American Bar Association

Section of International Law and Practice

International Legal Exchange Committee

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REPORT OF THE DELEGATION TO INTERNATIONAL ARBITRATION CENTERS

May 8–15, 1993

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Editors

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4. COMBAR Seminar on Topical Arbitration Issues

Speakers: Michael Collins, Q.C.; The Hon. Sir Peter Webster; Ronald Bernstein, Q.C.; Philip Naughton, Q.C.; John Uff, Q.C.; Frederick Brown

Date: May 11, 1993

Reporter: T. Elizabeth Fields

The COMBAR Seminar on topical arbitration issues, in The Queen's Room, Middle Temple, included as speakers: Michael Collins Q.C., Executive of the Commercial Bar Association (COMBAR); The Hon. Sir Peter Webster, recently-retired High Court judge (Moderator); Ronald Bernstein Q.C., author of a leading English textbook on arbitration and Vice-President Emeritus of The Chartered Institute of Arbitrators; Philip Naughton Q.C.; David Steel Q.C., editor of textbooks on maritime law; and John Uff Q.C.

Mr. Collins greeted the ILEX delegation and described COMBAR, which has about 600 members. Currently, there are 40 honorary overseas members located largely in the United States and Canada. COMBAR tries to provide relationships with lawyers in Eastern Europe, Europe, the Middle East, Asia, Canada and North America.[1]

Discovery and Evidence in London Arbitration

Mr. Bernstein began by stating, "[T]he boundaries of our ignorance continue to expand with those of our knowledge." He expressed his gratitude for this maxim and stated that during one counsel's argument in the House of Lords, a law lord said to counsel, "I never realized how incapable I am of understanding these matters until I heard your argument."

The hypothesis that ignorance shared is ignorance begotten can be tested with the following propositions: 1) the English law of discovery can be written on the back of a postage stamp; 2) discovery of evidence cannot be had in England because no one knows what it is; and 3) English law works with remarkably little difficulty.

The principal framework within which English arbitrations are conducted is the Arbitration Act of 1950. However, one must also look at the English law of Evidence and Discovery to get a picture of what actually happens in English arbitration. One reason is that, as a matter of practice, major arbitrations in England are conducted by barristers. Solicitors are usually content to stay within their own branch of the legal profession and leave to advocates the task of conducting advocacy. Barristers have grown up in a particular ambiance of litigation. As a result, they tend to bring the same habits to arbitration that they have grown up with in litigation.

As for discovery in arbitration, the extent of discovery is a matter for the arbitrator to decide. In practice, if counsel agree upon what discovery should take place, the arbitrator will permit dis-

covery. The Arbitration Act contains a provision for party agreement as to which documents within each party's possession may be discovered. If the arbitrator is experienced, he may ask counsel for reasons if discovery will be extensive. Subject to that, however, he will almost always allow agreed-upon discovery.

Where counsel disagree about the extent of discovery, a lay arbitrator's inclination would be to allow lesser rather than greater discovery. Even a legal arbitrator will usually not wish to be bound by the automatic all-embracing document discovery that takes place in a High Court action.

Despite the fact that discovery in a United States jurisdiction is more extensive than in England, the extent of discovery allowed in English litigation contexts is far more extensive than in European civil law jurisdictions. In a 1989 article, Professor Claude Raymond, a Swiss arbitrator, explained that civil law jurisdictions are much influenced by the principle that no man should be made to disclose matters to his detriment.

In England, the practice is that if you want discovery, you have to explain to the arbitrator why it is a sensible course. Discovery is frequently used in arbitration, but it varies from case to case. An extreme example is the rare case where fraud is alleged. If a plaintiff wants 100 percent discovery in such a case, he will quite likely get it. But in other cases, a party must persuade the arbitrator that there is a good reason for granting a discovery order. Other examples where discovery is often had are landlord-tenant and construction disputes.

Turning to the subject of evidence, arbitrators are governed by the same rules of evidence as are the courts of law. The Arbitration Act contains no rules of evidence, and there is virtually no mention of this subject in the Arbitration Rules of The Chartered Institute of Arbitrators. The Rules of the London Court of International Arbitration make only minor mention of it in Article 13. Therefore, the application of the rules of evidence to arbitration in England is very similar in practice to the application of the rules of discovery. It is a matter for the discretion of the arbitrator.

There are three points of context as regards evidence in English litigation. First, the jury has almost entirely disappeared from civil trials. Second, objections to evidence have largely disappeared from civil trials. Third, a great majority of cases are conducted by the submission of documents. These three tendencies are paralleled in English arbitration.

As for appeals from arbitration awards, in theory a party cannot appeal without leave of court. Mr. Bernstein does not know of a single case in which leave of appeal has been granted on evidentiary reasons alone. Nonetheless, if an arbitration is conducted under the UNCITRAL rules, a right of appeal exists in England.

In conclusion, the subject of evidence in arbitration has been thrown into a melting pot. Generally speaking, whether the arbitrator is a lawyer or not, he will tend to follow the "sensible" rules of evidence, as opposed to the "strict" rules of evidence.

Questions and Answers:

Q. Is there an ability to obtain documentary discovery of a third party?

A. There is a provision in the Arbitration Act which is not apparent. I know it to have been used once.

Q. Is there a way to take evidence from a third party?

A. The arbitrator can issue a subpoena in the same way as in litigation. Having issued the subpoena to take evidence, the arbitrator can convene a preliminary hearing for the purpose of receiving particular evidence from a particular witness.

Q. Can you respond to the difficulties faced in English arbitration as regards evidence and discovery?

A. Where arbitrations are conducted under a set of rules, most rules provide for a procedure. Where they are not conducted under rules, the parties usually have remarkable little difficulty in agreeing on a procedure. Furthermore, it is important to add that Professor Raymond has also said that common law arbitration procedure as practiced in England is moving toward the procedure of Continental Europe. In this sense, broad discovery is now more and more frowned upon in England.

Alternative Dispute Resolution (ADR)

Mr. Naughton began with a quote attributed to Sir Winston Churchill: "There are two things more difficult than getting up to speak after dinner: climbing a wall that is leaning toward you and kissing a girl who is leaning away." Mr. Naughton added that talking to Americans on the subject of ADR is another difficult task.

ADR is any method of resolving an issue susceptible to normal legal binding process without resorting to such process. It includes mediation, conciliation and mini-trial. In English usage, it excludes arbitration. However, it can be employed by courts and arbitrators.

Although ADR in the commercial aspect is new in England, in the fields of employment law and family law it has a lengthy history. The Advisory Conciliation and Arbitration Service (ACAS), established 20 years ago, currently handles 70,000 employment disputes annually. It is an automatic process conducted by mediators who are civil servants. Every time a complaint is made in a form which will lead to a hearing in an industrial tribunal, a mediator will contact the parties and make attempts to settle prior to trial.

Family law also is a source of considerable experience in mediation in England.[2] It is the only subject in ADR which has received extensive research and study. Most matters concern financial support and children. However, a high proportion of these mediated results, 40-50%, unwind within two years because the parties to such matters have the tendency to change their position. Unfortunately, many who argue against extending ADR in England make reference to the family law cases. This comparison is not valid, in Mr. Naughton's view.

The most noticeable development of ADR in England involves two current activities. First, the mini-trial is being used as a way of creating a more formalized environment for settlement conferences. Second, there is an effort underway to introduce some form of court-annexed ADR process. The Lord Chancellor's Department is continuing to request proof that money will be saved prior to funding a pilot scheme, however.

The first English organization in the commercial and more general fields of ADR was IDR,[3] established in 1989 by Richard Schiffer as part of his legal practice. It is modeled on an arbitration organization in Seattle, Washington. The second organization was CEDR,[4] organized in 1990 by John Uff QC. Although IDR employs four people full-time and CEDR employs three people full-time, they are the entire full-time work force in terms of making a living out of ADR in the United Kingdom.

A great deal said about ADR reflects aspiration rather than achievement. Nonetheless, CEDR now has 49 of the top 50 solicitor firms on its membership lists. It also has an impressive list of industrial members. They are slowly changing their own attitudes and, as a result, changing the attitudes of the practicing lawyers.

In these early developments, it is inevitable that much guidance be sought from United States sources. CEDR, IDR and the British Academy of Experts[5] have emphasized education and training programs. In most programs, the course has been led by an American. On the community side, Mediation UK[6] has made considerable progress in developing local schemes.

One barrier to ADR progress in the United Kingdom is that, unlike the United States, corporate in-house legal counsel are not typically powerful within their organizations. Most companies are still leaning toward the costly practice of paying a barrister or solicitor to resolve disputes in court.

Another problem is lack of actual experience. There are many more individuals who are trained to be mediators than mediations which have been concluded. No one individual has completed more than 10 mediations in the United Kingdom.

Nonetheless, the small number of disputes resolved obscures the progress made. ADR clauses are now surfacing in the contracts of trade associations, industries and individual companies. Of note is the new Civil Engineering Construction Contract.

The question that remains is whether these clauses are enforceable. The House of Lords has determined that an agreement to negotiate is not effective in the United Kingdom.[7] But a different Lord giving a leading 1993 judgment[8] stayed court proceedings pursuant to a contract regarding the English Channel Tunnel while a dispute resolution process agreed by the parties was allowed to continue.

As for predicting the future, it is difficult to say with certainty that ADR will take flight in England. There is an increased pressure for more economic alternatives to court proceedings, although it is fair to say that the waiting lists to enter the courts are not as lengthy as in the

United States. Also, there ordinarily are no jurors in civil actions in the United Kingdom, so there is no "roll of the dice" component to litigation.

Those concerned about litigation in England are seeking to improve the litigation process, which is the method by which all disputes should be resolved. Certainly, though, this process should find a better way. There is a social significance to side-stepping court procedure. The need for ADR in England may be recognition of inadequate change in judicial process.

Questions and Answers:

Q. Have there been difficulties in reaching a procedure for mediation in the United Kingdom?

A. Not really, because a procedure for mediation has been established by parties reaching an agreement. In the United Kingdom, if at the first stage of the process the mediator receives information in confidence from each party, he then attempts to reach a binding conclusion with the parties. The only risk is that the information received from the parties may be untrue. On the other hand, mediation clauses that have been introduced into airport construction contracts in Hong Kong have been well implemented. This is partly due to the cultural ethic of the people in Hong Kong, who are more inclined to resolve disputes through mediation.

Maritime Arbitration

Mr. Steel began with the question "[D]o lawyers have to eat?" He said he would answer this question at the end of his discussion.

An enormous number of maritime arbitrations are conducted in England. The two most important species are those conducted under the auspices of the London Maritime Arbitrators Association (LMAA) and those conducted under the auspices of the Committee of Lloyds.

The LMAA primarily conducts arbitrations arising under charter disputes or ship sale and construction contracts. About 1500 arbitrations are started each year before LMAA tribunals. The Committee of Lloyds handles predominantly salvage claims under Lloyds' standard form. Lloyds' standard form represents over 90% of all the substantial salvage systems of the world.

Statistics show numbers of English maritime arbitration awards have been falling in recent years, but this may be due to the contraction in world fleets. Another reason is the general worldwide recession.

Bruce Harris of The Chartered Institute of Arbitrators claims the first award in maritime arbitration was rendered in 1248 at Marseilles. By tradition, maritime disputes were resolved for centuries among people in the trade. Brokers often resolved problems among their respected colleagues. In the 1960s and 1970s, maritime arbitration became more formalistic. This was paralled by the Commercial Court's use of the Special Case procedure, which allowed appeals on matters of law to become a matter of course.

Nonetheless, the arbitration structure still was conducted among commercial men, which included active or newly retired brokers and shipowners. Thus, decisions were given by party peers. Plus, a large number of references were conducted without the intervention of lawyers and on documents alone. Each party appointed an arbitrator to act as its champion, with references to an umpire in the event of disagreement. Even if lawyers were present, the meeting remained informal.

As a result, the arbitration system was relatively quick and inexpensive, yet with results that were at times haphazard. This latter feature led to an increasing use of the Special Case procedure. Unsuccessful respondents used it as a way of delaying inevitable resolutions.

A vastly different scene has emerged today. In some respects there has been distinct progress. In 1979, the Special Case procedure was abolished. Now, appeals to the Commercial Court are restricted to cases where 1) the issue of law substantially affects the rights of parties; and 2) the arbitrator has clearly erred. This is a sensible balance between allowing the privacy of arbitration to prevail and preventing the development of arbitrary decision making.

Despite this development, the role of the lawyer has become even stronger in maritime arbitration proceedings. The number of oral hearings has increased very substantially. Pleadings, discovery and all the panoply of a court hearing is commonplace. Barristers conduct the argument, witnesses give oral evidence and experts render opinions. This gives cause for concern. There can be no future in a system when a tendency has arisen to leave arbitration at the door of the court room. For example, money spent on claims often exceed what claims are worth. Lawyers in pursuit of the truth

have become excessively thorough. With all this obsession, there is the danger of arbitration becoming too much of a sport or game.

The modern client seeks the advice of a lawyer. The arbitrator, younger and less experienced, perhaps not confident of his instincts, is reluctant to intervene. The new breed of arbitrators reflect less the conventions of the industry. They are more likely to have legal backgrounds and often lack direct experience in ship owning, management and brokering. In the last two years a surge of disputes have reached the Commercial Court because Commercial Court judges are much more likely to intervene to the advantage of the parties, having both the experience and the power. The end result is a procedure that has moved from the aim to conduct arbitrations cheaply and quickly. Instead, there has been increased cost and delay.

In seventeenth century France, a delegation of lawyers approached Cardinal Richelieu to lobby against a decision that would take business away from them. Their leader finished with the following plea: "[E]ven lawyers have to eat, Cardinal." "Not necessarily," was the Cardinal's cool response. Similarly in contemporary England, the essential problem is that lawyers see rewards in fighting cases to an appeal-proof judgment to vindicate their client's case. But, this may not be what the client wants. He might prefer the dispute to be settled commercially, *i.e.*, cheaply, whether right or not. The adversarial form of litigation in arbitration can only achieve a commercial outcome where lawyers on opposing sides have a good working relationship and both clients want to tango.

Finally, maritime arbitration is only as good as the arbitrators. Training, both legal and in maritime matters, although important, is no substitute for experience on the job. Self confidence, if well placed, is crucial. The Commercial Court is popular today because of its judges' specialized knowledge and confidence to impose time limits and introduce new procedures.

In answer to the question whether lawyers have to eat, the response is yes, but only if the arbitrators give them permission.

Construction Arbitration

As Mr. Uff explained, construction arbitration in England is mostly international. Typically, it involves a foreign company claimant and a respondent that is a local company, often a public authority.

In the nineteenth century, construction arbitration first emerged in England. The tradition stemmed from standard forms of contracts under which disputes were resolved by the engineer as arbitrator. This tradition led directly to the FIDIC form contract, which is similar to the initiatives by the Institution of Civil Engineers.

The remnants of the United Kingdom domestic system of decision by the engineer remain. An understanding of the engineer's role continues to be important to the arbitration process as a basis from which to instruct lawyers, arbitrators, barristers, solicitors and experts.

In the United Kingdom, construction arbitration is alive and well. This is contrary to the United States experience, which appears to be moving towards the development of systems which avoid litigation and arbitration, such as ADR.

Arbitration offers paramount advantages in the field of construction. There is a complete solution to questions among parties with a mixture of cultures and expectations. It also provides finality within a reasonable period of time, and hopefully with a reasonable cost in relation to the amount in dispute.

Construction arbitrations tend to involve very large sums of money, seldom less than $10 million. Thus, certain expenditures on arbitration costs can be justified. The problem is assembling all the parties together to conduct the arbitration. The tribunal usually cannot give the parties a series of consecutive dates for hearings to continue until the proceedings end, as this would be unworkable. Many English lawyers have discovered that a program of arbitration, not unlike that established by the ICC, must be set up as a key to successful arbitration. Often timetables are set for the arbitrator's determination of complex issues. International arbitrations also depart from the traditional oral hearing at a number of stages.

In London over the last 10 years there has been competition between arbitrators and the courts to develop new systems for resolving disputes. These include putting factual evidence, expert evidence and submissions into writing. By these various means, substantial arbitrations can be accomplished within manageable time scales.

To examine the Institution of Civil Engineers' Arbitration Procedure[9] is to discover the curious way international and domestic construction

arbitrations operate in the United Kingdom. Aside from those conducted under the auspices of ICC procedure, there is no tradition of three arbitrators. In England, construction arbitrations are conducted by one arbitrator. This, too, stems from the civil engineering traditions in the United Kingdom. The main distinction between contracts that contain a ICC arbitration clause and those that do not is that an ICC clause usually leads to the appointment of three arbitrators from entirely different countries. Each has a different philosophy, different expectations and different views on questions of impartiality.

In conclusion, London as a venue for construction arbitration is very attractive. It holds an attraction in the great majority of worldwide construction contracts, despite the fact that the language is used is English.

Frederick Brown, a Member of the ILEX Delegation, Presented a U.S. Perspective On the Morning's Discussions.

In the United States, the arbitration and the court process are drawing together, according to Mr. Brown. This involves more restrictions on what is appropriate for discovery. In arbitration, arbitrators are more likely to allow more kinds of discovery.

It is encouraging to hear about ADR proceedings in England. Americans, though, are in a similar position to the English in that "we talk about it more than we do it," through local and state bar associations. One thing Americans do differently, Mr. Brown said, is that ADR profit making organizations have sprung up all over the country. Probably the largest group is JAMS, which is composed of many retired judges. Overall, there appear to be many similarities in the two countries' systems of arbitration and ADR/mediation.

Endnotes

1. The Commercial Bar Association, 222-225 Strand, The Outer Temple, London WC2R IND. Telephone: 071-353-3502. Fax: 071-353-3597.
2. Contact Miss Lisa Parkinson, The Old House, Rectory Gardens, Henbury, Bristol BS10 7AQ. Telephone: 027-250-0140.
3. IDR Europe Limited, 46 Mount Street, London W1Y 5RD. Telephone: 071-629-0607. Fax: 071-408-0202.
4. Centre for Dispute Resolution, 3/5 Norwich Street, EC4A 1EJ. Telephone: 071-430-1852. Fax: 071-430-1846.
5. The Academy of Experts, 90, Bedford Court Mansions, Bedford Avenue, London WC1B 3AE. Telephone: 071-637-0333. Fax: 071-637-1893.
6. Mediation UK, 82a Gloucester Road, Bishopston, Bristol BS7 8BN. Telephone: 027-224-1234.
7. *Walford v Miles* (1992) AC 128.
8. *Channel Tunnel Group v Balfour Beatty Construction*, (1993) 1 Lloyds 291.
9. The Institution of Civil Engineers' Arbitration Procedure (1983).