must make up their minds about this before the arbitrator has become functus officio upon publication of his Award by asking him to state a "Special Case" for the opinion of the Court on one or more of the matierial issues of law. This has been the most important and probably the most controversial power possessed by our Courts in relation to arbitration. It has been unique to England and Wales, although a limited Special Case procedure was adopted in Scotland a few years ago.

This power of the courts can arise in two situations; one relatively rare but potentially extremely useful, and the other less rare, in arbitrations involving any debateable issue of law. In the first class of case, the arbitrator or umpire, being himself unsure of the answer to some legal question arising in the course of the reference, consults the Court, of his own volition, obtains a judgement, and then proceeds with the arbitration and the making of his Award accordingly. The Court's decision on the Consultative Case Stated by the Arbitrator may in that event substantially shorten the remainder of the

arbitration by eliminating certain issues of fact and other issues of law.

The second class of case arises when one of the parties, and sometimes both parties, do not wish the final decision on questions of law to rest with the arbitration tribunal but wish to have it decided by the Courts. The procedure in such cases is for the party or parties to request the Arbitrator to make his Award in the form of a special case. This request is sometimes intimated at an early stage so that everyone concerned in the Arbitration knows what is to come particularly if it is clear from the outset that a Special Case will be asked for in any event. More usually, however, the request is made at the end of the Hearing when the issues of law and the apparent attitude of the tribunal towards them have become clearer to the parties. The tribunal has a discretion to agree or to refuse to accede to a request for a Special Case. If it refuses, as sometimes happens, particularly if it considers that the request is made for tactical reasons such as to gain time, then the party desiring the Special Case can apply to the Courts for an Order that the Tribunal shall comply with the request.

In order to appreciate how the procedure works, and why its availablity has been, and to some extent remains, a controversial question, it is necessary shortly to explain the nature of the contents of an Award made in the form of a Special Case. Having considered the evidence and arguments advanced on behalf of the respective parties, both on the issue of fact and of law, the arbitral tribunal must first decide on and "find" the material facts which it accepts as reflecting the true position. These must be set out in full in the Special Case, usually in numbered paragraphs. It is then also usual to go on by summarizing in such detail as the tribunal thinks fit the opposing contentions of the parties which it has taken into consideration. Next the Special Case must set out the questions of law which are left for the decision of the Court. These will frequently be formulated by agreement between the parties in order to ensure that they are wide enough to cover all the matters of law which are at issue. Finally, the Tribunal usually states its conclusions in an alternative form making at least two alternative Awards, the ultimate choice between them depending upon the Court's answer to the question or questions of law. The first or primary Award will represent the Tribunal's conclusion as to the correct answer. The alternative Award will then set out what the outcome is to be if the question or questions of law are answered in the contrary sense to the view adopted by the Tribunal. When there is more than one question of law, or if more than one answer or permutation of answers are possible, then there may be more than two alternative Awards. In order to keep matters as simple as possible in complex situations in which all possible answers cannot be readily foreseen it has been a common practice for the Tribunal, instead of making numerous alternative Awards, to make only one or two but then to request the Court, if it should answer the question or question of law neither in the primary nor in the secondary sense as set out, to remit the case to the Tribunal with a Directions to make its Award on the basis of

whatever the judgement of the Court pronounces to be the correct legal position.

THE ARBITRATION ACT 1979

A talk on the Arbitration Act 1979 would not really be complete without a few words on the Commercial Court Committee, and on the Report on Arbitration presented to Parliament by the Lord High Chancellor in 1978.

Its two introductory paragraphs read :-

> 1. The Commercial Court Committee was established in order to provide a direct link between the commercial users of the Court and the Court itself, thus improving the service which the Court is able to offer. The Judges of the Commercial Court are ex officio members and the other members represent the main categories of user. These are bankers, ship-owners, charterers, shippers, underwriters, commodity merchants and dealers, brokers, professional arbitrators, solicitors and barristers. In addition, the Committee has members who give it links with national maritime law associations throughout the world, with North America and the European Economic Community and with the United Kingdom Department of Trade.
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> 2. The Committee's terms of reference are to consider and keep under review the working of the Commercial Court and the Arbitration Special Case procedure and to make recommendations to the Lord Chancellor as may be necessary from time to time. This report concerns arbitration and, in particular, the Special Case procedure.

The Bill for the Act was put before Parliament, firstly in the Lords and finally in the Commons, as a result of the Commercial Court Committee's Report, and it passed into law on the 1st August this year.

What is the Act designed to achieve? Clearly its broad object is to make London arbitration more effective and more attractive and it sets out to do that in more or less nine different ways :-

1. It removes from the Court their power to remit or set aside an Award for error of fact or law on its face.

2. It repeals Section 21 of the Principal Act - the provision relating to the Special Case.

3. It replaces the powers mentioned in (1) and (2) above by a new Appeal Procedure.

4. It seeks to prevent the abuse of the New Appeal Procedure.

5. It provides for Reasoned Awards.

6. It provides for the Hearing of preliminary issues of law arising in the course of the arbitration (this is more or less the substitute for the old consultative case).

7. It provides for the exclusion of the Appeal Procedure.

8. It provides for interlocutory orders.

9. It covers minor amendments.