The Story of the Arbitration Act 1979

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History

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This summer, for the first time, I told the rather extraordinary story of how the 1979 Act got onto the Statute Book.[1] I began by reminding my listeners of the principal measures of the 1979 Act which was to abolish, for international arbitrations, the "case stated" and the setting aside of awards for "errors of fact or law on the face of the award" procedures and replacing these quite out of date procedures (which never had a proper place in arbitration) by a limited appeal procedure which was retained, with a few changes, when we came to enacting the Arbitration Act 1996.

It is really a story of coincidences involving a remarkable number of people. I started this account, however, from a rather awkward beginning. I had recently attended an arbitration conference where a distinguished speaker stated that the 1979 Act reached our Statute Book for "rotten reasons"—his argument being that to pass a Parliamentary Bill just to make London more attractive as a seat for arbitration was a shallow reason. My difficulty, therefore, was that this distinguished speaker, Lord Mustill, was the guest of honour at the gathering at which I sought to tell this story!

For me it began in January 1978 at a Boston Chamber of Commerce lunch at which I was speaking. At the time I was working in the new office in New York of, as the firm was then called, Lovell, White & King and, through the good support of the partners, I was undertaking a number of speaking engagements. Stemming from this luncheon meeting I became embarked on English arbitration law reform. I have forgotten what I said in Boston—it would have been on a legal topic relating to English law—but I clearly remember being approached after the lunch by a member of the legal department of Raytheon—the big arms manufacturer and supplier to the US and other governments.

He told me of an appalling recent experience of Raytheon in conducting two arbitrations in London. I asked if somebody could write to me about the difficulties which Raytheon had experienced. A little later I received a letter from no less a person than the General Counsel of Raytheon—a letter which, with his permission, I later read in the House of Lords. Having cited the difficulties of both arbitrations being sucked into the English law courts with all the costs and delay penalties which went with that, the General Counsel ended his letter with these words:

> "I have issued instructions in my department that counsel are never to agree to the United Kingdom as a site for an arbitration."

Other things were happening. Mark Littman Q.C., who was shortly to leave British Steel and return to practice at the Bar, formed a body called the "London Arbitration Group" or, in short, called not very attractively "LAG". LAG first met in June in 1977 in the Middle Temple and I joined later at a meeting in the Law Society in March or April in 1978. The objective of LAG was to draw to the attention of the British Government the mounting discontentment, in the international arbitral community, of London being selected as the seat of international arbitration. Thereby it was the hope that something would be done about it.

[1] This article is based on a talk which Lord Hacking delivered at a party in the garden of his London home on July 23, 2009.

Then there was Clifford Clark, a former President both of (as it then was) the Institute of Arbitrators and the LMAA and a prominent maritime arbitrator, who set up a Joint Committee of the London Court of Arbitration, the Institute of Arbitrators and the LMAA to address the need for arbitration reform. Next there was John Donaldson in the law courts. He was then the presiding judge of the Commercial Court. He believed that he had been totally passed over for further judicial promotion because of his work in Prime Minister Heath's unpopular Industrial Tribunal. Later, after the Labour Party went out of power in March 1979, John's judicial career was restored and he rapidly moved into the Court of Appeal, became Master of the Rolls with (later) a seat in the House of Lords. However, in 1978, John Donaldson, possessing no hope of restoring his judicial career and waiting for his retirement from the Bench, turned his great energy and enthusiasm in getting the newly formed Commercial Court Users Committee to address this problem. As led by him, the Commercial Court Users Committee went in great depth into not only the difficulties but into the solutions and produced a report, which became designated as a Command Paper and which became the foundation for the 1979 Act.[2]

Help was also to come from overseas. Lloyd Cutler, the senior partner of Wilmer Cutler & Pickering became interested (as did Gerry Aksen the general counsel of the American Arbitration Association) and suggested that Reuben Clark, who had come over to run the Wilmer Cutler & Pickering London office, should get involved. This was much welcomed by Reuben Clark who, as a US tax lawyer in London, didn't have too much to do over here. So well did he get into the subject that he and a young German lawyer, one Dieter Lange, wrote an article on the case-stated procedure which was given much prominence. As I recall Reuben Clark became a member of John Donaldson's Committee and was certainly a member of LAG and later the London International Arbitration Trust (LIAT).

Out of all of this activity it was important to generate interest in Parliament and in the Government of the day. Not expecting it to be debated but hoping it would draw some attention, I tabled in April 1978 a motion in the House of Lords calling attention to the problems in our arbitration law and had it put into a ballot for a three-hour back bencher's debate. These debates didn't happen very often and the chances of being successful in the ballot were small. It was, therefore, greatly to my surprise to receive a telephone call—while I was on holiday in South Carolina—from Michael Davies (later Sir Michael Davies, Clerk to the Parliaments) of the House of Lords' Journal Office to be told that I had won a place in the ballot. Did I intend "to come over from the USA to open this debate"? "Yes" was my immediate answer.

We had, however, no hope of making any progress unless we got the support of Lord Diplock who was a powerful and influential figure among the Law Lords. His great concern was that the taking away from the Commercial Court of arbitration cases—particularly relating to admiralty, insurance and commodity disputes—which provided "the water in the fountain of the development of English commercial law", would be most damaging. Some of us didn't quite see why foreign parties were being compelled to make this expensive (in time and money) contribution to the development of English law. I remember being reminded of the comment of that great English jurist and judge Lord Devlin:

> "So there must be an annual tribute of disputants to feed the Minotaurs. The next step would, I suppose, be a prohibition placed on the settlement of cases containing interesting points of law."

Other persons were getting into the act. Bob Clare, who was the senior partner of Shearman & Sterling, married to an English wife and a strong anglophile, needed to put persuasion on Lord Diplock. So it was he who took Lord Diplock round and round the lake at Selsdon Park to urge upon him the need of the English to address their arbitration law problems.

[2] Commercial Court Committee, *Report on Arbitration* (HMSO, July 1978), Cmnd.7284.

In the meantime, Bertie Vigrass, as Secretary of the Institute of Arbitrators, had had Lord Diplock made the President of the Institute and, by this means, got into an inner track with him. It worked! Lord Diplock was persuaded, with the important caveat that the special cases (admiralty, insurance and commodity cases) should not be permitted (at least for the present) to contract out of judicial review, to support this arbitration law reform.

The debate for which I had successfully balloted was held in the House of Lords on the May 15, 1978. I flew over from the United States a couple of days before and found that Mark Littman and Bertie Vigrass had done their stuff. Lords Diplock, Scarman and Wilberforce, all prominent and influential Law Lords, were to be speakers in the debate and the Lord Chancellor (Lord Elwyn Jones) was himself to reply on behalf of the Government. Actually Mark Littman and Bertie Vigrass continued to do their stuff and by the time the 1979 Bill had passed through the House of Lords, Lords Denning, Rawlinson and Hailsham had also joined the ranks of those seeking arbitration law reform.

The Conservative peers were caught by surprise by all the Law Lords descending on the May 1978 debate. They had chosen a humble former stockbroker, Lord Cullen of Ashbourne, to speak from their Front Bench. He knew nothing about arbitration law and was not a match for the Law Lords. Thankfully, however, the Conservative peers remained loyal to Lord Cullen. I so state because Lord Cullen proved a good choice. He was a conscientious and well-researched speaker who did his homework. He therefore set out to make the commercial case for arbitration law reform. He calculated that 5,000 large arbitrations were being annually deterred from coming to London, at the loss of earning power to England of £100,000 for each arbitration. From this the figure of £500 million emerged as the large annual loss, as Lord Cullen argued, in (as they were then called) our "invisible exports".

The right figure for all international arbitrations then taking place in London was probably about 500, out of which only some were being deterred from coming to London. But this annual loss of £500 million struck home with the Lord Chancellor, who repeated it in his own speech, and came up later to me to comment in private upon it. I could hardly justify a figure which I thought was seriously exaggerated. So I replied: "Well, Lord Chancellor, I have not made the calculation but it must a large figure."

Another coincidence was the maiden speech of Lord Cockfield, who later became Secretary of State for Trade in the Thatcher administration and an EC Commissioner. He knew a lot about the balance of payments (although nothing about arbitration) and laid great emphasis on the importance of our "invisible receipts" (this being the money coming into the United Kingdom in payment for our "invisible exports": the provision of our services in banking, finance and the law, etc.) which he set for 1977 at £15 billion, about half of the declining visible exports (our manufactured goods, etc.) So the inducements were there right in front of the Government of James Callaghan, who wanted to be seen to do something good in its last difficult months which ended up (as will be recalled) with the miserable "Winter of Discontent".

So this is how the Government was persuaded to adopt John Donaldson's report and to introduce in late 1978 the Arbitration Bill. Before the story is over two more significant players should be mentioned. I refer to a bright young lawyer—then only 33 years old—who had left school early, done the old five years as an articled clerk and who had, at the remarkable young age of 23 years, become a partner in a City law firm. He was Bob Ayling who in 1979 was the Assistant Solicitor at the Department of Trade. There was also another bright lawyer, not quite so young but clearly going to the top of the ladder at the Lord Chancellor's Department. He was Tom Legg, later Sir Thomas Legg, Permanent Secretary in the Lord Chancellor's Department. Working together, one in the Department of Trade and the other in the Lord Chancellor's Department, they gave the Arbitration Bill (in Tom Legg's words) "Rolls-Royce treatment". It was announced in the Queen's Speech in November 1978, had its Second Reading in the House of Lords on December 12, 1978 and, after the Committee stages, had its Third Reading in the House of Lords as soon as February 15, 1979.

And as to the final drama, the Callaghan Government collapsed, on a no-confidence vote in the House of Commons in early April 1979 before the Arbitration Bill had reached there. It could have been lost altogether but, in a trade-off between the two Houses on Bills which were considered to be politically uncontroversial, the Arbitration Bill was taken, "on the nod" through the House of Commons and onto the Statute Book only an hour or two before James Callaghan had got to Buckingham Palace to offer the resignation of his Government.

What further thoughts have I had of those events of 30 years ago? The first is that 1978/9 Bill was not the first Arbitration or other Bill to be driven through Parliament for commercial advantage. Our first Arbitration Act of 1698 was specifically passed by Parliament, according to the objectives contained in the Preamble to it, for "promoting trade" and "rendering the awards of arbitrators [to] be more effectual" and it can be said that the subsequent Arbitration Acts of 1889 and 1934 were directed to the improvement of the conduct of arbitrations in England and, as such, to increase the attractiveness of the conduct of arbitrations within our shores. Moreover it has to be plainly stated that the arbitration reforms, contained in the 1979 Arbitration Act, would never have got the ear and support of the Government of the day but for the perceived commercial advantage they bore for London as a centre for international arbitrations.

My second reflection is that the 1979 Arbitration Act formed part of the ongoing process of arbitration reform which, once begun, had to continue. It was not drafted with the elegance of the 1996 Arbitration Act. In the style of the Parliamentary Draftsmen of that time, many of its provisions were drafted with a complexity which was happily avoided in the 1996 Act. It required parties, who wished to take their arbitration disputes out of the purview of judicial review, to enter into special "exclusion agreements" and contained the awkward division between international and domestic arbitrations—the parties of the latter only being able to enter an "exclusion agreement" after the commencement of the arbitration. Then, as mentioned in my talk of July last year, there was the illogical separating out of arbitrations relating to admiralty, insurance and commodities disputes which were not permitted to get out of the purview of judicial review! Also all our attempts to get further arbitration reforms in the 1979 Act were rejected except very minor ones relating, for example, to the powers of arbitrators when provision had been made for the appointment of umpires.

My third reflection goes to the impact which the 1979 Act made upon the judiciary who, from the outset, perceived that it marked a fundamental change in "public policy" in the relationship between the courts and arbitration so that, in the words of Leggatt J. in *Arab African Energy*[3] in 1983, "public policy" in this relationship was now to be directed "to the need for finality... the striving for legal accuracy may be said to have been overtaken by commercial expediency". Such was this impact on the judiciary that in the *Bremer Vulkan*,[4] which was not governed by the 1979 Act but which reached the House of Lords (in 1980) after the 1979 Act had come into force, the Law Lords stood back from intervening in an arbitration when, under previous authority, they would have done. The issue here arose out of the wanton delay for over five years by the claimant in proceeding with its arbitral claim. As led by Lord Diplock, the majority view in the House of Lords was that, as arbitration was a "contractual" and "voluntary" process, it was for the arbitrator and the parties in that process to provide the remedy for delay without intervention from the courts—a proposition never made before the 1979 Act reached the statute book.

The impact of the 1979 Act went further still in the first case, the *Nema*,[5] which the House of Lords took (in 1981) under the 1979 Act when the Law Lords, led by Lord Diplock, exercised powers to keep the courts out of an arbitration not under the actual provisions of

[3] *Arab African Energy Corp Ltd v Olie Produkten Nederland BV* (1983) 2 Lloyd's Rep. 419.

[4] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 2 All E.R. 289.

[5] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724; [1981] 3 W.L.R. 292; [1981] 2 All E.R. 1030.

the 1979 Act but out of "a Parliamentary intention" of which there were "several indications" in the Act! In this case the judge of first instance had granted leave for an appeal to the High Court under the 1979 Act s.1(4) on the grounds that "the determination of the question of law concerned could substantially affect the rights of one or more of the parties". As the 1979 Act was drafted, the applicant plainly satisfied this test. Maybe so, said Lords Diplock and Roskill, but—in the granting of leave—it was necessary to look at the intention of the Act rather than its actual words and that intention was "to turn the tide in favour of finality in arbitral awards". As someone who was closely involved in the passage of the 1979 Act, I think Lords Diplock and Roskill did correctly focus on what was the intention of the Act, but I have to state that it was only when the 1996 Act became law that the courts were given (in s.69) a statutory basis for taking this position—a position nonetheless adopted in all the cases that followed the *Nema*.

So this strange story continued, illustrating that there was more to the Act than its printed contents. So it got onto the statute book—and candidly there would have been no difference if it had gone through the House of Commons—out of a series of coincidences, out of perceived commercial advantages for London and out of a totally inaccurate calculation on the losses in invisible exports. I suppose, therefore, we should agree with my guest of honour of last July that all of these amount to pretty "rotten reasons". Yet I have my guest's permission to state that, though there may have been "rotten reasons" in getting the Act onto the Statute Book, it was not a "rotten" Act.