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PRESIDENT'S COLUMN by Raymond Kuah Leong Heng

Natural Justice and Arbitration Proceedings - The basic concern with natural justice is to make sure that its principles are not misconstrued so as to impede the flexibility and discretionary process of arbitration.

The curial process with its statutory Rules of Court embodies the natural justice requirements within Court Proceedings. Accordingly, in litigation it is statutorily obliged to comply with the Rules of Court. However, in arbitration proceedings there is no requirement to comply with such Rules of Court; although natural justice in arbitration proceedings is implied pursuant to Common Law Principles. Thus it is recognised that common law has its roots in natural justice, although it is a mutable concept that has to take into consideration the requirement of a fair hearing as being one of the fundamental legal principles.

Natural justice requirements within arbitration must necessarily vary to accord with each case involved, and ought to be considered in the context that arbitration is a private and consensual process, and generally operates as an alternative to litigation. In ***Gas and Field Corp. of Victoria v. Wood Hall Ltd. and Leonard Pipeline Contractors Ltd. (1978) VR 385, Marsk J.*** held that natural justice applies by implication to arbitration proceedings and requires the arbitrator to be impartial and to provide a fair and full hearing to each party. Natural justice is crucial within any decision-making process because it ensures that unfair processes are not used to reach the decision. This principle applies to judicial, arbitrial as well as administrative forms of decision-making.

Under English legal system there are two fundamental requirements of justice in deciding a dispute between two or more parties. The first principle is that the judge, or the arbitrator or other tribunal must be, and must be seen to be, disinterested and unbiased. The second principle is that every party to the dispute must be given the opportunity to present his case; to know the opposing case and to meet the opposing case; since it is as fundamental a principle of arbitration, as of litigation, that each party shall have a fair opportunity to his own case and to challenge the case put by his adversary. It follows that unless the parties otherwise agree, an arbitrator shall not receive oral evidence from one party in the absence of the other; and should not receive any document from one party without ensuring that the other party receives a copy. ***Re: Renown Investments v. Mecca Leisure (1984) 271 E.G. 989, C.A.***

It is common ground that the very existence of arbitration as a mechanism for resolving disputes arising out of a particular commercial contract has its origin in the arbitration agreement; since each contracting party must consent to the referral of a dispute to an agreed arbitrator, who may be a sole arbitrator or a panel of an arbitral tribunal. Parties who choose to enter an arbitration agreement do so largely to prevent the development of a court case. It is recognised that

Natural Justice and Arbitration Proceedings

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the flexibility and private nature of arbitration is better suited to a dispute resolution arising within a business relationship. For example, if the dispute has arisen as a result of a minor breach of a non-fundamental term in the contract between two parties in business, the arbitrator may well consider what each party hopes to achieve; since strict formality and adoption of the Rules of Court may be detrimental to the aims of expedient resolution and the continuance of an amicable business relationship in such a dispute.

For this reason, where there are terms and conditions of arbitration proceedings expressly set out in the contract, the appointed arbitrators are bound to comply with the wishes of the Parties and must indeed heed their express requirements. However, in the event of an overall analysis of the arbitration agreement, no express or implied term can be established, the arbitrator ought still to consider the circumstance in which he may have to exercise a discretion to determine appropriate procedures in the context of the hearing, the nature of the dispute, and such practical issues as the costs and expediency when determining conduct of the arbitration proceedings.

Arbitration was created and developed as a private mode of dispute resolution mechanism to provide an adaptable and flexible alternative to the court method of dispute resolution; and it should therefore be so regulated by the parties and the arbitrator appointed by the parties. The requirement to ensure a fair decision is reached through due regard for natural justice is not commensurate with the adversarial procedures.

This is illustrated in the (Australian) case: ***Imperial Leatherware Co. Pty. Ltd. v. Macri and Marcellino Pty. Ltd.*** where it brings the focus of arbitration clearly into perspective; and in the words of Roger CJ. the Supreme Court of NSW:

> *"The heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues. Those aims, to a large extent, are made impossible of achievement if the procedures of a Court are mirrored. Nor is there anything in the requirement to provide 'procedural justice' which requires adoption of the pleadings and procedures of Court. What is required is that the parties enjoy the benefits of natural justice consistently with the requirements of arbitrators for dispensing with technicalities".*

In having a thorough examination of the policy and structure of the Act and the basic purpose underlying arbitration, Roger CJ went on to state:

> *"The sole requirement in the "letter and spirit" of the Act is the call of natural justice which, while requiring that each party have a proper opportunity of putting its own case, and meeting the case for the other party, does not regard adherence to court procedures as necessary".*

However, in ***South Australian Superannuation Fund Investment Trust v. Leighton Contractors Pty Ltd. and Ors (1990) 55 SASR 327***, the case was held to have imposed concepts of fairness taken from litigation process and applied them to arbitration. It is submitted that this development impedes the autonomous operation of arbitration, because fairness assumes a different role within arbitration to that being practised in the Court room; as there are no statutory obligations concerning fair procedure within arbitration; and the parties and arbitrator have the discretion to determine what is necessary and just in the particular circumstances.

Arbitration is essentially founded on the concept of the great importance to freedom of contract. Parties who make the choice of arbitration as the appropriate form of dispute resolution should be entitled to determine how to regulate their conduct of arbitration; and balanced with this purpose is the need to ensure that a decision-making process is conducted on a fair basis. The requirements of natural justice must therefore be adapted to individual circumstances; this is particularly important within an alternative private dispute resolution process. ▲

FEATURE

The English Arbitration Act 1996 and reform of arbitration law in Hong Kong and Singapore: a brave new world?

by **Robert Morgan - Hong Kong**

(Text of an address delivered by Robert Morgan to the Annual General Meeting of the Singapore Institute of Arbitrators, 29 July 1996)

Singapore has received much coverage in the Hong Kong media over the past couple of months, in particular because of the similarities that are said to exist between the Pearl of the Orient and the Lion City in terms of their economic and commercial climates. The Singapore Chamber of Commerce was inaugurated in Hong Kong on 17 July, an event followed shortly afterwards by the Singapore Expo. There also exist a number of legal similarities. I am privileged to have been invited to play a part in increasing understanding between our jurisdictions, though the timing is entirely coincidental!

In terms of arbitration law, both jurisdictions bear great similarities. Their laws were originally based entirely on the English model. Both subsequently adopted the UNCITRAL Model Law on International Commercial Arbitration of 1986, thus promulgating a dual system of law: a new system for international arbitrations and the continuance of the original legislation (with a few amendments) for domestic arbitrations. Hong Kong did this in 1990, Singapore in 1995. In both cases the Model Law was adopted with some degree of modification. However, this is not the end of the story in either case. Hong Kong is now undergoing a period of reflection about the success of the Model Law, the need to modernise domestic arbitration and whether it would be appropriate to reintroduce a unitary system of arbitration law, albeit one based upon the Model Law rather than the English system. Singapore has just embarked on its journey to explore the Model Law in a practical sense, through case law experience. That the Model Law has been, by and large, successful in Hong Kong is something of which the territory can be proud and I have every reason to believe that Singapore's experience will not be dissimilar.

My brief tonight is to talk to you on the theme: *The English Arbitration Act 1996 and reform of arbitration law in Hong Kong and Singapore - a brave new world?* England's new Arbitration Act received the Royal Assent on 17 June 1996 and is due to take effect on 1 January 1997. Why should we look at this Act at all? What relevance does it have to South East Asia? As I have said, the law reform process is ongoing in Hong Kong and I do not expect that arbitration law in Singapore, whether domestic or international, will remain static for an indefinite period. Thus I pose the question: what can we learn from each other and to what models should we look?

To answer this question, we must consider first of all what the English Act is about and the background from whence it sprang. I do not seek to offer a detailed analysis of the Act in this forum but to discuss its fundamental principles and focus on a number of provisions of interest to the arbitration community here.

A POTTED HISTORY OF THE ENGLISH LAW REFORM PROCESS

It had for some time been considered that the Arbitration Acts 1950-1979 were notable for what they did not say rather than for what they did. Nowhere was there a clear statement of the arbitrator's powers, there was no statement of his duties and the user - particularly the foreign user - had to look to a morass of case law as well as to the statutes. Furthermore, it was felt that the arbitrator in any case lacked real inherent powers to progress an arbitration, challenges to jurisdiction being a case in point. Despite this, the arbitrator was still expected, in the 1980s idiom, to 'manage' the reference[1], to be in the driving seat. There was also the perennial worry about users being driven away from London because of the user-unfriendliness of English arbitration law. The momentum for reform really began, however, with the publication in June 1989 of a report by the Departmental Committee on Arbitration Law ('the DAC') entitled *A Report on the UNCITRAL Model Law on International Commercial Arbitration.* To the consternation of librarians everywhere, this report had an alternative (though punchier) title on the inside cover, *A New Arbitration Act?* The report came to be known among arbitration *cognoscenti* as the Mustill Report, after its then Chairman, Mustill LJ (as he then was). The report examined the Model Law in detail and offered a number of criticisms of varying weight and (as the Hong Kong experience would show) substance which were eventually to tilt the DAC against recommending its adoption:

1. that it was not a complete code of arbitration law. It applied only to international commercial arbitrations and there were a number of areas which the Model Law left untouched;

2. that it was not an international convention but only a 'model' law. This is, in my view, a benefit rather than a demerit as UNCITRAL's approach promoted flexibility;

3. that it was expressed in language which differed from a UK statute, having been drafted by representatives of states with a variety of drafting traditions;

4. that few countries had adopted it and that it was therefore a largely untried and untested system;

5. that it made no provision for a right of appeal on points of law. The feeling was that the Arbitration Act 1979 had struck a correct balance between party autonomy and judicial intervention, which should not be disturbed;

6. that it was in any event undesirable to have a dual system of arbitration law.

The DAC was also of the view that harmonisation of arbitration laws for harmonisation's sake was no reason for adopting the Model Law, even if the Model Law was the next in a line of instruments, starting with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, intended to give primacy to the awards of international arbitration tribunals. Whilst not recommending the adoption of the Model Law, the DAC opted for the typically British compromise solution encapsulated in the well-known paragraph 108 of the Mustill Report, which recommended the promulgation of a new Arbitration Act comprising a number of features:

1. a statement in statutory form of the important but uncontroversial principles of arbitration law, both common law and statutory;

2. a logical order and sufficiently untechnical language;

3. application to domestic and international arbitrations;

4. wider content than the Model Law;

5. the same structure and language as the Model Law, so far as possible, to make it more accessible to those who are familiar with the Model Law.

The Department of Trade & Industry (DTI), while generally mindful of the need for reform, was not prepared to commit public money for the considerable amount of work that was required to create the necessary Bill. The responsibility for getting the reform process under way therefore fell to the so-called Private Group led by Mr Arthur Marriott[2], with financial support from a number of organisations, including the Chartered Institute of Arbitrators, the Royal Institution of Chartered Surveyors, the Law Society, the London Maritime Arbitrators Association and a number of City of London law firms. The Group produced and sought comment upon ambitious proposals for an Arbitration Bill in May 1991 (which became known as the 'Eckersley draft') which followed the structure and language of the Model Law much too faithfully for more conservative tastes. DTI officials made it clear that a Bill in this form stood no chance of getting through the administrative and legislative machinery. It did, however, form the basis for discussions by the DAC and several more drafts of varying quality and utility were considered and put out to public consultation over the next four years. During this time the DAC, under the chairmanship of Steyn LJ (as he then was) gradually came to see the merits of the case put by the arbitration community for real root and branch reform rather than a mere combination of consolidation and codification of existing law. This was manifested by, *inter alia*, the appointment of Arthur Marriott to the DAC. Following another change of Chairman in 1994, the DAC decided to prepare a new draft on which the new Chairman, Saville LJ, did much work[3]. Following a further period of consultation and redrafting, the Arbitration Bill began its progress through Parliament in December 1995.

I should pause at this point to comment that Lord Steyn once described the gestation period of the Bill - 6½ years - as "elephantine" (the DAC itself was established as long ago as 1987). Given that the normal gestation period for an elephant is 22 months, the elephant that inspired Lord Steyn's comment is a unique biological specimen or a creature to be pitied! If only the Arbitration Bill had been just 22 months in the making.

THE ENGLISH ARBITRATION ACT 1996

So what are the principal features of the new Arbitration Act? Any survey this evening must of necessity be brief and selective, but I suggest that the following are the main points.

1. Like its predecessors, the Arbitration Acts of 1950 and 1979 as amended, the 1996 Act provides for a unitary system of arbitration law governing domestic and international arbitrations. Having said that, however, Part II of the Act contains provisions which apply only to domestic arbitrations. These define domestic arbitration agreements and deal with conditions for a stay of legal proceedings and agreements to exclude the High Court's jurisdiction to determine preliminary points of law and appeals against awards.

2. The Act is drafted in more user-friendly language than the 1950-1979 Acts, though its style is a compromise between normal English drafting conventions and that of the Model Law. One particular improvement which is not, however, in the Model Law, is the use of cross-references between sections, particularly with regard to provisions which affect the fundamental rights of the parties.

3. The Act codifies principles of common law and judicial pronouncements on the earlier legislation. This is seen particularly with regard to the general duties imposed upon tribunals and parties and to the powers of the High Court to remit or to set aside an award.

4. The Act treats the arbitration process in a more logical order than its predecessors. Part I begins

with introductory provisions: a statement of general principles (of which more in a moment); the scope of application of Part I; the seat of the arbitration (juridical rather than geographical - a concept which is dealt with for the first time in an English Arbitration Act) and a general explanation of mandatory and non-mandatory provisions. Thereafter, Part I of the Act goes on to deal with the arbitration process in a chronological order, from arbitration agreement to enforcement of and judicial challenges to awards.

5. *Statements of principle.* Section 1 is unique among UK Acts in the sense that it contains statements of general principle by reference to which Part I of the Act, which contains the major provisions of the statute, are to be construed. I can do no better than to quote *verbatim* the principles set out by the section:

   "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

   "(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

   "(c) in matters governed by this Part the court should not intervene except as provided by this Part".

   This is largely, though not entirely, in line with the Model Law. The tenor of the Act may be gathered by looking at this provision, particularly principle (a), in conjunction with Schedule 1, which helpfully lists the provisions of Part I that are mandatory, *viz* those from which the parties cannot contract out: these include such matters as stay of legal proceedings, extension by the court of agreed time limits, objections to jurisdiction, the general duty of the tribunal (about which more in a moment), the power of the High Court to remove the arbitrator and immunity of the arbitrator (about which more later). The mandatory provisions are the core of the Act; the remainder are subject to contrary agreement by the parties. It remains to be seen whether the courts will, in applying principle (c), treat 'should' as meaning 'shall'.

6. ***Statements of duty.*** The Act follows the approach of the Model Law in imposing affirmative and overriding duties, both on the arbitral tribunal and on the parties, which pervade the entire arbitration process. The duties imposed on the tribunal by s 1 are expanded upon by s 33, which requires the tribunal, firstly, to "(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined". In so doing, the tribunal "shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

   As can be seen, the exercise of the tribunal's discretion is thus made subject to express duties of reasonableness and judiciousness, as well as judicial capacity, with regard to choices of procedure. The new statutory immunity conferred on tribunals by s 29 of the Act is therefore not something which is given without a *quid pro quo*.

   The Act imposes general duties on the parties by way of a *quid pro quo* for maximising party autonomy. Section 40 requires the parties to "do all things necessary for the proper and expeditious conduct of the arbitral proceedings", which includes "(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any orders or directions of the tribunal, and (b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law ..." These general duties are not exhaustive and more specific duties are imposed on the parties by particular sections, eg to object to jurisdiction during the arbitral proceedings as soon as the matter alleged to be beyond jurisdiction is raised (s 31).

7. The Act is said to enact the Model Law in its entirety. Whether commentators and the courts will agree with this remains to be seen, but it is apparent that there are a number of differences of approach between the Act and the Model Law. For example:

   i. *s 5 of the Act does not implement the strict requirement of art 7 of the Model Law that the arbitration agreement be signed;*

   ii. *s 15 of the Act maintains the traditional English preference for a single arbitrator in the absence of party agreement, by contrast with the 3 arbitrators required by art 10 of the Model Law;*

   iii. *whereas art 12 of the Model Law requires the arbitrator to be both independent and impartial, s 33 of the Act requires only impartiality. This could lead to protracted arguments about the suitability of a particular nominee, who may be capable of acting impartially but who may not be entirely independent of a party;*

   iv. *the strict rules of evidence continue to apply unless the parties otherwise agree or the tribunal otherwise decides (s 34(2)(f) of the Act), whereas art 19(2) of the Model Law presupposes that the rules will not apply[4];*

   v. *the Act vests a clear power in the tribunal to order security for costs (s 38(3)), whereas in the Model Law this is not specifically stated and there is some debate as to whether this really is an interim measure of protection.*

   What is, however, clear is that the Act shares the philosophy of the Model Law with regard to such

matters as:

i. ***party autonomy.*** Section 1(b) of the Act and art 19 of the Model Law both give primacy to party autonomy. Where they diverge, however, is that the Act limits this freedom by reference to "such safeguards as are necessary in the public interest"; the Model Law, by contrast, is more specific in the sense that art 19 of the Model Law is subject to the overriding duty of fairness imposed both on the parties and the tribunal by art 18;

ii. ***arbitration agreements.*** *These must be in writing although, by virtue of the Act, there is no need for them to be signed. The principle of separabilliity of arbitration agreements will also be enshrined in the Act (s 7) and, in common with the Model Law (art 16(1)), separability will be full, not partial;*

iii. ***powers of the tribunal.*** *The tribunal is the primary decision-making authority and a number of powers (both existing common law powers and new powers) are clearly vested in the tribunal, such as the making of binding rulings as to jurisdiction (s 30) and orders for security for costs (s 38(3)) and the appointment of experts, legal advisers or assessors by the tribunal. The Act also makes clear that certain other powers may be given to the tribunal by agreement of the parties, such as the making of provisional awards (s 39);*

iv. ***the role of the High Court during arbitral proceedings.*** *This is restricted to (a) supporting the tribunal's peremptory orders in the event of failure to comply or insufficient compliance, (b) securing the attendance of witnesses; (c) making orders on matters beyond the tribunal's competence (eg matters affecting third parties) and (d) taking protective and other measures prior to the constitution of the tribunal. The last of these actually includes new powers, for example to order the form an appointment procedure should take instead of merely appointing an arbitrator (s 18(2) & (3)).* Kompetenz-Kompetenz *will be enshrined in English law by virtue of ss 30 and 31 of the Act and in the meantime the place of the Court of Appeal's decision in the* Harbour Assurance *case[5] is practically assured. The* quid pro quo *is, however, that by virtue of s 32 the last word on jurisdiction remains with the High Court;*

v. ***form of the award.*** *Section 52 requires awards to be in writing and to be signed by all arbitrators. For the first time an English statute lays down a positive duty to give reasons unless the parties agree otherwise. To get over the* Hiscox v Outhwaite *problem on challenges to or enforcement of a domestic award which has been made overseas[6], s 53 provides that where the seat of the arbitration is England & Wales or Northern Ireland, an award shall be treated as having been made there in any event, regardless of where it is actually signed etc;*

vi. ***finality of the award and judicial challenge.*** *Both the Act (s 1(c)) and the Model Law (art 5) limit recourse to the courts, except as provided by the legislation. However, the Act has retained the more wide-ranging powers of intervention found in its predecessors. Thus, under s 24 of the Act, the court may remove an arbitrator, though by contrast with the 1950 Act a number of exclusive grounds for doing so are set out: lack of impartiality or qualifications; physical or mental incapability to conduct the proceedings or justifiable doubts as to his capacity to do so (presumably judicial capacity); failure to conduct the proceedings properly or with reasonable despatch or to make an award with reasonable despatch. Section 68 of the Act sets out the court's power to remit or set aside an award on the ground of 'serious irregularity' (the term 'misconduct' has finally been given a long-overdue burial), which again is defined by reference to an exhaustive list, including failure by the tribunal to comply with its general duty of fairness towards the parties or with the procedure agreed between the parties; over- or under-performance of the tribunal's mandate, uncertainty or ambiguity as to the effect of the award and failure to comply with requirements as to the form of the award. The precise scope of this section will be a matter for the courts, but my initial reaction is that it appears to do away with procedural mishap, thus rolling back several years of judicial activism in arbitration. What is, however, clear is that remission of the award will normally be preferred to setting aside (s 68(3)), as at present. Then, of course, there is the right of appeal on a point of law, which is not only preserved by s 69 but extended in the sense that the time limit for applications for leave to appeal will be 28 days instead of the present 21. Whilst s 69 seeks to implement the* Nema *guidelines[7], I am not certain that its wording is adequate to the task of differentiating between a one-off contract and a standard form of contract. If I am right, the opportunities for judicial legislation under this section are potentially as awesome as those which accompanied s 1 of the 1979 Act. Appeal provisions have never been an easy subject for discussion; this problem is not helped by the fact that, whilst it is said that users are in favour of restricting rights of appeal, in practice they want the right legal answer at the same time!*

I must confess to having misgivings about this whole question of rights of appeal. There are few or no statistics on the matter, but opinion among the legal profession appears to indicate that applications for leave to appeal are made in a large proportion of cases. This in turn appears to indicate that parties are keen to utilise what rights of appeal they have, because the right legal answer is important. Lawyers

are less likely to be able to predict accurately the outcome of arbitrations and therefore to advise their clients accurately, because the Nema guidelines may in practice promote uncertainty in the law. This imposes a real social and business cost - more time and money tied up in arbitration pursuing apparently good arguments which are ultimately rejected. Speed and finality of arbitrations are very laudable aims, but I doubt whether the 'side effects' I have summarised can really have been intended by the House of Lords in The Nema.

This problem may beg the question in some people's minds (though not, I stress, mine): why should arbitral institutions and arbitrators invest considerable amounts of time, effort and money on Continuing Professional Development programmes aimed at reinforcing awareness of current substantive law and in promoting the making of certain and enforceable awards, when the judicial system will allow most errors of law to go by default?[8]

8. Lastly in this brief survey of the Act, arbitrators will be conferred with immunity from suit for any act or omission in the discharge or purported discharge of their functions, except where the act or omission was in bad faith (s 29 of the Act). The obiter dicta of the House of Lords in Sutcliffe v Thackrah[9] and Arenson v Casson Beckman Rutley & Co[10] about the immunity of arbitrators are therefore made binding law and Mustill & Boyd need speculate no more about when a major lawsuit against an arbitrator will be brought and what the outcome is likely to be[11]. A similar immunity will be vested in arbitral institutions (s 74), which under present law[12] are undoubtedly liable for duff appointments.

For all this, no-one would seriously assert that England will become a Model Law country. What is or is not a 'Model Law country' opens up another debate entirely because a number of states and territories, including Hong Kong and Singapore, have adopted the Model Law subject to modifications. For those who are interested in exploring this topic, I commend Professor Pieter Sanders' excellent and interesting article, Unity and Diversity in the Adoption of the Model Law[13].

What is clear from the history of the 1996 Act is that, despite the resistance of DTI officials to what they perceived as an over-ambitious and ultimately controversial attempt at reforming the law, and also as an encroachment upon their rights to prepare and initiate legislation[14], it was by the reformists sticking to their guns that the new legislation came to see the light of day at all. History is most informative on this point: the last attempt at an all-embracing piece of arbitration legislation in England, Lord Bramwell's Arbitration Bill of 1885, was lost precisely because it was considered to be too controversial and too ambitious[15].

The position in Hong Kong

Hong Kong's first Arbitration Ordinance, which was based on the English 1950 Act, was promulgated in 1963. Amendments to the Ordinance have, by and large, followed developments in England, but since 1982, the territory has tended to plough its own furrow. Thus, Hong Kong introduced a power for the High Court to consolidate arbitrations (albeit little used) and stole a ten-year march on England by introducing dismissal of claims for want of prosecution in arbitrations, albeit by the High Court and not by arbitral tribunals. In 1985, an amendment to the Ordinance opened the provision of advice, document preparation and advocacy services in arbitrations to non-lawyers, making Hong Kong one of the most laissez- faire jurisdictions in South East Asia in this regard. The most significant reform was, however, the adoption of the UNCITRAL Model Law into Hong Kong law on 6 April 1990. This created a dual system of arbitration law for arbitrations conducted in Hong Kong: domestic arbitrations would henceforth be governed, with a few modifications, by the 1963 Ordinance and its pre-1990 amendments (now Part II of the present Ordinance), while international arbitrations would be governed by Part IIA of the Ordinance, which implemented the Model Law (Sch 5 thereto)[16]. A number of provisions which are applicable both to domestic and to international arbitrations (eg enforcement of awards) are set out in Part IA of the Ordinance. To adopt Vincent Powell-Smith's metaphor in his Opening Address to the conference organised by this august Institute in 1994, Arbitration and the Changing World of the Nineties, this showed that the time had come "to cut the apron strings" with the old country.

Apart from difficulties arising from, inter alia, the rigid requirement for signed arbitration agreements laid down by art 7 of the Model Law[17], case law shows that the Model Law has worked very well. Hong Kong did not share the DAC's qualms about compromise legislation written in a style different from our own, nor about the need for transitional provisions, nor about opting into or out of different arbitration regimes. No one seems to have grieved over the lack of an appeal mechanism and those who have cannot say they were not warned about the importance of getting their arbitration agreements right at the outset[18]. Taken together with the establishment in 1985 of Hong Kong International Arbitration Centre (HKIAC)[19], the adoption of the Model Law has done much to put the territory on the international arbitration map; cases decided by our High Court receive prominent coverage by, among others, the ICCA Yearbook Commercial Arbitration, the Arbitration and Dispute Resolution Law Journal in London and Mealey's International Arbitration Report in the USA.

This does not mean, however, that we have been blind to the shortcomings of the Model Law, to the demerits of the domestic arbitration law and to the need to dispense with colonialist trappings. Far from it. In 1992 the Attorney General invited HKIAC to establish a committee "to consider whether the Arbitration Ordinance requires any, and if so, what amendments, particularly in the light of the May 1st 1991 draft of a new (English) Arbitration Act prepared by Basil Eckersley or any subsequent versions thereof". HKIAC's Committee on Arbitration Law was chaired by Kaplan J and counted representatives of the Chartered Institute of Arbitrators (Hong Kong Branch), the Bar and the Law Society among its members. I was privileged to be

appointed Secretary. We submitted our report to the Attorney-General in April 1996. The gestation period for arbitration law reform proposals in Hong Kong has been marginally shorter than in England, but it was appropriate for us to consider the various drafts of the English Bill as they emerged. Timing was, however, fortuitous in that we also had Singapore's International Arbitration Act 1994 to assist us in our deliberations. What we hoped to do was to get an Arbitration (Amendment) Bill before the Legislative Council (LegCo) in May 1996, primarily to tidy up the Model Law and to start the process of harmonisation of domestic and international arbitration laws rolling, with a second root and branch reform Arbitration Bill following in May 1997. However, the first Bill's legislative slot was put back to October 1996 because the Attorney-General's Bill on reform of the legal profession was given precedence[20]. As to the second Bill, this may not now happen at all; officials may question why we should have another Arbitration Bill so soon after the first and in any case LegCo in its present form will be abolished on 1 July 1997, having finished its final session about a week before that. We cannot know at this time whether our new masters will give an Arbitration Bill high priority in the Provisional Legislature of the Hong Kong Special Administrative Region. The work of our Committee on Arbitration Law, so far as it relates to more fundamental reform of the law, may therefore have been in vain.

So, what reforms have the Committee sought to introduce? To begin with, a preliminary Bill (the 1996 Arbitration (Amendment) Bill), which is intended mainly to modify and tidy up the Model Law and to begin the process of harmonising domestic and international laws of arbitration by introducing provisions of common application. The Bill seeks, in particular:

1. to amend art 7(2) so that agreements contained or evidenced in writing but not necessarily signed by the parties are embraced within the definition of an 'agreement in writing'. This would overcome the situation in H Smal Ltd v Goldroyce Garment Ltd[21] where an agreement in writing was held not to exist where a party supplied goods pursuant to a purchase order by the other party, who accepted the goods without returning a signed copy of the confirmation, which contained an arbitration clause;

2. to define precisely what interim measures of protection the tribunal and the High Court may order. Thus the tribunal will be able to order security for costs, the securing of sums in dispute and other interim measures and there will be a corresponding reduction in (but not total abolition of) the powers of the High Court to make orders during the arbitration proceedings, including the repeal of its powers to order discovery and security for costs;

3. to permit enforcement of orders or directions of the tribunal as orders of the court, in line with s 12 of Singapore's International Arbitration Act 1994;

4. to apply art 8 of the Model Law to the stay of legal proceedings to arbitration in domestic cases;

5. to vest responsibility for making default appointments in HKIAC instead of the High Court, in line with s 8 of Singapore's International Arbitration Act 1994. Furthermore, HKIAC will be vested with a discretion to decide whether 1 arbitrator or 3 should be appointed failing agreement by the parties;

6. to permit the tribunal to extend time limits for commencing arbitrations (or the High Court where no tribunal is yet in existence);

7. to vest power to dismiss claims for want of prosecution in the tribunal and to extend this power to international arbitrations;

8. to extend ***Kompetenz-Kompetenz*** to domestic tribunals by reference to art 16 of the Model Law;

9. to state clearly the tribunal's general powers, both as to the conduct of proceedings and as to the reception of evidence;

10. to restate the common law principles (i) that the parties are jointly and severally liable for the tribunal's fees and expenses and (ii) that the tribunal may exercise a lien over the award pending payment;

11. to clarify the tribunal's power to award compound interest on sums paid late[22]; and

12. to confer immunity from suit on arbitrators and appointing authorities.

A word of caution, however; this is not yet the final version of the Bill to be presented to the Legislative Council.

The 1997 Bill was intended to be a new principal Arbitration Ordinance which would complete the process of harmonising the domestic and international laws of arbitration and follow closely the layout of the Model Law. Provisions proposed for this Bill include the following:

1. abolition of the right of appeal in domestic cases and adoption either of the Model Law power to set aside awards (art 34) or refuse their enforcement (art 36). Consideration was given to permitting domestic users to opt into the appeal process but this was ultimately rejected. I should at this point remind you of my comment earlier about the attitude of users towards the right legal answer; this comment is borne out in the Hong Kong context in relation to arbitrations to which the Hong Kong Government is a party;

2. determination of preliminary points of law by the High Court both in domestic and international cases, but only by agreement of the parties;

3. extension of HKIAC's powers to appoint arbitrators to cases where a vacancy arises (ie where there has been a successful challenge or an arbitrator's mandate has been terminated);

4. removal of the High Court's power to remove an arbitrator for misconduct. The Committee considered that there are sufficient powers in the Model Law (arts 13-15) to challenge an arbitrator on the grounds of justifiable doubts as to his impartiality or independence or non-possession of required qualifications, or termination of his mandate on the grounds that he is *de facto* or *de jure* unable to perform his functions or that he has for any other reason failed to act without undue delay;

Thus it can be seen that the Committee has pledged its faith very much in the Model Law as the system of the future for a unitary system of arbitration in Hong Kong. Whereas the DAC played down the harmonisation of laws, our Committee attached due weight to the smooth operation of the New York Convention in Hong Kong and the common origins of the two instruments. In the current political climate, it would not have been appropriate to adopt wholesale a piece of legislation having its origins in the former colonial power. Nevertheless, the Committee has seen benefits in proposing the adoption of a small number of provisions of the English Act because they, in turn, have been heavily influenced by the Model Law. Likewise, it has looked to Singapore for inspiration. Despite the proposed changes, there is no doubt that Hong Kong will continue to be regarded as a Model Law territory; these changes are in no way at variance with the underlying philosophy of the Model Law to give primacy to party autonomy and to the status of the arbitral tribunal and to minimise intervention by the courts.

Both Hong Kong and London are established arbitration centres with good reputations to defend. Both places needed to replace outdated legislation, but the dynamics for law reform have not been identical throughout. Hong Kong is now, of course, in a unique position in that 1 July 1997 will see a change of sovereignty which may be accompanied (albeit not immediately) by a change in the climate in which arbitration operates. Will the independence of arbitrators be guaranteed or encouraged? Will the civil justice system continue to be independent and supportive? Will Hong Kong retain the economic and financial stability that is so essential to the success of an arbitration centre? What about the enforcement of arbitration awards between the Hong Kong Special Administrative Region and the People's Republic of China? The application (if any) of the New York Convention to Hong Kong awards after 1997 has not yet been settled and China seems in no particular hurry to legislate a solution to the problem, which it does not see as a British concern. This is, of course, the wrong test; it is not a British concern but a business concern. In the light of all this, will there be a crisis of confidence which will encourage the development of another major regional arbitration centre or strengthen the position of those already in existence? All these questions are, at the moment, the great unanswerables, but the time for finding solutions is short.

I believe there are lessons to be learned from all these experiences and problems, both actual and potential.

THE FUTURE

So where do we go from here? Arbitrators are to be given effective powers. Arbitrators and arbitral institutions are to be given immunity from suit. In Hong Kong, HKIAC is to be given powers to make default appointments (Singapore International Arbitration Centre already has this power) and determine the number of arbitrators in the absence of party agreement. With these not insignificant new powers and privileges, however, come new responsibilities. How are the challenges for arbitration in the 21st century to be met in order to create our brave new world?

1. Arbitral institutions must be prepared to look at the world around them, to learn how things are done elsewhere and be prepared to adopt and adapt where appropriate, albeit not slavishly. It is no use being parochial or resting on laurels; this will not guarantee the institutions a profile, or their members a place, on the world stage. This comment applies not only to arbitration practice and procedure but to education and training[23].

2. The institutions must set *and enforce* appropriate requirements for and standards of Continuing Professional Development. CPD must be compulsory and regular and cover not only technical knowledge of arbitration law and practice but also arbitral ethics[24]. The satisfaction of these standards must be fundamental to the decision whether to admit members to, or retain them on, panels or registers of arbitrators. There must be more proper monitoring by the institutions and less self-certification by their members. I pray in support of this proposition a very pertinent quotation by Arthur Marriott in his paper entitled *The Politics of Arbitration Law Reform*[25]:

   "(Arbitration law reform) will inevitably bring to the fore questions of regulation, of training, and of control, of those engaged in private dispute resolution. We will have to grapple with those issues. We will have to consider, for example, the role of the professional institutions in permitting their members to undertake private dispute resolution work. We will have to consider the proper role of training. We will have to consider the proper ethical standards to be applied, monitored and enforced."

3. Where panels or registers are maintained by institutions or arbitration centres, proper records must be kept of the qualifications of panel members or registrants, fulfilment by them of CPD requirements and the types of arbitration for which they are

considered fit and proper persons for appointment. After all, institutional appointing officers are busy people; they have to exercise a discretion judicially in choosing an appointee because in effect the parties have delegated to them their rights to do so. The responsibility becomes greater where an institution or arbitration centre is called upon to decide the number of arbitrators that will be appropriate to a particular case. The institutions must exercise due care; it will not be acceptable behaviour for them to shelter behind the cloak of immunity.

4. If arbitrators are to be prepared to exercise their new responsibilities effectively, they must be willing, rather than be compelled, to fulfill regular CPD training, particularly if they aspire to act as international arbitrators, where not only different laws but different usages[26] and cultural norms apply. They must exercise their newly conferred powers and authorities responsibly and with all due care. The legal duties of arbitrators developed by the courts over generations will continue to apply. Thus, arbitrators too must not be content to shelter behind their immunity.

5. Assuming the above *desiderata* are fulfilled, users should be prepared to maximise arbitrators' powers in order to maximise the advantages of arbitration. The confidence of users must, however, be earned, for they will always have the option to exclude or limit powers. I have no illusion that this is going to be anything but a difficult task. Looked at logically, it raises a fearsome 'Catch 22': users will not trust arbitrators unless the latter can demonstrate their competence (in terms of the proper exercise of their powers and authority, their exercise of elementary arbitral skills and their ability to manage references firmly, effectively and with due regard to their overriding duty of fairness) - *but* - how can an arbitrator demonstrate competence without (a) being appointed in the first place and (b) being vested with the widest possible powers? I am certain of one thing: if there is any anecdotal or empirical evidence of failure by arbitrators to demonstrate competence, users will either be reluctant to appoint them or (if their choice of appointees in a particular field is limited) will circumscribe the appointee's powers.

At the end of the day, arbitration is a service. The service provider (whether arbitral institution or centre, or arbitrators themselves) must supply the service to an appropriate standard or else feel the chill wind of competition, either from other arbitration centres or from those who would seek to sell us Alternative Dispute Resolution. Law reform offers the arbitration community a new start. It is up to all of us to get it right, not tomorrow but now. ▲

FOOTNOTES

1 See Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd (1981) AC 909 at 985 per Lord Diplock (House of Lords).

2 An English solicitor with the London office of an American law firm, Wilmer, Cutler & Pickering.

3 For discussion, see Sir Mark Saville, Arbitration and the Courts (the Denning Lecture 1995) (1995) 61 JCIArb 3, 157.

4 In Hong Kong, this principle applies also to domestic arbitrations: see Arbitration Ordinance (Cap 341) s 14(3A).

5 Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd (1993) QB 701.

6 See Hiscox v Outhwaite (1992) 1 AC 562 (House of Lords).

7 Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema (1982) AC 724 (House of Lords).

8 I am not alone in holding what some may regard as heretical thoughts. One Singapore commentator, writing shortly before the enactment of Singapore's International Arbitration Act 1994, has expressed my fears thus: (a) international arbitration is open to misuse by untrained and inexperienced arbitrators; (b) the unsuspecting party may be faced with a bad arbitrator or a bad award and (c) it is a mistake to assume that international arbitrators are more experienced and less prone to error than domestic: see Wong Meng Meng, Law Reform Push for Singapore ADR (1995) Asian Law Journal Vol 3 No 1, p 15.

9 (1974) AC 727.

10 (1977) AC 405.

11 Commercial Arbitration, 1st edition (1982) pp 192-193, 2nd edition (1989) pp 226-227.

12 Supply of Goods and Services Act 1982 s 13.

13 (1995) 11 Arbitration International 1.

14 See Arthur Marriott's informative comments in The Politics of Arbitration Reform (1995) 14 CJQ 125 at 129-130.

15 See V V Veeder QC & B Dye, Lord Bramwell's Arbitration Code 1884-1889 (1992) 8 Arbitration International 329.

16 Indeed, the present version maximises party autonomy by permitting parties to opt into or out of the domestic or international regimes (as the case may be) where the arbitration agreement was made on or after 6 April 1990: see Arbitration Ordinance (Cap 341) ss 2L, 2M, 34A and 34B.

17 See H Smal Ltd v Goldroyce Garment Ltd (1994) 2 HKC 526.

18 Time and again Kaplan J (as he then was) said that it was incumbent on lawyers to use the facility provided by s 2M of the Ordinance to opt out of the Model Law and into the domestic provisions of the Ordinance by agreement with the other party if a right of appeal

was what their clients wanted: see Ananda Non- Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd (1993) 2 HKLR 331, affirmed by the Hong Kong Court of Appeal at (1994) 1 HKC 204.

[19] This was due in large part to the unstinting efforts of the late Hunter J to develop Hong Kong's international arbitration profile until his untimely death in 1991. His achievements were commemorated by the inauguration of the Hunter Chair of Arbitration at the City University of Hong Kong in 1995.

[20] Since this paper was delivered, the Committee has been informed that the Arbitration (Amendment) Bill has been set down for introduction into LegCo on 9 October 1996. The most recent draft is now (early August 1996) out to consultation.

[21] See footnote 14.

[22] The present s 22A of the Arbitration Ordinance (Cap 341) is considered to have this effect already, though it has not yet been judicially tested: see, eg Kaplan, Spruce & Cheng, Hong Kong Arbitration Cases and Materials (1991) at p 108.

[23] A useful analogy may be drawn with the Mustill Committee's rejection of the Model Law on the ground that a developed system of arbitration law was already in place in England. This eventually came to be seen in some quarters as having resulted in a missed opportunity for real modernisation of English arbitration law. It is indeed fortunate that so much of the Model Law has, after all, been implemented in the 1996 Act.

[24] There is no shortage of clear guidance on arbitral ethics: see eg the International Bar Association's Code of Ethics for International Arbitrators (1987) and the Chartered Institute of Arbitrators' Guidelines of Good Practice for Arbitrators (promulgated in 1990 and published at (1991) 57 JCIArb 2, 81).

[25] (1995) 14 CJQ 125 at 126-127.

[26] Eg (i) in International Chamber of Commerce (ICC) arbitrations, the tribunal's duty to draw up Terms of Reference (see ICC Rules of Conciliation and Arbitration (1988 edition) art 13); (ii) arbitration ex aequo et bono or as amiable compositeur (see UNCITRAL Model Law art 28(3), UNCITRAL Arbitration Rules (1976 edition) art 33(2)).

NOTES ON ORGANISING ARBITRAL PROCEEDINGS

by ***Goh Phai Cheng****, Parliamentary Counsel,
Attorney-General's Chambers Singapore

The United Nations Commission on International Trade Law adopted a set of Notes on Organising Arbitral Proceedings at its 29th Annual Session which was held at New York from 28 May to 14th June 1996. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organising arbitral proceedings may be useful.

In the preparation of the Notes, the Secretariat of the Commission had consulted experts from various legal systems, national arbitration bodies and international professional associations. The text was prepared with international arbitrations in mind. It may be used for arbitrations which are administered by arbitral institutions and arbitrations which are not so administered. The Notes are not of a binding character on arbitrators or parties to the arbitration proceedings. Arbitral tribunals are free to use the Notes as they see fit. They are also not required to give resons for disregarding the Notes.

The Notes are not a substitute for arbitration rules that governed arbitration proceedings. They provide a list of matters which the arbitral tribunal may wish to formulate decisions on organising arbitral proceedings. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. The matters dealt with by the Notes include the following:

a The arbitration rules applicable to the proceedings.
b Language of proceedings.
c Place of arbitration.
d Administrative services that may be needed for the arbitral tribunal to carry out its functions.
e Deposits in respect of costs.
f Confidentiality of information relating to the arbitration and possible agreement thereon.
g Routing of writings among the parties and the arbitrators.
h Telefax and other electronic means of sending writings.
i Arrangements for the exchange of written submissions.
j Arrangement for the exchange of written submissions.
k Practical details concerning written submissions and evidence.
l Defining points at issue; order of deciding issues; defining relief or remedy sought.
m Possible settlement negotiations and their effect on scheduling proceedings.
n Documentary evidence.
o Physical evidence other than documents.
p Witnesses.
q Experts and expert witnesses.
r Hearings.
s Multi-party arbitration.
t Possible requirements concerning filing or delivering the award.

*The writer was the delegate of Singapore to the 29th Annual Session of UNCITRAL. ▲

NEWSFOCUS

The followings were admitted to membership of the Institute during third quarter of 1996

FELLOWS (By Examination)

O'Manony Declan
Yang Philip

MEMBERS (By Examination)

Mohd Jaffar Bin Ismail
Tan Anamah
Tan Chin Tiong
Tan Kia Hock, Roger
Robert Morgan

Nandy Kanak Ratan
Wong Kin Hoong

Transfer to Member (By Examination)

Krishna Ramakrishna Sharma

Associates

Madasamy Ravi
Lum Kok Keong Patrick
Chau Chi Wai
Tan Teck Ann

CONGRATULATORY MESSAGE

CONGRATULATIONS to Datuk William Lau Kung Hui on his conferment of the award of Panglima Gemilang Darjah Kinabalu (P.G.D.K.) by TYT Negeri Sabah on the occasion of His Excellency's 66th Birthday.

BOOK REVIEW

The Annotated Ordinances of Hong Kong
The Arbitration Ordinance
by ***Robert Morgan***

Review by: Raymond Kuah, MSIA, ARIBA ARIAS, FSIArb, FCIArb, FBIMgt.

The recent publication of this reference book, I am told by the author, belonged to one of a series which embrace many of the often referred to Ordinances of Hong Kong. In browsing through the pages on receipt of the book, it is quite apparent that the book has been written for the lawyers, as is evident in the approach and format in arranging the materials which follow the Ordinance section by section. This makes it difficult for any reader who may be unfamiliar with the scheme of the Ordinance. However, to a certain extent, such drawback has been more than made up by the author's systematic cross referencing in the commentary by way of comprehensive Notes.

However, because of the lack of an index in the book, from the user's point of view, it causes inconvenience in reference to the otherwise most useful reference work. This is, I am given to understand, due to the fact that the book is part of a series of Annotated Ordinances of Hong Kong; and that the indexing is to be found only in another master volume.

It strikes me forcefully that the author had put in a great deal of efforts in the research and in his approach to the task of producing this comprehensive and useful reference work for all those practitioners who may be involved in arbitration process.

The basic approach and contents have been well researched and the book is an invaluable source of information on the Statute laws which will undoubtedly become a reference source. There is a full reference to authority for the comments made with more than one thousand cases listed.

The law is stated as at 1st March 1996. The author has obviously taken steps to anticipate the effects of the changes to the Ordinance which may be enacted in due course with a Supplement to the Annotation to deal with the changes. ▲

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