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The Arbitration Act Ten Years On - A Paragon of Party Autonomy?

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The entry into force of the Arbitration Act 1996 ("the Arbitration Act") on January 31, 1997 marked a watershed in English arbitration law. English arbitration law had previously been criticised as allowing excessive court intervention in the arbitral process and failing to accord adequate weight to party autonomy. The Departmental Advisory Committee of the Department of Trade and Industry ("the DAC") was set up to address these concerns. Under the stewardship of Lord Mustill, Lord Steyn and then Lord Saville, the DAC sought, over a ten-year period beginning in 1985, to devise a statutory scheme that would resolve these issues and cement London's position as a global centre of international arbitration.[1]

The main goals of the Arbitration Act were:

- to provide a clear and accessible statement of the law;
- to limit judicial involvement in the arbitral process; and
- to limit rights of appeal against arbitral awards.[2]

The tenth anniversary of the Arbitration Act provides an opportunity to ask whether the Arbitration Act has accomplished these objectives. Is the Arbitration Act a model for other jurisdictions or can the Arbitration Act itself be improved by adopting recent statutory reforms in other jurisdictions? Does the Arbitration Act preserve or limit the party autonomy that is a fundamental precept of international arbitration?

Have the Goals of the Arbitration Act Been Met?

A Clear and Accessible Statement of the Law?

One of the principal goals of the Arbitration Act was to consolidate English law into one statute that would be readily accessible to potential users.

As Thomas LJ noted in *Seabridge Shipping AB v. AC Orssleff's Eftf's A/S* [1999] 2 Lloyd's Rep, the Arbitration Act aimed to consolidate English arbitration law "*in a logical order and expressed in language sufficiently clear and free from technicalities to be readily comprehensible to the layman.*"

The Arbitration Act has broadly achieved that goal. The Arbitration Act establishes a coherent legal framework that is both accessible and flexible. Whereas English arbitration law was previously spread across at least three statutes (the Arbitration Act 1950, the Arbitration Act 1975, the Arbitration Act 1979 and related enactments), as well as the rules of Supreme Court, and a wealth of case law, the Arbitration Act consolidated these sources into one statutory regime drafted in an accessible and user-friendly style.

Although the model law drafted by the United Nations ("The UNCITRAL Model Law") exerted a strong influence on the Arbitration Act in both language and structure, the DAC ultimately decided there were cogent reasons why England should not adopt the UNCITRAL Model Law in its entirety. The Arbitration Act differs from the UNCITRAL Model Law in important respects.

In some respects, the Arbitration Act is less prescriptive than the UNCITRAL Model Law. For example, the Arbitration Act does not contain the detailed stipulations about Statements of Claim or Defences at Article 23 of the UNCITRAL Model Law. Moreover, the detailed provisions concerning experts appointed by the arbitral tribunal at Article 26 of the UNCITRAL Model Law are entirely absent from the Arbitration Act.

In other respects, the Arbitration Act goes beyond the UNCITRAL Model Law. One significant difference is that the Arbitration Act articulates mandatory duties that apply in all arbitrations seated in England. Section 40(1) of the Arbitration Act imposes a general and mandatory duty upon the parties to do "*all things necessary for the proper and expeditious conduct of the arbitration.*" Similarly, Section 33(1) of the Arbitration Act imposes a general and mandatory duty on the tribunal to "act fairly and impartially as between the parties" and "adopt procedures suitable to the circumstances of the particular case, so as to avoid unnecessary delay or expense."

At a practical level, one particularly important difference between the Arbitration Act and the UNCITRAL Model Law is the express distinction the Arbitration Act draws between mandatory rules and provisions the parties can opt into or out of.

Section 4 of the Arbitration Act expressly distinguishes between mandatory rules and non-mandatory rules. Section 4(1) specifies that the mandatory provisions are listed in Schedule 1 of the Act and that such rules have effect notwithstanding any agreement by the parties to the contrary. The mandatory provisions include the power of the court to remove an arbitrator (s. 24), the general duty of the tribunal (s. 33), and the general duty of the parties to do all things necessary for the proper and expeditious conduct of the arbitral proceedings (s. 40(1)). Although these mandatory rules inevitably limit party autonomy, the limits of party autonomy are at least narrowly drawn and clearly articulated.

In turn, the voluntary provisions of the Arbitration Act fall into two categories: opt-out provisions apply unless the parties have expressly provided otherwise whereas opt-in provisions do not apply unless the parties have so stipulated.

For example, Section 41(1) of the Arbitration Act stipulates that the parties are free to agree upon the tribunal's powers in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration. In turn, Section 41(2)

specifies that the default provisions, described at Sections 41(3) to 41 (7), shall apply "*unless otherwise agreed by the parties*." These default provisions include the power to prevent a party from relying on any allegation or material relating to a peremptory order (s. 41(7)(a)), or to draw adverse inferences from non-compliance with orders of the tribunal (s. 41(7)(b)).

In its use of non-mandatory provisions, the Arbitration Act strikes a balance between offering potential users a detailed framework and giving the parties the flexibility to opt into or out of that framework. Parties agreeing to arbitrate in England should carefully consider which non-mandatory provisions to opt into and out of. By selecting the rules of a leading arbitral institution (such as the LCIA or the ICC), the parties will often opt into or out of provisions of the Arbitration Act. It is, therefore, important for parties to consider how the rules of any arbitral institution they choose may affect the application of non-mandatory provisions of the Arbitration Act. When the parties choose *ad hoc* arbitration, as distinct from arbitration under institutional rules, it is particularly important for the parties specifically to consider which provisions to opt into or out of. In the absence of institutional rules, the parties must opt into or out of any provisions expressly and separately.

Limited Judicial Intervention in the Arbitral Process?

A further goal of the Arbitration Act was to minimise judicial involvement in the arbitral process. The last ten years have shown the Arbitration Act to be broadly successful in this regard.

Prior to the Arbitration Act, English courts were criticised for their excessively interventionist approach. Some commentators cite the decision of the House of Lords in *S.A. Coppee Lavalin v. Ken Ren Fertilisers* [1994] 2 WLR 631 as the nadir of that interventionism. In the *Ken Ren* decision, the House of Lords held an English court had jurisdiction to grant an order for security for costs even where the parties had no connection to England. Even though the House of Lords emphasised that the jurisdiction would be exercised sparingly, the decision attracted significant criticism. Lord Saville noted that Ken Ren was seen as "*confirming the widely held suspicion that the English courts were only too ready to interfere in the arbitral process and to impose their own dictat on the parties, notwithstanding the agreement of the parties to arbitrate rather than litigate.*"[3]

Section 38(3) of the Arbitration Act 1996 has expressly removed the jurisdiction of the courts to order security for costs in arbitral proceedings and vested that power in the tribunal.

More broadly, the Arbitration Act expressly limits judicial intervention in the arbitral process. Section 1(c) of the Arbitration Act defines the "*General Principles*" applicable to the Act and states that "*in matters governed by this Part the court shall not intervene except as provided by this Part.*" In this respect, the Arbitration Act mirrors Article 5 of the UNCITRAL Model Law which states that "*no court shall intervene except where so provided by this Law*."

The Arbitration Act permits court intervention in narrowly defined circumstances including the removal of arbitrators (s. 24), and the determination of preliminary points of jurisdiction (s. 32), or law (s. 45). Moreover, a number of powers conferred upon courts under the Arbitration Act can only be exercised "*unless otherwise agreed by the parties*." These include the power to appoint or to set aside the appointment of arbitrators (s. 17 and 18), to enforce peremptory orders of the tribunal (s. 42), to determine preliminary points of law (s. 45), and to consider an appeal by a party on a *question of law* arising from the award (s. 69).

Limited Appeal Against Arbitral Awards?

A further significant goal of the Arbitration Act was to limit rights of appeal against English arbitral awards in the English courts. Because an award is typically "made" in the jurisdiction of the seat under Article V(1)(e) of the New York Convention, a successful appeal in the place of the arbitration creates a basis for resisting the enforcement of the award internationally. For this reason, broad grounds of appeal under the law of the seat can impede the effectiveness of an arbitral award and act as a disincentive for choosing a particular seat.

Before 1997, the grounds of appeal against arbitral awards were significantly broader in England than in many other jurisdictions. Indeed, as late as 1979, under the "case stated" procedure, the English courts could require an arbitrator to state a case on a question of law or fact for the opinion of the court where the arbitrator was believed to have made an error. Between 1979 and 1997, a remnant of the case stated procedure remained, but required arbitrators (instead of courts) to implement the court's finding on points of law by correcting their original award.[4] Although the 1979 Act permitted parties to opt out of case stated appeals for international arbitration, these exclusion agreements were disallowed in many domestic arbitrations.[5]

The Arbitration Act has significantly narrowed the grounds upon which an award of a tribunal seated in England can be appealed. The principal grounds of appeal under the Arbitration Act are that the tribunal lacked substantive jurisdiction (s. 67), serious irregularity in the arbitral proceedings (s. 68), and error of law (s. 69).

The Arbitration Act differs from the UNCITRAL Model Law because Section 69 of the Arbitration Act allows appeal on a question of substantive law. Under Article 34 of the UNCITRAL Model Law, an arbitral award can only be set aside in limited circumstances including incapacity of one of the parties to enter into the arbitration agreement (Article 34(2)(a)(i)), lack of substantive jurisdiction on the part of the arbitrators (Article 34(2)(a)(iii)), and infringement of the public policy of the state where there award is made (Article 34(2)(b)(ii)). The UNCITRAL Model Law does not contain any general right to appeal an arbitral award for substantive error of law.

In contrast, Section 69 of the Arbitration Act 1996 provides:

(1) *Unless otherwise agreed by the parties*, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

(2) An appeal shall not be brought under this section except:

a. With the agreement of all the parties to the proceedings;

b. With the leave of the court.

The right to appeal on a "question of law" under Section 69 appears broad. Some commentators have suggested that Section 69 remains a significant disincentive to arbitrating in England. However, there are several important limitations on the scope of Section 69.

First, Section 69 expressly only applies "*unless otherwise agreed by the parties*." It is an opt-out provision. Many parties opt out of Section 69 by incorporating the rules of a leading arbitral institution. For example, Article 26.9 of the LCIA Rules provides that the parties "*waive irrevocably the rights to any form of appeal, review or recourse to any state court or other judicial authority*." In agreeing to arbitrate in London under the LCIA Rules parties incorporate this rule and thereby exclude their right of appeal under Section 69. Article 28(6) of the ICC Rules operates to the same effect, though less explicitly.[6] When parties seek to opt out of Section 69 and do not select institutional rules that do so, they will

need to do so expressly.

Second, an appeal for error of law can only be brought with the consent of all the parties or with the leave of the court. English courts have recognised that leave to appeal should only be granted in limited circumstances and that the court must be satisfied it is "*just and equitable in all the circumstances*" to grant leave (per *Tuckey J in Egmatra AG v. macro Trading Corporation* [1999] 1 Lloyd's Rep 862 at 865). English courts have repeatedly refused leave to appeal where the applicable law is not English law (*Athletic Union of Constantinople v. National Basketball Association* [2002] 1 Lloyd's Rep 305 and *Sanghi Polyesters Ltd (India) v. International Investor (KFC, Kuwait)* [2000] 1 Lloyd's Rep 480). Therefore, parties will effectively exclude Section 69 by providing for a law other than English law to apply to their contract.

Third, even where leave to appeal has been granted, the English courts have been reluctant to overturn arbitrators' awards on questions of law. In *BMBF (No.12) Ltd v. Harland and Wolff Shipbuilding and Heavy Industry* [2001] 2 Lloyd's Rep. 227, the Court of Appeal overturned a first instance decision and upheld the arbitrators' award on the basis that "*it is not for the courts to substitute its own view for that of experienced arbitrators on questions such as this.*" The English courts have recognised that Section 69 is a "*long stop provision*" and the courts should exercise this provision sparingly so as to "*respect the decision of the tribunal of the parties' choice.*" (*per* Tuckey J in *Egmatra AG v. Macro Trading Corporation* [1999] 1 Lloyd's Rep 862 at 865).

For the reasons discussed above, Section 69 does not constrain party autonomy as much as has sometimes been suggested.

The Approach of the English Judiciary

The approach of the English judiciary over the last ten years has been as important as the Arbitration Act itself. Any statute is only as effective as the judiciary that interprets and applies the statute. Recent cases highlight an increasingly pro-arbitration stance on the part of the English courts. These English court decisions provide further support for England as an arbitral seat.

The decision of the Court of Appeal in *Fiona Trust & Holding Corp v. Privalov* [2007] EWCA Civ 20 this year is a case in point. In *Fiona Trust*, the Court of Appeal overturned the decision at first instance and granted a stay of court proceedings in support of arbitration. The court adopted a broad view of the severability principle (the principle that an arbitration clause survives the invalidity of a contract of which it forms part). The court held that the issue of whether the contract containing the agreement to arbitrate had been procured by bribery (and was therefore void for illegality) should be decided by the arbitrators.

The court reasoned that "*English common law has been evolving towards a recognition that the arbitration clause is a separate contract that survives the destruction (or other termination) of the main contract.*"

The Court of Appeal acknowledged that Section 7(1) of the Arbitration Act - which parallels Article 16(1) of the UNCITRAL Model Law - had given express statutory recognition to the severability principle. The court then considered that, in applying the severability principle, a "*liberal construction*" and a "*presumption of one-stop arbitration*" should be adopted.

A similarly pro-arbitration approach to questions of severability and the scope of the agreement to arbitrate was adopted in *Vee Networks Ltd v. Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192. In this regard, the approach of the English courts parallels pro-arbitration stance adopted by the U.S. Supreme Court in recent decisions including *Prima Paint Corp v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (1967), and *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006), and the Federal Court of Australia in *Walter Rau Neusser Oel und Fett AG v. Cross Pacific Trading Ltd* [2005] FCA 1152.

A Model for Other Jurisdictions?

Ten years on, has the Arbitration Act been a success? Do those areas where the Arbitration Act differs from the UNCITRAL Model Law encourage or discourage parties from arbitrating in England? Can the English Arbitration Act benefit from more recent statutory reforms in other jurisdictions?

At an empirical level, the continued, and growing, popularity of London as an arbitral seat bears testament to both the success of the Arbitration Act and the English Courts in applying the Act. The annual breakdown published by the ICC showed a jump in the number of ICC arbitrations in London in the years immediately following the enactment of the Arbitration Act (the number of ICC arbitrations where the parties chose a seat in the United Kingdom increased from 22 in 1995 to 48 by 2000).[7] Similarly, recent research by Queen Mary University ranks London as the preferred arbitration venue for corporate parties.[8]

Nevertheless, the marketplace for international arbitration is both dynamic and competitive. Parties have a choice of arbitral seat. For this reason, it is important to continue to assess the Arbitration Act against developments in other jurisdictions. Parties will only continue to choose England as an arbitral seat so long as England continues to offer a statutory regime that compares favourably with that in other countries.

At least fifty countries, including, recently, Germany (1998), Spain (2003) and Austria (2006), have adopted legislation significantly based on the UNCITRAL Model Law. However, acceptance of the UNCITRAL Model Law is far from universal and a number of countries have adopted bespoke solutions similar to the Arbitration Act. Both Sweden and Denmark have recently adopted arbitration laws that, although influenced by the UNCITRAL Model Law, also have noteworthy differences. The recent Danish Act 2005, for example, mirrors the distinction between mandatory provisions and non-mandatory provisions in the Arbitration Act (Danish Arbitration Act, Section. 2). However, the Danish Act differs in that an international arbitration award cannot generally be appealed on the basis of error of law (Danish Arbitration Act, Section 37).

Within the common law world, jurisdictions that have recently enacted or proposed amendments to their arbitration laws show fundamental similarities, but also subtle differences, to the Arbitration Act.

The Singapore Arbitration Act 2001 provides an interesting contrast to Section 69 of the Arbitration Act. For international arbitrations, Section 24 of the Singaporean Arbitration Act follows Article 34 of the UNCITRAL Mode Law and allows only limited review of the merits of an arbitral award. However, for domestic arbitrations, Section 49 of the Singaporean Arbitration Act allows appeals on questions of law similar to Section 69. On the surface, therefore, the grounds of appeal in respect of an international award are narrower under the Singaporean Arbitration Act. However, the parties in an English seated arbitration are free to opt out of the application of Section 69 (e.g. by selecting appropriate institutional rules). In this respect, although the default position under the Arbitration Act varies from the Singaporean Arbitration Act, the parties can contract out of that default position.

In the same way, distinctions between the Arbitration Act and the draft New Zealand Arbitration Bill underscore how the parties can vary the default position by contract. The DAC decided not to

include an express obligation of confidentiality in the Arbitration Act - the implied duty of confidentiality and the exceptions to that duty have evolved as a result of case law subsequent to the Act (*see Ali Shipping Corp v. Shipyard Trogir* [1999] 1 W.L.R. 314). The draft New Zealand Arbitration Bill (which, if passed, could come into force as early as 24 September 2007), in contrast, contains express statutory recognition of the confidentiality of information disclosed in an arbitration (Section 14) and the exceptions to the duty of confidentiality (Section 14A). Although this may appear to be a significant difference between the two regimes, parties can include express confidentiality undertakings within an agreement to arbitrate in England.

Conclusion

In reality, there is no perfect arbitration law. The hallmark of a good arbitration law is that it grants the maximum autonomy to the parties to define their own arbitral procedure. One of the attractions of the Arbitration Act is the balance that it strikes between establishing a default framework and enabling the parties to vary that position as a matter of contract (by, for example, opting into or out of non-mandatory provisions).

To the extent that the Arbitration Act differs from the UNCITRAL Model Law, most of these differences can be opted out of by the parties. The differences between the Arbitration Act and the UNITRAL Model Law do not, therefore, significantly constrain party autonomy. At a practical level, it is important for the parties to be aware of the flexibility of the Arbitration Act so that they are best positioned to craft the optimal arbitration procedure for the contract and subject matter at hand.

Ten years on, the Arbitration Act 1996 continues to provide a flexible and user-friendly framework. The Arbitration Act has played a significant, albeit not exclusive, role in the growing popularity of London as an arbitral seat. The flexibility according to the parties, coupled with an increasingly pro-arbitration judiciary, are significant draw cards for London.

Endnotes

1 *See* Saville LJ, *Departmental Advisory Committee on Arbitration Law*, 13 Arb. Int'l 275 (1999); Saville LJ, *DAC Report on the English Arbitration Bill*, 15 Arb. Int'l 413 (1999).

2 *See* Saville LJ, *Departmental Advisory Committee on Arbitration Law*, 13 Arb. Int'l 275 (1999).

3 Saville LJ, *The Arbitration Act 1996: What We Have Tried to Accomplish*, 13 Const. L.J. 410, 414 (1997).

4 Arbitration Act, 1979 s. 1(2)(b).

5 Arbitration Act, 1979 s. 3(6) (the 1979 Act permitted parties in domestic arbitration to opt out of case stated appeals, but only "after the commencement of the arbitration in which the award is made or, as the case may be, in which the question of law arises.").

6 ICC Rules, Art. 28(6) ("Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and *shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*.") (emphasis added).

7 *See 1995 Statistical Report*, 7/1 ICC Bull 1996, 7 (1996); *2000 Statistical Report*, 12/1 ICC Bull 2001 10 (2001).

8 Queen Mary School of International Arbitration, *International Arbitration:Corporate Attitudes and Practices 2006*, (published by PriceWaterhouseCoopers 2006).

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