CAIRO REGIONAL CENTRE FOR

INTERNATIONAL COMMERCIAL ARBITRATION

"The English Experience with the Model Law and the current new draft Arbitration Bill"

by C.M. Lake
Partner, Frere Cholmeley Bischoff

1. INTRODUCTION

1..1 This paper will cover the following issues:

- brief survey of English Arbitration Law;
- the debate as to whether to adopt the Model Law;
- the history behind the new Arbitration Bill;
- the current draft of the new Bill.

1..2 The English draft bill and the Consultation Document are to be found at (1994) Arbitration International Vol. 10 No. 2 p. 189. The DAC Report of 1989 is printed at (1990) Arbitration International 3.

2. A BRIEF SURVEY OF ENGLISH ARBITRATION LAW

2..1 The sources of English arbitration law are case law and statute. The case law reflects the fact that England has for a long time been an important venue for international arbitration. This is particularly due to the importance of the City of

London as a financial centre. Of equal importance is the role traditionally played by English law in Admiralty disputes. It is therefore not surprising that England enjoys a mature body of case law on arbitration going back several hundred years.

2..2 Apart from the case law, English arbitration law has also since 1698 been embodied in statute. There are currently three Acts:

- the Arbitration Act 1950: the purpose of this Act was to consolidate the previous Acts of 1889 to 1934. In today's light it stands out as a somewhat eccentric piece of legislation, placing wide supervisory powers in the hands of the Court. The layout of the Act is somewhat haphazard, beginning with topics such as the revocation of authority of the arbitrator or the consequence of his death. It follows no logical pattern (for example the definition of "arbitration agreement" is not attempted until Section 32).

- the Arbitration Act 1975: this Act gave effect to the New York Convention 1958 and provided, by S.1(1), a mandatory stay of proceedings brought in breach of an arbitration agreement.

- the Arbitration Act 1979: widespread dissatisfaction with the relatively wide right of appeal under the 1950 Act led to this right being restricted to appeals purely on a question of law. Appeals can now only be brought on a point of law. The 1979 Act also gave the parties the right to exclude the appellate jurisdiction of the English Court (S.3). However parties to certain "special categories" of disputes were still not allowed to exclude in advance of an arbitration the jurisdiction of the English Courts. These "special categories" are disputes arising out of:

  - Admiralty matters
  - insurance contracts

- commodity contracts

2..3 The 1989 Report of the Department of Trade & Industry's Advisory Committee on Arbitration Law ("the DAC") described England's blend of Common Law and statute as follows:

> "The Statutes are the skeleton; the countless cases faithfully reported over the decades are the flesh which gives the skeleton life." (Paragraph 100, quoted in (1990) Arbitration International 3).

2..4 The existence of this body of case law is, however, a mixed blessing. On the one hand, the practising lawyer has access to a vast body of reported case law to help him to find the answer to most problems. However, without having access to the cases, nobody other than a practising English lawyer will find it easy to get to grips with the details of English arbitration law. This is because the theoretical foundations of arbitration law have evolved directly from the cases. The statutes merely fill in some of the gaps without giving a full view of the picture.

3. IMPLEMENTING THE MODEL LAW

3..1 The United Nations Commission on International Trade Law ("UNCITRAL") Model Law was adopted on 21st June 1985. The Department of Trade & Industry ("DTI") (which is the government department with responsibility for arbitration) appointed a departmental advisory committee ("DAC") consisting of respected practising arbitrators, lawyers and academics and chaired by Lord Justice (now Lord) Mustill.

3..2 The DAC's terms of reference in 1985 were to advise the Secretary of State for Trade & Industry on:

3..2.1 whether, and to what extent, the Model Law should be implemented; and

3..2.2 whether, in the light of the Model Law, recommendation should be made to improve the system of arbitration in England and Wales.

3..3 In 1987 the DAC consulted leading practitioners, and arbitral bodies, to hear their views as to whether the Model Law should be implemented. In the consultation paper, which was issued in 1987, the DAC listed 10 possible options ranging from outright enactment of the Model Low in toto to outright rejection. It narrowed the options down to 4:

(i) acceptance of the Model Law in toto;

(ii) rejection of the Model Law in toto;

(iii) enactment of the Model Law to apply only if the parties expressly so agreed (this was intended to be an interim measure to test how the Model Law worked and to see whether thee was sufficient demand to justify its acceptance in the future);

(iv) enact the Model Law but permit the parties to contract out of it.

3..4 The result of the consultation process was that 11 of the 36 Respondents favoured rejection of the Model Law, 3 favoured option (iii) above, 6 adopted a "wait and see" attitude once the Model Law had been tested in other countries and 7 favoured adopting the Model Law, but with some changes.

3..5 With these responses in mind, the DAC in June 1989 addressed itself to whether the Model Law should be adopted, and if so, how. Its report (printed in (1990) Arbitration International 3) is essentially divided into two parts; the first debates whether the Model Law should be accepted or rejected in toto and the second

looks at options (iii) and (iv) outlined in paragraph 3.3 above.

3..6 **The arguments for and against outright acceptance of the Model Law**

The DAC began by asking itself whether harmonisation was a worthy end in itself. The Committee's conclusions were that there was no great advantage in adopting the Model Law merely because of the possible benefits of harmonisation. First, the Model Law did not set out a complete code and therefore full harmonisation would not be achieved even if the Model Law were to be adopted. Secondly, the DAC was concerned that one of the great strengths of arbitration, namely its unlimited flexibility in prescribing different procedures to resolve different types of dispute, would be destroyed by any process of harmonisation. Finally, the DAC commented (paragraph 62) that as at June 1989 none of the nations where most of the world's largest international arbitrations were held had adopted the Model Law. (This of course is a view which no longer holds currency.)

3..7 Secondly, the DAC took into account that England should keep in step with international trends in arbitration law although this factor was not sufficiently strong in itself to justify adoption of the Model Law. The Committee noted (paragraph 67) that since the 1979 Act the balance between the powers of the Court and the autonomy of the parties seemed to have worked well and there was no demand at present to restrict the right of appeal any further.

3..8 Third, the DAC rejected the notion of having different regimes for international and domestic arbitration. It was felt that there would be litigation generated by

the question as to whether Article 1(1) or Article 1(3) of the Model Law applied to any individual case and that the existence of a "dual system" would unnecessarily complicate the existing law.

3..9 Finally, and most importantly, whilst the DAC recognised that the current statutes were "... diffuse and unsystematic, and would profit from some form of re-statement" (paragraph 76), having considered the detailed provisions of the Model Law and compared them with the current law prevailing in the United Kingdom, the DAC decided that, whilst some provisions would be of benefit if enacted into English legislation, the Model Law "... did not offer a regime which is superior to that which presently exists ..." (paragraph 89). This view is based, to a large extent, on the DAC's perception that:

> "... to assimilate the Model Law into the highly developed system which prevails in England ... when the present system is working well, or at any rate not shown to be working badly, could only be justified if the Model Law was demonstrated to be superior to the present system, or if there were some other potent reason for adopting the Model Law". (Paragraph 78).

The DAC concluded, as shown above, that there was no good reason to adopt the Model Law.

3..10 **Contracting In/Out of the Model Law**

Having decided not to adopt the Model Law in toto, the DAC then considered whether to adopt options (iii) and (iv) outlined in paragraph 3.3 above, namely whether to allow the parties to contract in and out of the Model Law. The DAC's view was that either the Model Law was superior to current English law or it was not. If it was not, the Model Law should be rejected and the view was that the idea of contracting in was a compromise which solved no problem. For the same reason, the DAC rejected the option of applying the Model Law in every case unless the parties expressly agreed to exclude it. It was felt that parties when signing a commercial contract do not give thought to how future disputes will be resolved and that they would therefore be stuck, unwittingly, with the Model Law without having given the matter any thought.

3..11 With that in mind, the DAC then turned to the form of the new English Arbitration Bill. The DAC was faced with three possibilities - first, it could consolidate the arbitration law into a single Act of Parliament. Consolidation is the process of collecting together all statutory provisions on one topic and "restating" them into one Act of Parliament. Because consolidation bills do not alter the law, they have a relatively easy passage through Parliament and are not debated in full. The DAC rejected the option of consolidation on the basis that:-

> "To make the law sufficiently accessible, the consolidated provisions of the statute would need to be fleshed out by other material enacting at least

some of the rules currently founded in the extensive jurisprudence. The problem is to know how far this process should be taken" (Departmental Advisory Report, June 1989, para 105).

3..12 The second option was codification. Codification is the process of gathering into one statute all of the English law (whether contained in a statute or in case law) on a particular subject. The problem with this course of action was that the preparation of a full draft code would be a long and difficult business, and a complete draft would take too long to put into place (ibid, paragraph 106).

3..13 The third, and acceptable, option was:

"An intermediate solution in the shape of a new "Act" with a subject matter so selected as to make the essentials of at least the existing statutory arbitration law tolerably accessible, without calling for a lengthy period of planning or drafting or prolonged parliamentary debate. It should in particular have the following features:-

(1) It should comprise a statement in statutory form of the more important principles of the English law of Arbitration, statutory and (to the extent practicable) common law.

(2) It should be limited to those principles whose existence and effect

are uncontroversial.

(3) It should be set out in a logical order, and expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman.

(4) It should in general apply to domestic and international arbitrations alike.....

(5) It should not be limited to the subject matter of the Model Law.

(7) Consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model law, so as to enhance its accessibility to those who are familiar with the Model Law."

(ibid, Paragraph 108)

3..14 The DAC's recommendations were then accepted by the Government. On the initiative of a private group (the Marriott Working Group), a distinguished barrister and arbitrator then prepared the first draft of the Bill which adopted the language and style of the Model Law. This draft was, generally speaking, accepted by the broad majority of those practising arbitration. However, the DAC was told

that the Government would not give its support to a Bill which had not been drafted in the style traditional "Parliamentary" style. The bill therefore had to be completely redrafted and in 1992 the DAC asked the DTI to take over responsibility for the bill (which until then had been funded privately). The Government then took over the responsibility for the bill and, in February 1994, the DTI published the draft Arbitration Bill and Consultation Document. The Consultation period ended on 30 June 1994.

4. THE MODEL LAW AND THE ENGLISH DRAFT BILL COMPARED

The English Arbitration Bill, as has been seen, makes no pretence to adopt the substance of the Model Law. However, the Model Law has influenced the draft Bill in two respects. First, the draft Bill has attempted to adopt the logical structure of the Model Law and secondly the draft Bill has adopted a number of the provisions of the Model Law (DTI Consultation Document, Part III paragraph (1) - see (1994) Arbitration International Vol. 10 No. 2 at page 223). The interaction between the Model Law and the draft English Bill can best be seen by comparison between the two in the following areas.

4..1 Competence

4..1.1 Clause 3(1) of the English draft bill reads as follows:

"3(1) For the avoidance of doubt it is hereby declared that the Tribunal may make determinations relating to any question of law (including questions relating to the validity and effectiveness of the Arbitration Agreement), but without prejudice either to the powers of any Court (whether under this Part or otherwise) to review such determinations, whether before or after an award is made, or to the question whether any award made by the Tribunal is enforceable". (English Draft Arbitration Bill (1994) Arbitration International Vol. 10 No. 2 page 194).

4..1.2 Article 16 of the Model Law allows the arbitrator to rule on his own jurisdiction whenever the existence of the validity of the arbitration agreement or his own qualifications are challenged. Clause 3(1) of the draft English Bill summarises the position under English law. In itself, Clause 3(1) is similar in purpose to Article 16(1) of the Model Law.

4..1.3 However, there are two important differences. First, if one compares the wording of the two it soon becomes clear that the draft Bill has failed in its purpose of putting forward a clear exposition of English law. Compared to the terms of Article 16(1), the terms of Clause 3(1) would

seem to someone not familiar with English statutes to be a prolix and complex way of explaining that same principle. Secondly, article 16(2) of the Model Law obliges the parties to raise a jurisdictional plea by no later than the submission of the Statement of Defence. However there is no such stipulation in the terms of the draft English Bill on the ground that, according to the DTI, it would "... place procedural constraints by statute upon jurisdictional challenges" ((1994) Arbitration International Vol. 10 No. 2 page 226).

4..1.4 The DTI also felt that the existing principles of waiver and acquiescence would mean that a party who had engaged in arbitration proceedings could not then complain that the arbitrator lacked jurisdiction. This may well be true but it will be disappointing for arbitration practitioners and their clients to endure the disruption, cost and delay, of a jurisdictional challenge being made at a late stage in the arbitration even if the challenge is at the end of the day found to be groundless.

4..2 **Impartiality**

4..2.1 Clause 8(1) of the English draft bill reads as follows:-

"8(1) A person shall not be appointed arbitrator or umpire on a reference, whether by a party to the reference or by the Court or otherwise, if he is not impartial in relation to each party and to all other matters relevant to the reference; and any person who knows that he is disqualified from being appointed an arbitrator or umpire on any reference because he is not impartial shall not accept the appointment" (English draft bill, quoted above).

4..2.2 Article 12 of the Model Law requires the arbitrator to "... disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

The corresponding provision can be found in Clause 8 of the English draft bill. Clause 8 is divided into three sub-sections, the first dealing with impartiality, the second with independence and the third with procedural objections. There are several problems with the English draft Bill in this respect; first, the difference between impartiality and independence is not exactly easy to identify without recourse to the case law. Secondly, Clause 8(1) states that an arbitrator will not be appointed "... if he is not

impartial in relation to each party and to all other matters relevant to the reference ..." It is extremely difficult to prove that an arbitrator is not impartial and this in itself will be a difficulty.

4..2.3 In my view it would be better for England to adopt the situation favoured by the Model Law of requiring the Arbitrators to disclose circumstances likely to give rise to a problem. Placing the duty on the arbitrator avoids the grim prospect of the parties having to argue with the arbitrator over his impartiality.

4..3 Immunity of arbitrators

4..3.1 Clause 9 of the English draft bill reads as follows:-

"9 Neither an arbitrator nor an umpire, nor any servant of an arbitrator or umpire, shall be liable in damages for anything done or omitted in the discharge or purported discharge of his functions as arbitrator or umpire unless the act or omission is shown to have been in bad faith" (English draft bill, quoted above).

4..3.2 This is a subject that is not contained in the Model Law. This draft clause has provoked considerable controversy. First, English law on the immunity

of arbitrators is by no means settled. This provision is therefore an innovation and falls outside the DAC's intention of "restoring" the law. Until recently, the prevailing wisdom was that arbitrators would be treated as judges and would therefore not be subject to litigation. However, two case in the 1970's suggested otherwise (Arenson v. Arenson [1977] A.C. 405 and Sutcliffe v. Thackrah [1974] 1 All E.R. 859).

4..3.3 Secondly, the terms of Clause 9 confer only partial immunity from suit, as the DTI recognises (DTI Consultation Paper, Part IV, page 239). The terms of this Clause are therefore likely to set in course a debate on the immunity of arbitrators for some time. Two further questions are also raised. First, what does "bad faith" mean? There is no definition of this and there will no doubt be litigation over this point. Second, there appears to be no immunity for institutions. The position of English law is by no means certain as to whether institutions enjoy the same immunity as arbitrators (United Cooperatives v. Sun Alliance [1987] 1 EGLR 126 and Pratt v. Swanmore Builders [1980] 2 Lloyd's Rep. 504).

4..3.4 Whilst some remain confident that the terms of the current Clause will not actually put arbitrators in the firing line, many respected arbitrators have raised the justifiable fear that the mere threat of litigation is enough to disrupt the arbitral process (see for example V. Veeder, speech to the Society of Construction Law and the Society of Construction Arbitrators

on 8 February 1994, pages 13-17).

4..4 **Powers of the court**

4..4.1 Clause 27(1) of the English Draft Bill reads as follows:-

"27(1) Without prejudice to the right of appeal under Section 28(1), the High Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award, but subject to that the High Court may -

(a) remit an award in whole or in part; or

(b) where proceedings have been improperly conducted or a reference or award has been improperly procured, set an award aside in whole or in part;

but the Court shall not set aside an award unless satisfied that it would not be appropriate to remit the award".

4..4.2 The general principle under the Model Law is clearly stated in Article 5:

"In matters governed by this Law, no court shall intervene except where so provided in this Law".

To this statement of principle there are two basic principles of exception. First, the court has a supportive role as outlined in Articles 11(3) and (4), Articles 13(3), Article 14 and Article 16(3). The court also has a supervisory role in Article 34(2) which provides that the court has no power to set aside an award unless the conditions in Article 34(2)(a) or (b)

are satisfied. These do not allow the court the right to set aside an award on a point of law.

4..4.3 The position under English law is that the Court can exercise jurisdiction over an arbitration as follows:-

(a) the Court can determine a preliminary point of law under section 2 of the Arbitration Act 1979. The application can be made with the consent of the Arbitrator, or with the consent of all the parties;

(b) the Court can make orders with regard to the conduct of the arbitration and make procedural orders, for example for discovery of documents or examination of witnesses under section 12 of the Arbitration Act 1950;

(c) the Court can remit an award to the Arbitrator for reconsideration or set the award aside under sections 22 and 23 of the Arbitration Act 1950;

(d) the Court can hear an appeal upon matters of law under section 1 of the Arbitration Act 1979.

The way in which these statutory powers have been exercised demonstrates the interplay between statute and common law in the English system. For the statues say very little about the circumstances under which the Court has power to remit an award. It is only in the case law that one sees that remission is usually limited to an error of law on the face of the award, "misconduct" by the Arbitrator, an Arbitrator's request to correct an admitted mistake and material fresh evidence discovered after the award. The Court has also laid down limits on its own jurisdiction in case law to

hear an appeal of law under section 1 of the Arbitration Act 1979 and this jurisdiction has been set out in a number of landmark cases following the House of Lords decision in The Nema [1980] 2 Lloyd's Rep 83.

4..4.4 The English draft Bill sets out the "supportive" powers of the court in Clause 15. The reference in Clause 15(4)(a) to security of costs will no doubt excite a measure of curiosity and, no doubt, horror to civil lawyers when they realise its ramifications. Other supportive powers can be found in Clause 16 (giving the court, with the consent of both parties, the power to determine any question of law arising during a reference) and Article 23 (giving the court the power to correct mistakes or errors in an award).

4..4.5 The "supervisory powers" of the court are contained in Clauses 27 and 28 of the English draft Bill. Clause 27 gives the court the power to remit an award or (where proceedings have been improperly conducted) set an award aside. The problem with this section is that it does not identify the grounds upon which a Court can remit an award. Some (including myself) believe that these grounds should be recited in the draft bill. On the other hand, some belive that this issue should be allowed to evolve through the common law (see for example Steyn LJ, "England's Response to the UNCITRAL Model Law of Arbitration" (1994), Arbitration International Vol 10. No. 1 page 14.

4..4.6 Clause 28 states that the parties may appeal to the High Court on a point of law, in which case the High Court may confirm, vary or set the award aside or remit the award. Controversially, the 3 "special categories" (referred to above) are still maintained. Although the opportunity to appeal is extremely limited, the fact that parties cannot in some cases "contract out" of the English Court's supervisory role once a dispute has arisen is regrettable because the threat alone of an appeal is often a powerful and disconcerting weapon.

4..5 **Equity Clauses**

4..5.1 Article 28(3) of the Model Law states:

"The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so."

The DTI have decided not to adopt this Article on the basis that English law does not at present recognise these so-called "equity clauses". Many have urged for such clauses to be recognised; in 1979, Lord Devlin called for the recognition of such clauses. However, traditionally the Courts have regarded it as their role to ensure that parties who engage in arbitration in England should have the benefits of English law and should not risk dicing with unknown factors such as "rules of fairness". However, if party autonomy is to be upheld by the Courts, then so should, in my view, equity clauses. As Lord Justice Steyn puts it, "... if businessmen who are involved in commercial disputes wish to play Russian roulette, they are entitled to do so" ("Towards a new Arbitration Act", (1992) Arbitration Vol. 58 No. 2 page 83). All that can be said is that this is a somewhat disappointing standpoint bearing in mind the fact that an English court, whilst prepared to enforce a foreign arbitration award made under "internationally accepted principles of law governing contractual relations" (Deutsche Schachtbau v. Ras Al Khaimah National Oil Co. [1987] 2 Lloyd's Rep. 246), will not contemplate such an arbitration taking place on English soil.

5. OBSERVATIONS ON THE ENGLISH DRAFT BILL

5..1 Opinions on the English draft Bill diffuse into many different shades of view. Some believe that the Model Law should have been adopted outright, some feel that a dual system should have been maintained and others feel that, rather than

First, if the draft Bill receives too much criticism the new Act may not be allowed sufficient Parliamentary time and it may even be lost. A fresh opportunity to improve arbitration law may not arise for several years. There is, therefore, at present no alternative but to support the draft Bill and the view is that the debate on the Model Law cannot be reopened, at least if this Bill is to stand any chance of success (John Uff Q.C. and Donald Keating Q.C., "Should England reconsider the UNCITRAL Model Law or not?" (1994) Arbitration International Vol. 10 no. 2 p. 179 at page 184).

5..8 Secondly, despite its deficiencies, the draft Bill undoubtedly represents an improvement in English arbitration law. The draft Bill follows a logical structure from the Arbitration agreement through to enforcement and this in itself is a considerable improvement on the "illogical and confusing" layout of the 1950 Act (the words of Lord Justice Steyn, "England's response to the UNCITRAL Model Law of Arbitration", (1994) Arbitration International Vol. 10 no. 1 at page 5). The Bill adopts to a large extent the logical structure of the Model Law and improves upon its predecessors by abandoning the drafting technique of deeming provisions, which provide that "unless a contrary intention is expressed therein, every arbitration shall be deemed to include a provision that ...". These "deeming provisions", which puzzled many international arbitration practitioners, have been replaced by straightforward and clearer prescriptive statements.

5..9 I am therefore firmly of the view that "half a loaf" is better than no loaf at all and that the benefit of having a single, consolidated Act will outweigh these other difficulties. The closing words are perhaps best left to the President of the Board of Trade (formerly DTI), Mr. Michael Heseltine:

> "We do very well in the arbitration field. But our law, built up over years, is becoming incomprehensible to the people who want to use

it. Other countries have updated and clarified their law. Others are in the process of doing so. If we do not do the same, and keep abreast of them, we will lose business."

(Lecture, "The Competitive Society", 1993 Combar Lecture given on 18 May 1993.)

C.M. Lake
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