# International Congress of Maritime Arbitrators XII
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## Judicial Interference or Judicial Assistance?
## The Arbitration Act 1996

*by The Hon Mr Justice Clarke*

It is a daunting task indeed to follow Judge Haight and Lord Mustill (then Lord Justice Mustill) in delivering the third lecture which bears the name of perhaps the best known and, with respect to all those distinguished arbitrators present, the most respected maritime arbitrator of his generation, at least in England and probably elsewhere. My only qualification for the role of lecturer today is that I have spent many happy hours, days and even weeks addressing maritime arbitrators of every kind — good, bad and indifferent, although I am sure that there are none here today in either of the last two categories. I have also spent a certain amount of time sitting as an arbitrator in maritime disputes of different kinds. I shall leave to others to determine which category I fell into.

Before turning to my theme, perhaps I may be allowed to add a personal recollection of Cedric Barclay to the collection of his sayings which has been gathered by Jose Maria Alcantara and Imogen Rumbold and which I would thoroughly recommend. Lord Justice Evans has written a foreword which includes two Latin phrases, which he says aptly describe Cedric's extraordinary and varied career. I am sure that you all know them well. The first is *nihil quod tetigit non ornavit* — he touched nothing which he did not adorn — and the second is *ars est celare artem* — his skill is to conceal his skills. As they say in the Court of Appeal, I agree and have

nothing to add.

My own recollection dates from the 1970s. I was involved as counsel in an arbitration which concerned an allegation of loss of oil. The shipowners said that any loss had occurred, if at all, not (of course) on board their vessel but at an oil refinery or tank farm near Genoa. They were represented by that well-known solicitor advocate (and now of course arbitrator) John Maskell, then of Messrs Norton, Rose, Botterell and Roche whom I am pleased to see is here today. As happens only too often, we ran out of time and the arbitration had to be adjourned. It just happened that a month or two later an international congress was to take place not far from Genoa. I think that it may have been the International Congress of Maritime Arbitrators ("ICMA") 1976. In any event, someone suggested that the arbitration should be adjourned to Genoa just before or after the congress. It was in the days of umpires, who always seemed to me to have much more gentlemanly air than the more prosaic third arbitrator or even than the chairman, which is the expression used in the Arbitration Act 1996. John Maskell says that I am mistaken, but my recollection is that the umpire was Captain Baskerville, who is of course President of the London Maritime Arbitrators Association ("LMAA") this year. The umpire (whether it was Captain Baskerville or not) said that unfortunately he would not be able to go to Genoa for the resumed hearing. "That's all right", said Cedric, "we will have a cardboard effigy of the umpire".

Unfortunately we did not resume the arbitration in Genoa with a cardboard (or any other) effigy of the umpire, but I have often wondered what the court would have said if the losing party had applied to set aside an award on the ground that it was misconduct for an umpire (or indeed any other member of the tribunal) to attend by cardboard effigy and not in person. I wonder, too, how the English courts would approach such an application today in the brave new world now being ushered in by the Arbitration Act 1996.

My theme this morning concerns the role of the courts in international arbitration, and in particular the balance to be struck between judicial

interference and judicial assistance. I know that there has been much debate over the years as to what role if any the courts should play with regard to arbitration. Being a parochial Englishman, I can regrettably only speak of the English experience. However I hope that these thoughts upon the future role of the courts with regard to arbitration in England will prompt discussion about the similar role of courts elsewhere. I am sure that there are many people present who will be able to enlighten us as to the various approaches of courts to arbitration, whether in Europe (especially perhaps here in France), USA or elsewhere. I look forward to learning about the way that other jurisdictions approach these various problems. Over the years, the English courts have been accused, with some justice, of undue interference with the arbitral process. It will no doubt all be different now, although I do not suppose that the courts will ever be free of criticism. Judges are convenient Aunt Sallies for the dissatisfied in this as in other fields. But the reduced role of the courts contemplated in the Arbitration Act 1996 will hopefully reduce the criticism and help to engender arbitration, including of course in particular maritime arbitration. In his lecture in 1992, Lord Justice Mustill said this: "To my colleague Mr Justice Saville I owe the following inspirational verse:

> "They said that the thing just couldn't be done,
> And he smiled and he said that he knew it.
> He tackled the thing that couldn't be done,
> And he couldn't do it."

Lord Justice Mustill added that like the man in the rhyme he had tackled consolidation and he could not do it. The same cannot be said of the efforts of Lord Justice Saville (as he now is) in bringing about the Arbitration Act 1996, although I observe from s 35 that there is still no power in the arbitrators (or I think in the court) to order consolidation of arbitrations between different parties in the absence of agreement. Before he took control of it, various efforts to draft a new Bill were made. Despite the valiant work of Basil Eckersley to that end, the powers that be initially said

that the thing just could not be done but, unlike the man in the rhyme, Lord Justice Saville did it. In an astonishingly short time he drafted the Bill which is now (and has since it obtained the Royal Assent last week) become the Arbitration Act 1996. I understand that it is likely to come into force early next year. Lord Justice Saville was one of course ably assisted by the Departmental Advisory Committee ("DAC"), which has played a leading role over the years under its distinguished chairmen, successively Lord Justice Mustill, Lord Justice Steyn and Lord Justice Saville himself. But the contribution of Mark Saville to the drafting of the ACt has been such that I am sure that he will soon be regarded as the Mackenzie Chalmers of the late 20th century. Mackenzie Chalmers was (as I am sure you all know) the author of the Sale of Goods Act 1893 and the Marine Insurance Act 1906.

It may be asked whether the courts should have any role in connection with arbitration at all. I am of course aware that arbitrators regard almost any activity on the part of the courts as an unwarranted interference with their autonomy. No doubt some of it is, or at least was. However, even courts have their place. They may even have some advantages. Two particular advantages spring to mind.

The first is the role of the court in preserving property so that it is available for the enforcement of an award. Thus in England, we have the Mareva injunction which is of course only a type of saisie conservatoire, such as has been available in other jurisdictions over very many years. The second is the role of the court in enforcing the award. An arbitration award would not be of much use if it could not be enforced. Other advantages also spring to mind, including the power to appoint an arbitrator where a party fails to or refuses to do so. The power on occasion to remove an arbitrator may also have its place.

There is a further advantage which the role of the court may have. One of the purposes of the courts in our particular field is to try to develop coherent principles of commercial and maritime law. When parties agree English law and arbitration in a standard form of charterparty, I suspect that one of the reasons they do so is that there is now a body of law built up

over many years which enables the parties to know with reasonable confidence what their rights and obligations are. They know that English maritime arbitrators will (saving all just exceptions and a maverick or two) apply those principles so that the results of an arbitration can be predicted with reasonable confidence. One of the reasons why the principles are so well developed is that in the past the courts have been asked to consider a large variety of questions of law which have arisen out of an arbitration, and in particular an arbitration award. Examples include fascinating topics like the meaning of (say) a weather working day or of personal want of due diligence (a concept which may apply to shipowners but not — I am sure we can agree — to arbitrators or judges).

I do not know whether this is true in other jurisdictions but both English maritime law and the general law of contract would in my opinion be a much poorer thing if no issues which were first considered by arbitrators ever became before the courts. No doubt many present will hold differing views on that question, but I suspect that many parties to maritime contracts agree. This lecture is not of course intended to be simply a plug for London arbitration but I suspect that one of the attractions of LMAA arbitration under English law is indeed the developed state of our maritime law, imperfect though it no doubt is. If the court had no role in the continued development of that law by being excluded from taking any part it seems to me to be likely that fewer (not more) parties would agree arbitration of this kind. In fact under the 1996 Act, subject to the overriding will of the parties, the court will retain a role in this sphere in the future.

That is so despite the fact that in many countries it is accepted that in circumstances where parties have agreed to submit their dispute to arbitration, to substitute the decision of the court for that of the chosen tribunal on the substantive issues would be (as the DAC puts it in its Report on the Arbitration Bill dated February 1996) wholly to subvert the agreement which the parties had made. The DAC did not accept that argument on the ground that it can be said with force that where parties have agreed English law they have agreed that the law should be properly

applied by the chosen tribunal, so that if it failed to do so it would not be reaching the result contemplated by the parties. For that reason a limited right of appeal was retained. For the reasons which I have tried to give I think that that was a sensible decision which is likely to enhance the attraction of arbitration in England, but whether that is so or not only time will tell.

We have come a long way since I started in practice, even though that was not so long ago when compared with some of those present. At that time, the old case stated — the consultative case and the special case — held sway. The case stated was a peculiarly English idea. The arbitrators stated their award in the form of a case for the opinion of the court on a question of law. The difference between the types of case stated was that a consultative case was stated in the course of an arbitration whereas the special case was stated at the end. There was little if anything to stop parties referring questions of law to the courts in this way. As a result, losing parties could make cases last more or less for ever. As I recall, it was a sort of game played by the lawyers in which each side provided the arbitrators with draft findings of fact. The arbitrators then found the facts and the losing party dreamed up some point of law for the court to decide, which of course put off the evil day. It never worked very well, partly because it was not unknown for arbitrators to choose some of the findings of fact suggested by A and some of the findings of fact suggested by B without always considering their compatibility — something which I feel sure never happens today. However the real problem was that there was no satisfactory control mechanism to stop the losing party from arguing endless points of law (or what were said to be points of law) before the court.

In the 1970s, the situation was recognised as less than satisfactory. So the Arbitration Act 1979 came into being. The case stated was swept away. In that brave new world the right to challenge an award on the ground that it was wrong in law was much restricted, although the Act contemplated that arbitrators should give reasons. Whether that was universally approved of I do not know, but I once heard Lord Denning say at an arbitrators'

dinner: "Your decision may be right but your reasons are sure to be wrong." I suppose that that is as true of judges as it is of arbitrators.

Under the 1979 Act, in the absence of agreement leave to appeal was required and the House of Lords soon laid down guidelines as to the circumstances in which leave should be granted or refused: see *Pioneer Shipping Ltd v BTP Tioxide Ltd*[1] and *Antaios Naviera SA v Salen Rederierna AB.*[2] It is not of course for me to say as a mere puisne judge (spelt P-U-I-S-N-E not P-U-N-Y, although the latter might perhaps be more apt) but I have always thought that the regime invented by the House of Lords in general and Lord Diplock in particular was somewhat bizarre. If I understand the way it has worked so far it is as follows. If the point of law is one of general importance it is only necessary to show that the arbitrators were arguably wrong. If, on the other hand, the point is one-off and of no importance (save presumably to the parties) it is necessary to show that the arbitrators are plainly wrong. Since most suggested points of law are neither of general importance nor entirely one-off, I had understood that one imagined a notional graph in which one-offness was measured against wrongness (or I suppose rightness) before deciding whether leave to appeal was granted or not.

I observe that under s 69(3)(c) of the Arbitration Act 1996 there is to be no jurisdiction to grant leave to appeal unless the court is satisfied inter alia that on the basis of the findings of fact in the award —

(i) the decision of the tribunal on the question is obviously wrong or
(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.

That appears to me to be rather more restrictive than the position under *The Nema* guidelines as presently understood. There is also a further important restriction on the role of the court. By s 69(3)(d) the court must further be

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1 [1982] AC 724 ("*The Nema*").

2 [1985] AC 191 ("*The Antaios*").

satisfied that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question of law concerned.

One of the most important features of the new Act is the application of the principle of party autonomy. The parties rule — OK! It is clearly so stated in s1 of the Act, which provides:

> "1. The provisions of this Part are founded on the following principles, and shall be construed accordingly —
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> (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."

So the courts are to be kept in their place, as contemplated by the Model Law.

Thus the parties are to rule OK but the whole process is to be subject to one simple overriding principle, which can presumably not be overridden by the parties and which is set out in s 33 in this way:

> "33(1) The tribunal shall —
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> (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
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> (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.
>
> (2) 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."

It might be said that it was not necessary to have a statutory provision spelling out the obvious. After all, even I know that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense — although there have been moments when I wondered whether that was so, as for example when putting a perfectly good point on behalf of charterers and being cross-examined by the owners' arbitrator (or should I properly say the arbitrator appointed by the owners) as to the absurdity of the charterers' position, I have considered carefully whether to use this opportunity to get my own back by identifying the person or persons concerned, but it might be necessary to observe the principle of audi alteram partem and to afford him or them a right of reply, so I have decided against it. In any event, I should think I observe the even more important English principle of no names, no pack drill.

It seems to me to be very sensible to set out the basic principles in the 1996 Act namely:

1. the parties rule — OK; and
2. the courts to keep off, but
3. arbitrators to act fairly and impartially and to determine the dispute with the minimum of delay and expense.

Many of the subsequent provisions of the Act underline the autonomy of the parties: see for example with regard to procedure (s 34), consolidation (s 35), representation (s 36), appointment of experts (s 37), general powers (s 38), provisional award (s 39), failure of a party to comply with an order (s 41), determination of preliminary points of law (s 45), assessment of different issues (s 47), costs (ss 63 to 65) and others. You will no doubt be pleased to hear that I shall not attempt to analyse these provisions in detail. That is partly because I have noticed some of those present dozing off, but more importantly because I know that Alec Kazantsis will be discussing the Act later in the week. I apologise to him in

advance if there is any overlap between what I have to say and what he proposes to say.

Section 46 ( 1 ) provides that the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute or if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

It therefore appears that the parties can agree that the arbitrators should apply principles other than those of the law, thus recognising equity clauses ( which are as I understand it common in some types of contract including treaties of reinsurance) , arbitration *ex aequo et bono,* amiable composition and even I suppose the principles of *lex mercatoria,* whatever they are. Until now, the courts have shown a somewhat ambivalent attitude to clauses of this kind. I am sure that you are all familiar with the articles on this topic by Stewart Boyd QC [3] and by Sir Michael Kerr, [4] which ( as one would of course expect) both contain learned and detailed analyses of the position to date. Sir Michael Kerr in particular concluded that so-called equity clauses had an important role to play in international arbitration and that they should be fully recognised by the courts.

His conclusions included the following:

> " Since 1979 English law has been sensitive to the need of developing its rule and practices in response to an explosive expansion of international arbitration throughout the major trading nations of the world. But, in the traditional English way, it is responding too slowly and too cautiously. Our traditional 'step by step' approach leads in turn to an ever recurring English malady: 'too little and too late'. This is what we are witnessing at present in the inadequacy of the English response to the demands of

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3 Steward Boyd, *"Arbitrator not to be bound by the Law" Clauses,* [1990] 6 Arb Intl 122.

4 Sir Michael Kerr, *"Equity" Arbitration in England,* 2 Am Key Int'l 377 (1991).

international commercial arbitration." [5]

He added at the end of his article:

> "Unless the parties have expressly agreed otherwise, our courts cannot get away from the principle that arbitrators must follow and apply the substantive law in the same way as the judges. Our only hope in that direction lies in the full recognition of equity clauses. Depending on their width, they provide clear evidence of the desire of parties to arbitrations to get away from the substantive law. It must now be the aim of English law, through our courts, and if necessary through legislation, to give the fullest effect to the parties' bargains and wishes."

That article was written in 1991. Now Parliament (spurred on by Lord Justice Saville and the DAC) has heeded Sir Michael Kerr's exhortations and given the fullest effect to the parties' wishes, in the case of equity clauses as in other areas of the arbitral process.

However, one thought occurs to me in this regard. Suppose an arbitration clause in these terms:

> "The arbitrator shall be entitled to decide according to equity and good conscience and shall not be obliged to follow the strict rules of law."

What would the position be if an arbitrator were to say that the application of the principles of equity and good conscience required the application of the principles of English law and then purported to apply those principles but got them totally wrong? Would the court grant leave to appeal? I do not know. Like the House of Lords, my father-in-law always said that one should never answer hypothetical questions. I suspect that the true answer is that arbitrators (especially maritime arbitrators) are much too canny to be caught out in that way. But, whatever the answer to that question, s 46 of

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5 Id at pp 400–1.

the Act is surely another example of the welcome principle of party autonomy.

Parties have many rights under the Act but they have few duties. However, s 40 sets out a cardinal principle which many here may think salutary. It provides:

> "40 — (1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
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> (2) This includes —
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> (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and
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> (b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45)."

The role of the court is to give support to the whole process: see for example ss 42–45, which relate to matters such as the enforcement of peremptory orders of the tribunal, and a plethora of other matters including preservation and sale of property. Indeed, if the court has any role with regard to arbitration, it is surely to support the arbitral process at every stage. It would be of interest to a mere English lawyer to know whether other jurisdictions contain similar provisions giving support to arbitrators and, if not, whether it is thought such support would be beneficial.

There is an important respect in which the court's existing powers have been restricted namely the power to award security for costs. In *Coppée Lavalin NV v Kenren Chemicals and Fertilizers Ltd (In Liquidation in Kenya)*, [6] the House of Lords held that in appropriate circumstances, security for costs could and should be ordered by the court in the context of an international arbitration. In para 193 of its report on the Arbitration Bill the DAC said this:

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6 [1995] 1 AC 38 ("*Coppée*").

> "The proposition that the court should involve itself in such matters as deciding whether a claimant in an arbitration should provide security for costs has received universal condemnation in the context of international arbitrations. It is no exaggeration to say that the recent decision of the House of Lords in *Coppée* was greeted with dismay by those in the international arbitration community who have at heart the desire to promote our country as a world centre for arbitration. We share those concerns."

The court will no longer have such a power under the new Act. However, unless otherwise agreed by the parties, arbitrators will have the power to order a claimant to provide security for costs of the arbitration provided that the power must not be exercised on the ground that the claimant is resident out of the jurisdiction: see ss 38(2) and (3). Again the desirability of giving arbitrators or even courts a power to order security for costs is a topic which may be worthy of further discussion. Perhaps there should be no power to order security for costs at all, whether vested in the court or the arbitrators, on the ground that the parties have entered into their agreement including the arbitration clause for better or worse. But whether that is so or not, the Act does confer that power upon the arbitrators.

There are a number of further features of the Act which I would mention as showing that the will of the parties is to prevail. They may be considered under the headings of stay of court proceedings, special categories and exclusion agreements and the replacement of misconduct and procedural mishap with the concept of serious irregularity.

### *Stay*

Section 9 of the Act makes a number of significant alterations to the existing law which generally make it more likely that a stay of proceedings will be granted in favour of arbitration. I would however like to refer to one particular change which may give rise to difficulty and which will certainly give rise to debate. Section 9(4) provides:

> "On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."

As the DAC points out in para 55 of its report, the Arbitration Act 1975 contains a further ground for refusing a stay, namely where the court is satisfied that "there was not in fact any dispute between the parties with regard to the matter agreed to be referred." Those words have been omitted from s 9(4), partly at least because they do not appear in the New York Convention. The DAC adds that in its view the words are confusing and unnecessary for the reasons given in *Hayter v Nelson*, [7] which (I may add) was a decision of Mr Justice Saville.

It appears from the way that para 55 is worded that the DAC may have thought that the omission of those words from the new Act will not have a significant effect. However, I wonder whether that is so. The present approach of the English court is to consider whether the defendant applicant has an arguable defence to the plaintiff's claim and, if he has, to stay the action in favour of arbitration, but if he has not, at least where it is readily and immediately demonstrable that the defendant has no good grounds at all for disputing the claim to refuse the stay on the ground that there is not in fact any dispute between the parties with regard to the matter agreed to be referred. Indeed my own view is that the correct position to date has been that, where summary judgment would be granted under O 14, a stay should be refused. [8] That is because, as Mr Justice Saville put it in *Hayter*, [9] the words "there is not in fact any dispute" mean "there is not in fact anything disputable".

It remains to be seen whether the court will be able to refuse a stay in such a case now that those words no longer appear in the Act. It may in

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7 [1990]2 Lloyd's Rep 265 ("*Hayter*").

8 See for example *Channel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 per Lord Mustill at p 356.

9 Supran fn 7 at p. 270.

one sense be good for arbitration if the court cannot refuse a stay, but must send the case off to arbitration, but I wonder whether there is not still a case for saying that where the defendant's case is obviously hopeless on the facts or the law or both the court should refuse the application and give judgment for the plaintiff. On the other hand I suppose that it may be said that if the claimants know that a stay is bound to be granted in such a case, that will have the desirable effect of persuading them to arbitrate in the first place and not to waste time with proceedings in court. As on all these topics the views of all those present will be of considerable interest. As at present advised it seems to me to be difficult in such a case to say that the arbitration agreement is null and void, inoperative or incapable of being performed.

### *Exclusion Agreements and Special Categories*

Under s 3 of the Arbitration Act 1979, it was in general open to the parties to enter into an exclusion agreement in order to exclude the power of the court to determine questions of law. But s 3 was subject to s 4 which provided that an exclusion agreement made before the commencement of the arbitration was to have no effect if the question of English law arising under the award or in the course of the reference related to any one of three special categories, namely:

(a) a question or claim failing within the Admiralty jurisdiction of the High Court, or

(b) a dispute arising out of a contract of insurance, or

(c) a dispute arising out of a commodity contract as defined by something called the Arbitration (Commodity Contracts) Order 1979.

Thus maritime matters, insurance contracts and contracts relating to commodities of types which were dealt with on established UK markets were excluded from the scope of permissible exclusion agreements. The special categories originated from the Report on Arbitration of the Commercial Court Committee in July 1978 which was chaired by Mr Justice

Donaldson. Various reasons were given for having such special categories. It was said that a right of judicial review in such cases was, as para 48 of the 1978 report put it "very important to the maintenance of English law as the first choice of law in international commerce. The committee added in para 49:

> "it may reasonably be said that if few of those concerned wish to contract out, there is no reason to entrench that right. This is correct, subject to two qualifications. The first is that whilst few would reach such a decision if they gave the matter careful consideration in relation to a particular contract, there is a risk that a contracting-out clause might imperceptibly become a normal trading term. The second is that at the present time there is without doubt considerable and justified dissatisfaction at the abuse of the existing special case procedure and a temporary and abnormal increase in the number of parties wishing to contract out. Once a change has been made to judicial review based upon reasoned awards and sufficient time has elapsed for the superiority of the new system to be appreciated, an entirely different attitude should emerge. [If it does], and the parties, having applied their minds to the problem in the context of a particular contract, wish to contract out of the right of judicial review, we think that they should be allowed to do so."

It was thus envisaged that the necessity for special categories would be reconsidered as time went on. That necessity was reconsidered by a sub-committee chaired by Mr Justice Mustill in 1985 which recommend that the special categories be retained for the time being. The DAC reached the same conclusion in 1990, principally(as I understand it) because no one represented that the position should be changed and the law seemed to work well in practice.

However, as a result of receiving submissions that the law did not work well in practice, the DAC subsequently issued a short report asking

for recommendations from the market. I must say that none of the reasons given for the retention of the special categories ever seemed to me to have much merit. In any event, no doubt as a result of its soundings from the market, the DAC recommended the abolition of the special categories and they do not appear in the 1996 Act. The result is that by s 69(1) the parties may agree (without restriction) that no appeal to the courts is permissible. As far as I am aware no one mourns the passing of the special categories.

I suppose that if anyone is to weep it is me since I have the privilege to be the Admiralty judge in London and one of the special categories was a question or claim falling within the Admiralty jurisdiction of the High Court. Thus I suppose that in theory the effect of the abolition will be to reduce the amount of actions begun in the Admiralty Court and to increase the number of arbitrations. I doubt whether it will in fact have that effect, but if it does that seems to me to be an entirely good thing. That is for two reasons. The first is that I can see no good reason of either policy or principle why parties should not be able to agree whatever they want in this respect. It is another example of the admirable principle of party autonomy which runs throughout the Act. The second is a personal reason. Given that I am no longer paid fees, whether I have more work or not is of much less importance to me than to the splendid body of maritime arbitrators in London. So more work for me may be said to be bad for me whereas more work for them must be good for them, and incidentally for the volume and value of invisible exports from the UK.

There is perhaps one other point to note with regard to exclusion agreements. It is that there is no change to the approach adopted by the English courts to exclusion provisions in the rules of international arbitral organisations. Thus in *Arab African Energy Corp Ltd v Olieprodukten Nederland BV* [10] and in *Marine Contractors Inc v Shell Petroleum Development Co of Nigeria,* [11] it was held that r 24 of the International

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10 [1983]2 Lloyd's Rep 419.

11 [1984]2 Lloyd's Rep 77.

Chamber of Commerce ("ICC") Rules was effective to exclude any right of appeal from a final award or an interim award of the ICC. The same principle would no doubt apply to similar provision in the rules of the London Court of International Arbitration ("LCIA") or indeed of any other such body. There is no change to that position in the 1996 Act, so that the present position is that parties are free to contract out if they wish. It seems to me that that is all to the good.

### *Misconduct, Procedural Mishap and Serious Irregularity*

First an attribution: I am not ashamed to admit that this part of my lecture owes a good deal, I hope just short of plagiarism, to an article written by Johnny Veeder QC.[12] The present position, that is before the 1996 Act comes into force, is this.

Section 22 of the Arbitration Act 1950 gives the court power to remit an award to an arbitrator or umpire. Such a power has existed virtually unchanged since s 10 of the Arbitration Act 1889. The statute does not specify any limit upon the circumstances in which the court may exercise its power to remit. But traditionally there were four grounds upon which the court would in practice do so. They were rooted in history because they were the grounds upon which (as I am sure you all know) the court would have set aside an award or treated it as a nullity before the passing of the Common Law Procedure Act 1854. They were these: (1) where the award was bad on its face, (2) where there had been misconduct on the part of the arbitrator, (3) where there had been an admitted mistake and (4) where additional evidence had been discovered after the making of the award.

However in recent years, there has been a potentially significant change in that restricted approach. Johnny Veeder QC likened the change to a ship sailing with a brand new mainsail with a flag embroidered with

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12 V V Veeder, Remedies against Arbitral Awards: Setting Aside, Remission and Rehearing (1993) Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce 125.

Lord Atkin's famous statement: "Finality is a good thing, but justice is better". The change came about in this way. In two particular cases, awards were remitted to arbitrators where there was no misconduct or mistake on the part of the arbitrators, but where a serious professional error was said to have been made by the aggrieved party's advocate such that it was thought to have caused grave procedural harm to the party concerned. The first case was a decision of Mr Justice Evans in *Indian Oil Corporation Ltd v Coastal (Bermuda) Ltd.* [13]

I shall set out briefly what happened (taken from Johnny Veeder QC's summary) because they seem to me to provide a cautionary tale for us all. I am sure that I shall be corrected by Lord Justice Evans if I have them wrong. The arbitration was a London maritime arbitration between international parties in England in English. It was a traditional arbitration of its kind, perhaps with the exception that the arbitrators were not members of the LMAA, but QCs practicing at the Commercial Bar. They were distinguished QCs, namely Adrian Hamilton, Martin Moore-Bick and Gordon Pollock. There was no misconduct or fault of any kind alleged against them. During the course of the arbitration it occurred to the tribunal that an argument might be open to one of the parties which was not being advanced. The arbitrators several times gave that party an opportunity to apply for leave to amend its case to advance that argument. On each occasion that invitation was refused and the argument was not advanced. In the event, the arbitrators made an award against the party concerned, that is the sellers.

One of the arbitrators, Gordon Pollock, recorded his regret at the refusal to take the point in these terms:

> "... I believe that the sellers had a far stronger case than they allowed themselves to advance, one which might very well have succeeded had it been formulated differently. However, the

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13 [1990] 2 Lloyd's Pep 407 ("*Indian Oil*").

> sellers' learned counsel resolutely and expressly eschewed any departure from the sellers' pleaded case and expressed a willingness to have this part of the case decided on the basis of express oral contractual agreements or nothing."

No doubt spurred on by that view, the sellers (with new solicitors and counsel) applied to the court to remit the matter to the arbitrators to enable them to seek to advance the case on a different basis. After analysing a number of earlier cases, Mr Justice Evans held that the power to remit could be exercised both in cases, of misconduct and in cases where there had been some other procedural mishap, even if the mishap was due to the fault of the aggrieved party or his representatives. In the circumstances, he held that there had been a lamentable failure on the part of the sellers' representatives at the hearing of the arbitration. He held that in these circumstances, there had been a procedural mishap and that justice required the remission of the matter to the arbitrators. An appeal to the Court of Appeal was settled after it had been argued but before it was decided. However, the views which the Court of Appeal had formed in that case were expressed in the later case of *King v Thomas McKenna*, [14] which arose out of quite different facts to which I need not refer. The Court of Appeal made it clear that it would have dismissed the appeal in the Indian Oil case. The leading judgment was given by Lord Donaldson MR. He emphasised the importance of the principle that, save in the limited circumstances in which leave to appeal can be granted on questions of law, the decision of the arbitrators on both fact and law is final. Thus he said:

> "... If the arbitrator in the event is believed by one party, perhaps rightly, to have wrongly accepted the evidence of a particular witness or found for the other party on an erroneous appreciation of the weight of the evidence generally there is no reason for the courts to intervene. Similarly if the arbitrator misinterprets the law ..."

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14 [1991] 2 QB 480 ("*King*").

Lord Donaldson MR then turned to the scope of the court's power to remit on the ground of procedural mishap or procedural misunderstanding. He said:

> "... In my judgment the remission jurisdiction extends beyond the four traditional grounds to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspect of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator ... Parties to arbitration, like parties to litigation are entitled to expect that the arbitration will be conducted without mishap, or misunderstanding and that, subject to the wide discretion enjoyed by the arbitrator, the procedure will be fair and appropriate."

As Johnny Veeder QC points out in his article, Lord Donaldson MR justified his approach on the ground that although parties choosing arbitration must take their arbitrators and arbitral procedures "warts and all" in fundamental distinction to litigation, English arbitration was not entirely a private matter:

> "... because the state stands in the background as the ultimate enforcer of the resulting award ... in exercising a discretion under section 22 [that is a discretion to remit the award to the arbitrator] the courts must never lose sight of this fundamental distinction and the ultimate involvement of the state."

Before considering briefly how the position is to be changed under the 1996 Act, I cannot resist reproducing a footnote from Johnny Veeder QC's article. It is a footnote to the expression "warts and all". You no doubt know the origin of the phrase, but in case anyone does not, the footnote explains:

> "This phrase originates from Oliver Cromwell addressing his

> portrait painter: 'Mr Lely, I desire you would use all your skill to paint my picture truly like me, and not flatter me at all; but remark all these roughnesses, pimples, warts, and everything as you see me, otherwise I will never pay a farthing for it'. Lord Donaldson's reference is particularly apt, because Cromwell's words to the General Assembly of the Church of Scotland in September 1643 have long inspired a disappointed litigant addressing an arbitral tribunal on receipt of its award: "I beseech you, in the bowels of Christ, think it possible you may be mistaken."

I turn to the approach of the 1996 Act. It approaches the matter somewhat differently. It introduces for the first time the concept of serious irregularity. Thus it provides by s 68(1):

> "A party to arbitral proceedings may (upon notice to the other party and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award."

The Act then defines serious irregularity as irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:

(a) failure by the tribunal to comply with its general duty of fairness under s 33, to which I have already referred;

(b) the tribunal exceeding its powers other than with regard to its substantive jurisdiction, because in that case the aggrieved party can challenge the award under s 67 on the ground that the tribunal did not have jurisdiction to make the award (see also s 33);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its

powers;

(f) uncertainty or ambiguity as the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award;

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

It is to be observed (as the DAC points out in para 280 of its report) that any challenge on the ground of serious irregularity in one of the specified respects must pass the test of substantial injustice, so that its purpose is not to interfere with the arbitral process but to provide it with support if something should have gone wrong — since we all know that even in the best regulated systems things do go wrong from time to time. Thus, as the DAC puts it, it is only in those cases where it can be said that what has happened is far removed from what could reasonably be expected of the arbitral process that one would expect the court to take action. The test is not what would have happened if the parties had litigated, because the parties have chosen arbitration so that they cannot complain of substantial injustice unless what has happened is simply not an acceptable consequence of that choice. In the words of the DAC:

> "section 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

I am sure that situation will never arise in an international maritime arbitration in London, or (I hasten to add) anywhere else. It must have been included for non-maritime arbitrations.

But where stand the principles set out by Lord Donaldson MR in *King*? The answer is to be found in para 282 of the DAC report. It there says that the responses which it received from the market were critical of those

principles on the ground that they involve an unwarranted interference with the arbitral process. The DAC agreed and thus proposed a closed list of irregularities drafted in terms which are not wide enough to allow the setting aside of an award simply because it has come about because of some failure on the part of a party or its advisers. The effect of s 68 of the Act will thus be that the principles in *King* will no longer represent the law. The DAC concluded that s 68 was intended to reflect the internationally accepted view that the court should be able to correct ( and only correct) serious failure to comply with the "due process" of arbitral proceedings: cf Art 34 of the Model Law.

And so at last I come to my conclusions. I have tried to set out a number of areas where the Arbitration Act 1996 seeks to achieve a balance between the independence of the arbitral process, based upon the autonomy of the parties, and the role of the court. The question is whether that balance has been fairly and sensibly struck in the Act. The Act follows as far as possible the structure and spirit of the Model Law. It also seems to me to follow the principles set out in para 108 of the 1989 report of the DAC, when it was under the Chairmanship of Lord Justice Mustill. In the present context, it appears to me that the Act does strike the right balance. It ensures that the court gives all proper assistance to the arbitral process without undue interference with it. I feel sure that the judges will approach the construction of the Act in that light. I certainly hope so. I also hope that, where the parties have not excluded recourse to the courts on questions of law, the courts will continue to play their part in the future development of English maritime law and that law will in its turn be of value in international maritime trade.

Although, as I said earlier, this is not a plug for London arbitration, I can see no reason why in the light of the Act, London international arbitration in general and maritime arbitration in particular, should not grow from strength to strength. We have reached the semi-final, if only thanks to a penalty shoot out, and I see no reason why we should not go on to win the semi-final and indeed the final itself. It must however be

recognised that the competition will be tough at each stage and that as always we can learn from experience elsewhere; so I hope that we may learn during the week how courts in other jurisdictions seek to hold the balance between the arbitral and the judicial process.

*The Hon Justice Bradley Harle Giles*

6 March 1944 — 23 April 1999

Bradley Giles was a partner in the firm of Russell McVeagh McKenzie Bartleet & Co from 1974 until 1991, when he moved to the independent Bar. He became a Queen's Counsel in 1995 and a High Court judge in 1997. He was also said to be the first New Zealand lawyer to undertake any formal study in maritime law, which he did at the University of Michigan Law School, and which later accorded him the rare honour of the Helen L DeRoy Fellowship, an achievement which he shares with two former members of the US Supreme Court, the late Chief Justice William Rhenquist and Associate Justice Potter Stewart. In 2002, the Chief Justice of New Zealand, the Rt Hon Dame Sian Elias, and the Chief Justice of the Federal Court of Australia, Chief Justice Black, presided over a unique. ceremony in the High Court, at which occasion the Maritime Law Association of Australia and New Zealand presented a silver Oar Mace to the Court in honour and memory of Justice Giles.