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Cedric Barclay and Lord Denning: Arbitrators and the Courts

by The Rt Hon Sir Anthony Evans

To those who were fortunate to know them, and who saw and heard them in action, both Cedric Barclay and Lord Denning were exceptional men; indeed, in their different fields of activity, both were pre-eminent in their times. Cedric Barclay as an arbitrator, mostly but not by any means exclusively in maritime cases, and much else besides; shipowner, engineer, master of many languages, co-founder of ICMA, the list is a long one. Lord Denning as the supreme judge of his generation throughout the common law world. That is no exaggeration, taking account of his skills as a lawyer, his meteoric career on the Bench, his personality and his ability to communicate with students, practitioners, teachers and fellow judges alike, without ever losing the common touch which owed much to his deep roots in the Hampshire soil.

They came to know each other well, and my object today is to underline the mutual respect and liking which grew up between them and which was strong enough to influence the relationship between London arbitrators and the Courts of England and Wales, in which Lord Denning sat, during the years when they flourished. I shall also suggest that the example of cooperation and mutual regard between judges and arbitrators which they fostered provides us with sound guidance when we consider wider issues regarding the relationship between arbitrators and courts

today.

Hence my title: Part One is "Cedric Barclay and Lord Denning" — both individuals, but exemplars of maritime arbitration and of the judiciary in their time — followed by Part Two, "Arbitrators and the Courts" — not as individuals, but arbitrators collectively, including but not limited to maritime arbitration, and the Courts, meaning national Courts, not just in the United Kingdom but around the world, which increasingly are called upon to perform a role in the arbitration process. The nature and scope of their role is much debated — some say that it happens to often, others say not enough — but noone, I believe, even the most ardent advocates of transnational or supranational arbitration, suggests that national courts have no role to play at all.

I should say, first, and as simply as I can, that you, Mr. Chairman, and your organising Committee have done me the greatest honour of my professional career by inviting me to give this lecture, the eighth in the series inaugurated by Lord Mustill in Vancouver in 1991 in memory of Cedric Barclay, who died in 1989. I say this for personal as well as professional reasons. Cedric and Cora, I am proud and happy to say, became close personal friends, as they were to some of you here today.

I first appeared before him as junior counsel in the 1960s, and thereafter many times until I became a judge in 1984. By that time he had achieved his full eminence as Chairman, and Life Member of the LMAA, Chairman and Life Member of the Chartered Institute of Arbitrators, President of the Society of Maritime Engineers, not to mention his co-founding of ICMA. He was renowned as a leading — the leading — figure among London maritime arbitrators. But he retained his gift for making the hearings before him relaxed and informal, though still business-like, and for putting parties, witnesses and counsel at their ease. I remember when he had offices in Sloane Street, it was one December, when he used Christmas as an excuse to produce a sumptuous chocolate cake which he dispensed to all present — including counsel (not me) who continued his submissions without observing the old adage 'never speak with your mouth full'.

Permit me one more personal memory. The arbitration hearing was in the 1960s. I was led by Michael Kerr QC. We were appearing for charterers in, I think, a safe port case, in other words we were saying that the master was responsible for the damage that had occurred to the ship. As happened in those days, a convivial lunch was enjoyed by all present — the parties, their witnesses, arbitrators, solicitors and counsel, all at the same table. Cedric was sitting next to the master and were getting on famously together. Michael Kerr and I were sitting opposite them, and he said quietly to me "just think, I've got to suggest this afternoon that that man is a liar". Now I shan't enter into the question whether lunches of that sort, from which alcohol was not entirely excluded, were consistent with today's notions of arbitral impartiality and decorous behaviour. But I can assert that, in that particular situation, no-one doubted for a moment that Cedric's judgment of the personalities and the issues would be entirely unaffected by the arrangements, nor for that matter that Michael Kerr's skills as an advocate would not be equal to the occasion in every way. I can't remember what the finding was, but I think we won the case, so perhaps he did achieve what he set out to do.

Part One
Cedric Barclay and Lord Denning: the story until 1996

It is quite unnecessary for me to say more, to this audience, about Cedric Barclay's remarkable career. Lord Mustill began the first lecture with the catch-phrase "The most unforgettable person I have ever met". (He said that it came from "a well-known periodical" without identifying which one: was it The Times, Punch, Woman's Own?) In 1996, Sir Anthony Clarke, now Lord Clarke, said he was "perhaps the best known and... the most respected maritime arbitrator of his generation, at least in England and probably elsewhere." I would like, however, to mention by name his beloved wife, Cora. When Bruce Harris published for the last ICMA Conference at Singapore, in 2007, the Collection of Lectures delivered

from1991 until 2004, he dedicated the volume to the memory of Cedric and Cora Barclay (the title page, incidentally, shows a marvellous and entirely characteristic picture of them together), and he was right to do so. We should remember them as a couple, and Cedric would have wished us to do so. I salute her memory also.

Lord Denning

I risk a charge of unfairness, even exaggeration, if I identify Lord Denning with the English judiciary during the years, particularly the 1970s, when the relationship between Cedric Barclay, and other maritime arbitrators, and the English Courts developed as it did. Lord Denning was never a judge of the Commercial Court. In fact, during the 1950s and into the following decade, the Commercial Court was far from busy, and the Commereial Judges who were appointed annually from the Queen's Bench Division to head up the Court sometimes found that there were not enough commercial cases to take up the whole of their time. Then, gradually, the work increased, and a new generation of judges was appointed: Mr. Justice (later Lord Justice) Megaw in 1960; Mr. Justice Mocatta in 1961; Mr. Justice (later Lord) Roskill in 1963; Mr. Justice (later Lord) Donaldson in 1967; and Mr. Justice (later Lord Justice) Kerr in 1972. I mention these by name, because Cedric Barclay, and his colleagues, came to know them personally, and in some cases well. They met formally, at arbitration hearings, and informally at social or quasi-professional functions such as the annual dinners of the LMAA (founded in 1959, as we recall this year). And of course, as counsel and judges, they saw the awards made in cases which were taken to the Commercial Court, not strictly as appeals but under the Case Stated and Consultative Case procedures which existed in those days under the Arbitration Act 1950. These applications to the Court became increasingly frequent, so much so that an appeals procedure was introduced by the Arbitration Act 1979 in an attempt to reduce their number, which met with only limited success.

It was when Lord Denning, already appointed to the House of Lords,

descended from what Cedric Barclay undoubtedly would have called those Olympian heights to take up office as Master of the Rolls, the presiding judge in the Court of Appeal, that he became clearly identified with commercial law and with cases emanating from the City of London in particular. That was in 1962, and he held the office until 1981 when he more or less reluctantly retired at the age of 82. By that time, he had made a significant contribution to commercial law, including arbitration and shipping.

Not all of that contribution, however, was progressive. One decision which on any view was retrograde was his judgment in *The Lysland* [1973] 1 Lloyd's Rep. 296 where the Court of Appeal ordered arbitrators to state their award as a Special Case, on the ground that the case raised "a clear cut point of law" (see p. 306). But that was uncharacteristic, and on re-reading the *Lysland* judgment it is hard to see why Lord Denning went so far as to reverse the judgment given by Mr. Justice Kerr in the Commercial Court. The two arbitrators had refused to state their award as a Special Case. (Cedric Barclay was Umpire, and had played no part at that stage.) Mr. Justice Kerr declined to order them to do so. But the appeal against him was allowed, and the Court of Appeal's judgment was a major reason why the number of Case Stated Awards and Consultative Cases increased during the 1970s and the Arbitration Act 1979 was passed in an attempt to limit them.

For the record, the other members of the Court of Appeal were Lord Justices Megaw and Scarman. The former particularly was a rigorous common lawyer, and perhaps on that occasion Lord Denning allowed himself to be persuaded by the majority. If so, it was unusual, because he was reputed to have said that, as a general rule, when his two brethren disagreed with him they were dissenting from his judgment, although naturally their majority view prevailed. Indeed, that is probably what he thought when *The Lysland* returned to the Court of Appeal as a Special Case stated by Cedric Barclay as umpire. In the Commercial Court, Mr. Justice Ackner (as he then was) disagreed with his view, and his judgment was

upheld by the majority in the Court of Appeal. They were Lords Justices Orr and Browne, neither of whom was experienced in maritime cases, so far as I am aware, and Lord Denning disagreed with them. He said —

> "In such a case as this, I think that great weight should be given to the views of the commercial arbitrators and umpire. After all, the parties have agreed to submit their dispute to him for decision, and not to the Courts. And they have done so for a very good reason. The commercial arbitrators have spent their lives in the markets and exchanges. They are familiar with commercial practices and dealings. They know the meaning of the words used by commercial men. They can be trusted to come to a right decision on them. I agree with the decision of the Umpire."
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> ([1976] 1 Lloyd's Rep. 427)

Modern technology makes it easy (for some, but not me) to consult the Law Reports electronically and to ask the question : how many cases are reported in which Cedric Barfclay is referred to by name? The answer, confined to the Lloyd's List Reports between 1968 and 1990, is 135. Lord Denning presided in the great majority of these cases which progressed to the Court of Appeal.

(I interpose that the fact that Lord Denning presided in so many of them is unlikely to have been a coincidence. The presiding judge in any court usually controls the alloeation of cases and can select which cases he will hear. This is a factor which, in this and other contexts, in my view is significant and ought not to be overlooked.)

The reports of these cases include not only the judgments but sometimes the words of the arbitrators themselves. So that you will hear the words of my two protagonists, let me select a few quotations which I hope are representative, and which may enable those who knew them personally to hear their distinctive voices in your minds.

In *The Kozara* [1973] 2 Lloyd's Rep. 1 the issue was whether an award made in a foreign currency (U. S. dollars) should be upheld. Lord Denning said this-

> "There has been some uncertainty in the City of London about this... Many commercial arbitrators have assumed that they have jurisdiction to make an award in a foreign currency, and have done so. That indeed was done by Mr. Chesterman and Mr. Barclay in the present case: and those two gentlemen have much experience of commercial arbitrations. But some arbitrators, especially legal arbitrators, have been hesitant. This hesitation was produced, or at any rate increased, by the observations of Mr. Justice Diplock [in a case in 1958]...".

The Award was upheld. Note the side-swipe at Lord Diplock, an outstanding lawyer whom Lord Denning may have thought was less in touch with the views of commercial men than he was: but that's another story...

Lord Denning continued this theme in *The Hadjisakos* [1975] 1 Lloyd's Rep. 356. He said that both Mr. Clyde and Mr. Barclay "are very well known and respected arbitrators in the City of London", and "I do not think the decision of the arbitrators should be reversed". Unfortunately. Lord Justice Roskill disagreed with them and him, but Sir John Pennycuick, a distinguished Chancery Judge, came to the same conclusion as Lord Denning, though he said "The Court must attend to the views of arbitrators: but that is not a relevant factor to be taken into account upon the construction of the document".

The Puerto Rocca [1978] 1 Lloyd's Rep. 252 came before Mr. Justice Mocatta as a Special Case stated by Cedric Barclay as sole arbitrator, and the report includes this delicious extract from the Special Case —

> "D. The parties have asked for the Award to be stated in the form of a Declaration by way of a Case Stated.
>
> Conscious of the value of the Special Case procedure and as an ardent proselyte thereof I have agreed to do so (enthusiastically). This is one of a series of disputes which makes it imperative that the superior guidance of the High Court be

> sought and obtained The shipping community (and this arbitrator) will be most grateful for assistance. "

Bearing in mind the debate that was raging at that time about the merits or otherwise of the Special Case, it is tempting to speculate about how far his tongue was in his cheek when he wrote those possibly ironic words. He was probably disappointed with the judgment-

> "I take a different view of the argument in this case from that taken by the very experienced arbitrator" (p. 257) .

Then in *The Darrah* [1976] 1 Lloyd's Rep. 285, through Lord Denning's judgment we hear the voices of both —

> "The arbitrator, Mr. Cedric Barclay, thought that the charterers were right and the shipowners were wrong. This seemed to him "elementary" and he apologised for troubling the Court with a Special Case. But he was asked to do so. And he did so, so that "the Court could reaffirm the law, this being also the wish of the parties". Now I must say that I entirely agree with the arbitrator. "

(The Commercial Judge had disagreed; but Lord Denning's view was upheld by the House of Lords [1976] 2 Lloyd's Rep. 359, Lord Diplock presiding.)

Now let me move from Cedric Barclay and Lord Dennng as individuals, to consider briefly the Courts' attitude towards arbitration generally during the years before the Arbitration Act 1996. I have never subscribed to the admittedly popular view that the English Courts invariably were somehow antipathetic towards and even jealous of arbitration during the first half of the twentieth century. Lord Justice Scrutton's famous remark "There shall be no Alsatia where the King's writ does not run" (*Czarnikow v. Roth Schmidt & Co.* [1922] 2 K. B. 478) meant no more, in my view, than that. Where the parties' dispute is governed by English law, it is for the English Courts, ultimately, to pronounce on their rights. The same principle was adopted by Mr. Justice Megaw in *Orion v. Belfort* [1962] 2

Lloyd's Rep. 257where he held, despite my youthful efforts to persuade him otherwise, that an equity clause could not be enforced.

However that may be, Parliament and the Courts have now grappled with the underlying conundrum that arises when parties agree that their disputes shall be governed by English law, but that they shall be resolved, not by national judges or by the English Courts, but by arbitrators, not necessarily lawyers, appointed by themselves. It then becomes necessary to reconcile their choice of process — arbitration is a form regulated to a greater or lesser extent by law — with their express or assumed choice of English law to govern the substantive issues involved. Undoubtedly, the balance between these two factors altered during the period between 1950 and 1996, not just in terms of statutory changes but also because the Courts moved towards accepting that arbitrators' decisions, including on issues of English law, should not be second-guessed. The House of Lords judgments in *The Antaios* [1981] and *The Nema* [1982] are sufficient evidence of this.

Nor should we forget that arbitration itself changed greatly during the same period. First, let me place on record a composite memory of what I learned from the arbitrators I came to know in the 1960s and 1970s about the practice of maritime arbitration at the Baltic Exchange in, say, the 1950s. Arbitration then was a relatively informal procedure, not confrontational but necessary in order to resolve disputes which were bound to arise under charterparties and bills of lading, often involving only small amounts. Shipowners and charterers or cargo interests each appointed arbitrators who were expected to meet and discuss the issues, and if possible to agree an outcome. When they disagreed, they took the dispute to an individual, maybe a senior broker whose decision they could both respect. Gradually a small number of such individuals could be identified, or identified themselves, as specialist arbitrators and umpires, though not necessarily full time. Cedric Barclay and Clifford Clark became leading full time arbitrators, alongside R. A Clyde who came fresh from founding his eponymous firm of solicitors (now flourishing to an extent he cannot have

imagined) and they were soon joined by Donald Davies, happily present here today, and by one whom please permit me to mention by name, for personal reasons, John P. Powell, solicitor, of William A. Crump.

Secondly, regarding changes in arbitration practice, some random examples have emerged from the Lloyd's List Reports which I have already mentioned. Let me present them simply as quotations, and without comment.

The North King [1971] 2 Lloyd's Pep. 460 (Mr. Justice Mocatta). The Special Case stated by the Umpire, Michael Summerskill Esq, included this recital —

> "F. The hearing of the arbitration took place before me on 5th February 1971, the Owners appearing by their solicitors Messrs. Holman Fenwick & Willan, and the Charterers appearing by their arbitrator, Mr. Barclay."

The Darrah [1974] 2 Lloyd's Rep. 430. The Case Stated by Cedric Barclay as sole arbitrator included —

> *"Neither of the parties was represented at the arbitration which took place on an evening* [in 1973]."

The Ares [1978] 2 Lloyd's Rep. 456 — Mr. Justice Brandon (later Lord Brandon) said that it was the "usual practice" for the parties to serve written pleadings "with such documentary evidence annexed to them as they thought fit", and he added —

> *".... it must be borne in mind that it was a matter for the dscretion of the arbitrators whether to order discovery of the shipowners documents or not".*

Finally, I cannot resist quoting from *The Virgo* [1976] 2 Lloyd's Rep. 135 where Cedric Barclay was sole arbitrator and Mr. Justice Mocatta the Commercial Judge —

> *"This is a very interesting consultative case stated by Mr. Cedric Barclay who has plainly found it both interesting and somewhat amusing."*

Here is further evidence of the professional relationship involving a great deal of mutual respect which existed between individual judges and maritime arbitrators at that time, and which I hope still does. It provides a practical foundation for discussion of what is sometimes treated as no more than an issue of legal principle, that is, the relationship between arbitration (I prefer to say arbitrators) and the Courts.

Epilogue

I was able to read out the following letter from Lord Denning at the LMAA dinner in March 1995 —

> *"Dear Anthony Evans,*
>
> I am very gtad you are going to speak on behalf of the guests at the dinner of the London Maritime Arbitrators Association. I have myself often spoken on their previous dinners and remember well Cedric Barclay, Clifford Clark and other founder members. I have always regarded the Association as providing most valuable service to the shipping industry, not only in London but throughout the world and they have done it with the utmost efficiency and dispatch. . . "

Part Two
Arbitrators and the Courts: where are we now?

I am conscious of the fact that, until now, this paper has been concerned exclusively with maritime arbitration in London. That was inevitable, because London was where Cedric Barclay practised as an arbitrator and Lord Denning sat as a judge. Both saw maritime arbitration as a product of the long tradition of, what we would call today, dispute resolution processes in the City of London and other major ports in England and Wales. But they both were internationally minded and always kept abreast of changes in the commercial scene: and what we see today, twenty years on, is very different from what they were familiar with.

Today, maritime arbitration centres exist in many other cities than London — New York of course is long established, and others more recent include Singapore, Hong Kong, Sydney and now, this ancient port of Hamburg, whose importance is proved by the fact that this impressive ICMA Conference is taking place here and has attracted a wide range of papers you will hear discussed over the next four days.

I cannot claim any first hand personal experience of maritime arbitration outside London, and I hope you will forgive me if my general observations remain London — or at least UK — centric. But general principles are involved here, regarding the relationship between arbitrators, wherever they may hold their hearings and publish their Awards, and the national Courts of different countries which may be called upon to assist or supervise the arbitration process, and above all, to enforce the Awards.

Is arbitration now transnational?

It is sometimes suggested these days that arbitration has graduated beyond being merely a contract-based and consensual form of dispute resolution, and should now be regarded as a legal institution in its own right, detached from and independent of national laws and of the national Courts which administer them. Recent eloquent examples include the Freshfields Lecture given by Prof. Julian Lew QC in 2005, entitled "Achieving the Dream: Autonomous Arbitration", and this year's address by Professor Philip Capper to the City of London Arbitrators' Livery Club. I also heard the case that there exists an independent body of international law made forcefully by David Brynmor Thomas at a 2008 meeting of the International Arbitration Club. He identified what might be called the treaty framework, including for example the New York Convention 1958, the UNCITRAL Model Law and Arbitration Rules, and in private international law the common elements found in statutory regulation in different countries and in Rules published by arbitral institutions around the world and widely acted upon.

These arguments are stronger, in my respectful view, in relation to

international commercial arbitration than they are to arbitration generally, and they have scarcely any force in relation to maritime arbitration in any of its present forms. Almost by definition, sea trade and the contracts which regulate it are international, and it would be tautologous to describe maritime arbitration as such. But maritime arbitrators apply national laws as required by the contracts under which they are appointed and which give them their jurisdiction. Together, they constitute a body of existing arbitration practice which is clearly distinct from financial, construction and other kinds of intemational disputes with which commercial arbitrators deal. And it would be pointless, I suggest, to consider whether whatever tendencies there are for international commercial arbitration to become "transnational" or autonomous or to exist, presumably float, in a different legal sphere from the layer in which national Courts operate, apply also to maritime arbitration. It is clear, in my view, that they do not; rather, perhaps, that it is irrelevant whether they do, or not. Maritime arbitration in different parts of the world is firmly based on the contracts for sea carriage and related activities which the parties have made, or on legal relationships which have been established by the dealings between them. Invariably, their disputes must be resolved by reference to relevant national laws, which govern the arbitral process also. I shall assume, therefore, that maritime arbitration is grounded in national laws, at the risk of upsetting any proselytes of transnational arbitration who regard that as an old-fashioned even jejune approach.

Dubai

I am fortunate to be involved in the founding years of the Courts of the Dubai International Financial Centre — the DIFC Courts. These Courts do not have at present any maritime jurisdiction — though this may come — and you may think that it is self-indulgent for me to mention it at all. Worse still, that some self-advertising is involved. In fact, there are two reasons for referring to it. First, alongside the DIFC Courts exists the DIFC/LCIA Arbitration Centre, which may well have a maritime content in future.

Secondly, its role is defined by the DIFC Arbitration Law, No. 1 of 2008, and under that Law, the DIFC Courts are anthorised "to perform functions of arbitration assistance and supervision" (Article 11) . That, to my mind — and I had no hand in its drafting — is an apt description of the role which national Courts can and should play when the parties have chosen arbitration as the appropriate form of dispute resolution for their case. Courts can assist and they should supervise the arbitration process, always with the object of ensuring that the arbitration proceeds as the parties intended that it should, and that it produces a valid Award which the successful party can enforce. And "enforcement', from a practical point of view, is the most important requirement of all. Unless the Award can be enforced, the whole arbitration has been a time-wasting and undoubtedly expensive exercise. And ultimately, the power of a sovereign State exercised through and with the authority of its national Courts underwrites the successful conclusion of any arbitration process.

It is sometimes suggested, as I have noted, that arbitration exists, or should exist as an institution, independently of national Courts. I can see why arbitration institutions may be keen to emphasize that arbitration is an independent and (nearly) self-contained dispute resolution process, but this should not lead them to deny that national Courts are necessary, both to 'assist and supervise' the arbitration process, and to enforce a valid Award which results from it.

Appeals

That leads me to the much-debated question of appeals to national judges from the decisions of arbitrators on issues of law. Noone now suggests, I think, that there should be appeals to courts on issues of fact. One of the reasons for the undoing of the Special Case and Consultative Case procedures which were defined by the Arbitration Act 1950 (and which in themselves had much to commend them, given the premise that questions of English law should be decided by the English Courts) was the practice, regrettable in my view, of accepting as a genuine "issue of law" the

question whether facts found by the arbitrators were sufficient to discharge the factual burdens of proof which the law placed on the parties to the dispute. *The Lysland* judgment, unfortunately for the development of the law of arbitration, did much to encourage this. The particular problem was removed by the Arbitration Act 1979 which instead permitted appeals to the Court on issues of law, but only in certain circumstances and only with leave from the Court. The requirements of the Act were narrowly interpreted and strictly regulated by the judgment of the House of Lords in *The Nema* [1982]. (The judgment is sometimes cited as an example of judicial law-making: the policy was clear, the justification for finding it in the wording of the Act, less so.) However, the policy was maintained, and the requirements were tightened up by the Arbitration Act 1996.

Appeals to the Court are possible only in the limited circumstances set out in section 69, and the number of appeals heard by the Commercial Court has been greatly reduced.

A great debate arose because many people, not least in the shipping industry, believed that the small number of appeals has deprived the Courts of opportunities to clarify the law, particularly when the true construction of standard clauses is uncertain or disputed in commercial circles, and the Courts' authoritative ruling is required. Against this, even those who recognised the contribution that the Courts can make in this way were conscious of the additional costs, delay and temporary uncertainty which the unfortunate parties to a particular dispute might have to bear. What would always be substantial costs would fall on a party who might regard them as a disproportionate price to pay for clarity in the law and an unfair burden for the losing party to have to bear.

The debate continues, but when Bruce Harris's Committee looked into the working of the 1996 Act after its first ten years, and carried out considerable research, they concluded that the present working of section 69 strikes a proper balance, in present circumstances at least.

Third parties

Before leaving the question, what role national Courts can and should play in maritime arbitration today, I should refer to one topic which to my mind is highly significant, both conceptually and for practical reasons of efficiency and saving of costs. This is the ability of Courts to hear claims by and against third parties to the primary, usually a bilateral dispute which is brought before them by parties to the arbitration agreement. Questions of jurisdiction sometimes arise, which can prevent third party claims from being joined in Court proceedings, but in general a Court has power to hear them, either at the same time as the parties" dispute, or subsequently but before the rights and liabilities of all interested parties are finally adjudged. The English Courts have power to permit additional parties, or to order the consolidation or amalgamation of third parties, whenever it appears "just and convenient" to do so.

In the case of arbitration, any proposal of this sort — that the scope of bilateral references should be extended to includes third parties, not bound by the same agreement to arbitrate — comes up against the underlying principle of 'the autonomy of the parties'. In other words, the arbitration tribunal gains its jurisdiction from the arbitration to agreement, and only the parties to that agreement can be subject to it. This generally proves to be an immovable object, and to date it has resisted the force of practical reasons which are recognized by the Courts. Even when the same dispute involves a third party, who may be bound by an arbitration agreement, but not in the same contract (charterparties and bills of lading is one classic example, or when a shipbroker or insurance broker is involved in or affected by the primary contract dispute) , arbitrators have no power to order consolidation of separate arbitration proceedings, nor even that they shall be heard together, except when the parties agree that they shall. The requirements of 'justice and convenience' are powerless against the strict principle which arises from the consensual i. e. the contractual basis on which arbitration rests.

The Arbitration Act 1996 says nothing about this, because no

consensus was revealed by the researches carried out beforehand by the DAC (Departmental Advisory Committee). Admittedly, it is difficult to devise a statutory formula which works well in practice (that has been the experience, I believe, in Holland). But nevertheless, and personally, I have never understood why a procedural power which ex hypothesi can be exercised only when it is just and convenient to do so, taking account of all parties' interests, and which the Courts have exercised successfully for longer than a century, should not be extended to arbitrators also. In this respect, I believe, the Arbitration Act 1996 marks the high water of the strict application of this principle, and I hope that the tide level will recede. On the other hand, Bruce Harris's Committee thought, in 2006, that the time had not come to make this change.

Finally, in speaking of the relationship between arbitration and Court procedures, I should mention the procedures themselves. Court procedures, of course, are prescribed by the Rules of the Court itself. One of the reasons why commercial parties opt for arbitration is said to be their wish to reduce the costs and delay of court proceedings. Then they find that arbitration is no cheaper and no quicker than court proceedings would have been, and that becomes a criticism of arbitration itself.

The force of that criticism is recognised, and much stress is laid upon the arbitrators' right, and their duty under, for example, the Arbitration Act 1996, to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense" (section 33(1)(b)). Despite that statutory injunction, it is the fact that all too often arbitrations are conducted in the same way as litigation — pleadings, discovery, oral hearings where witnesses give evidence and counsel make oral submissions. In the result, the parties' costs are much the same, except that three judges have to be paid, not just one. Arbitrators are urged to make sure that "unnecessary delay and expense" are avoided in every case, but in practice they have little power to limit the parties' costs. That can only be done by the parties and their representatives who incur them; the definition of 'recoverable costs" in section 63 of the Act begins with a

reference to the underlying 'autonomy of the parties' principle ("(1) The parties are free to agree what costs of the arbitration are recoverable"). There is no doubt, in my view, that the primary responsibility rests with the parties themselves, which probably means with their legal representatives — although I appreciate that that becomes, for them as professionals, a self-denying ordinance.

Happily, I believe that maritime arbitration is less open to criticism in this respect than other forms of arbitration may be, but even so I would remind you that excessive costs are the main reason why arbitration could become less popular, in any field. That will not happen if arbitrators bear the parties' interests in mind, and in the present context they should not assume, or allow the parties' representatives to assume, that arbitration proceedings should be conducted as if they were taking place in Court. But they should also recognise that judges and law-makers make great efforts to devise procedures which are suitable for the trial of commercial, including maritime disputes, and it is not necessary for arbitrators to re-invent the wheel when court procedures do not involve unreasonable cost or delay.

West Tankers

Now I come to a perilous section of my short voyage, exploring the current relationship between arbitrators and the Courts. We are in European waters - strictly, the countries of the European Union together with Norway, Iceland and landlocked Switzerland who are also parties to the Lugano Convention on the recognition and enforcement of judgments. The Convention has force in the European Union through The Judgments Regulation [Regulation 44/2001].

You probably all know that the recent judgment of the European Court of Justice in the *West Tankers* case has caused widespread consternation, not only in the United Kingdom but in continental Europe also.

I need not attempt a detailed analysis of the ECJ judgment, and it would be beyond the scope of this paper to do so. Fortunately, you need look no further than the current issue (August 2009) of Arbitration, the

Journal of the Chartered Institute of Arbitrators, where you will find two impressive articles, first, "The Anti-Suit Injunction: Historical Overview" by David Alteras, at page 327, and secondly, After West Tankers — Rise of the "Foreign Torpedo?" by Stuart Dutson and Mark Howarth, at page 334. I am greatly indebted to them, and also to Simon Gault who is doing great work handling the issue on behalf of the LMAA.

I propose therefore to confine myself to a number of self-contained propositions about the case and its consequences.

(1) First, the facts. The charterparty was governed by English law and contained a London arbitration clause. The charterers owned a jetty at Syracuse in Sicily which the vessel proceeded to damage. Charterers commenced arbitration proceedings against the shipowners in London. They also sought and obtained compensation from their insurers up to a policy limit. The insurers then exercised subrogation rights against the shipowners, but in order to do so they began Court proceedings in Sicily. These of course duplicated the arbitration proceedings in London. The shipowners resorted to the Commercial Court in London which issued an Order restraining the charterers from continuing their court action in Sicily. The charterers challenged the right of the English Court to do this, the House of Lords referred the issue to the ECJ, and the ECJ held that the anti-suit injunction was not permitted by the Judgments Regulation.

(2) Second, the anti-suit injunction is the English Courts' weapon of choice when faced with a jurisdictional issue of this sort. Should one of the parties to an arbitration agreement be permitted to bring Court proceedings in respect of a claim covered by the arbitration agreement? Of course not, is the answer in the domestic national context, and the English Courts have developed the anti-suit injunction as a means of restraining the party from bringing proceedings in a foreign Court in breach of an agreement to arbitrate. The first reported case concerning an arbitration agreement dates from 1911 (*Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.* (1911) 105 L. T. 846) but the form of injunction has

been traced back to the seventeenth and even the fifteenth centuries: see David Alteras's article at pages 328–9. More recently, the Courts have asserted that the injunction does not offend international comity or infringe the sovereignty of the foreign court, where proceedings are threatened or are taking place, because it is addressed only to the party by whom the proceedings are brought: *The Angelic Grace* [1995] 1 Lloyd's Rep. 87.

(3) Under English law and practice, the position is clear. Ignoring or attempting to circumvent the arbitration agreement is a breach of contract, which the Court may restrain in accordance with well-established general principles. Note, however, that the Court's power is discretionary; no injunction may be ordered unless it is "just and convenient" to do so.

(4) The ECJ does not like anti-suit injunctions. It regards them as inconsistent with the spirit of "mutual trust" that exists and must be fostered between the Courts of EU Member States. The Judgments Regulation is explicit: the national Court "first seised" of an issue must be permitted to decided that issue, and the Courts of other Member States must desist from doing so. That the anti-suit is so regarded by the ECJ was made clear in *Turner v. Grovit* [2004] ECR 1–3565 [2005] 1 AC 101.

(5) Nevertheless, the Judgments Regulation expressly excludes arbitration from its scope. Article 1.2 reads simply "The Regulation shall not apply to... (d) arbitration". The rationale for this exception is that the recognition and enforcement of arbitral agreements and awards is governed by the 1858 New York Convention: see the Report by the European Commission ref. COM (2009) 174 para. 3.7). The ECJ itself has held that the exception operates — in other words, the Judgments Regulation does not apply — when arbitration issues form the subject matter of the proceedings before a national Court *Marc Rich*(C – 190/89 [1992] 1 Lloyd's Rep. 342 [1991] ECR 1–3855), and *Van Uden* (C–391/95 [1999] QB 1225 [1998] ECR 1–7091). The ECJ pointed

out in its *West Tankers* judgment that the English proceedings in which the anti-suit injunction was ordered (and in which its Opinion was given) were outside the scope of the Judgments Regulation (ECJ judgment paras. 22–23).

(6) But the ECJ held that since the proceedings brought by charterers insurers in Italy were within the scope of the Reguation (noone doubted this), the Italian Court was "first seised" not only of the substantive issues but also of the "preliminary issue" concerning the application of the arbitration agreement (paras. 24–27). The Court then found itself in the straitjacket of the 'first seised' provision in the Regulation —

> "It follows that the objection of the lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No. 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that Regulation."(ibid.)

(7) The question whether the English Court should exercise jurisdiction over an issue which the parties have agreed to refer to arbitration arises in a different form in other situations, for example when proceedings are brought in more than one country in respect of the same subject matter and it is desirable that unnecessary duplication shall be avoided. The Courts' common law approach is to exercise a discretionary power and, where appropriate, to cede jurisdiction to the foreign court. This principle has been developed in cases known formerly by their now-forbidden Latin names, forum non conveniens and lis alibi pendens. The discretionary approach is exemplified by the House of Lords' judgment in *The Cambridgeshire* [1987]. It contrasts sharply with the strict rule under the Judgments Regulation as it was applied by the ECJ in *West Tankers*. These two different philosophies underlie much of the debate now raging, in Europe and elsewhere, about the fall-out from

that judgment.

(8) Finally, I do not seek to contribute to that debate, and as regards European Law I am scarcely qualified to do so. But from an arbitrator's standpoint I venture to make these observations —

(a) the judgment is concerned expressly and exclusively with the rule that the Italian Court, being 'first seised' of the substantive issue, has precedence over the courts of other Member States in deciding whether the arbitration clause is valid and should be enforced: it is noteworthy that the Court's conclusion is expressly limited to the objection raised by the shipowners "before the Tribunale di Siracusa" (para. 27, quoted above);

(b) the Court recognised that the English proceedings were outside the scope of the Regulation, because they were concerned with the excluded subject of arbitration, and therefore they were valid: yet the English Court was prevented by the Regulation from directing the parties to give precedence to arbitration, as the United Kingdom's treaty obligations under the 1958 New York Convention required it to do; and

(c) the ECJ judgment therefore has demonstrated that in practice the Judgment Regulations can compromise the Member States' obligation under the New York Convention, to require performance of a valid arbitration agreement. Inevitably, if a party objects to the validity or application of the agreement, that issue has to be tried, though not necessarily before the arbitrators are appointed and the arbitration begins. The issue most appropriately should be decided either by the arbitrators themselves, to the extent that the national law permits them to do so (London arbitrators, under the Arbitration Act 1996, have a limited power to decide the extent of their own jurisdiction; in other countries the power is much greater, even unrestricted), or by the national courts of the State which the parties have chosen as the seat of the arbitration.

> The effect of *West Tankers* is that the issue must be decided by the courts of a Member State chosen for his own reasons by the party who challenges or ignores the arbitration agreement. The position clearly is unsatisfactory and one hopes that this impediment to efficient and prompt arbitration proceedings will soon be removed by clarification of the arbitration exception in the Judgments Regulation, if necessary by extending its scope.

Civil law or common law approach?

Hamburg stands alone of the maritime arbitration centres I have mentioned above in being situated in a State where the national courts apply what I shall call civilian law, rather than common law rules.

This difference ought not to affect the attitude of national courts towards arbitration and arbitrators, because all States who are parties to major international arbitration treaties, including the New York Convention itself, undertake the same obligations towards each other, regardless of the sources of their national Laws. But in practice it cannot be denied that judicial responses are conditioned by the training and experience of the judges themselves and influenced by their background in civilian or common law. The *West Tankers* judgment itself is evidence of this. Common law judges are permitted to exercise their individual discretion in certain circumstances, provided they take account of general principles that apply; civilian judges are more inclined to look for and then apply the relevant rule of law.

Reconciling this difference of approach, in my view, is one of the major challenges facing international lawyers today. This does not mean that one system must be preferred and the other rejected. It is rather to be hoped that new rules will be developed, and new procedures adopted, which embrace the best features of both systems.

Take one example from the field of arbitration. The UNCITRAL Model Law and Rules of Arbitration are sometimes regarded as having their origin

in the common law, but they have been adopted by States world-wide, with or without modification, regardless of their individual legal histories and traditions. This process is currently underway in the United Arab Emirates, of which Dubai forms part. The UAE became a party to the New York Convention in 2006. Its Constitution and Civil Laws are based on the civilian model, derived from France through Egypt. Now, steps are being taken to introduce an updated Federal Arbitration Law, and this may incorporate features of the UNCITRAL Model Law. If it does, that will be a practical example of good practice in combining features from both systems and, at the same time, contributing to an international consensus in this important area of the law.

Conclusion

My aim has been to demonstrate that the relationship between Cedric Barclay, and other maritime arbitrators, and Lord Denning, and other judges, was one of toleration and mutual respect. I suggest that those same characteristics should guide their successors today, not just in England and Wales but in all countries where arbitration is available to businessmen. Whilst it is not unknown for individual arbitrators and arbitration institutions to suggest that arbitration is independent of national courts, the better and, I believe, the generally accepted view is that both have their different roles to play. As the distinguished Australian lawyer and international arbitrator, Doug Jones, said in a recent paper, "access to the courts ..... is the fundamental basis of any legal system" (Arbitration Vol. 75 (2009) page 63). Nor in the *West Tankers* judgment did the European Court doubt for one moment that the jurisdictional issues were to be decided by a national court; the question was, which one?

Arbitration is contract-based, and contracts ultimately can only be enforced, whether or not they are also interpreted, by national Courts. Their functions of course are separate, and the dividing line between them is drawn differently in different jurisdictions and under different systems of law. The parties to an arbitration agreement are autonomous, but within

limits set by the relevant governing law.

Let me use some contemporary language. Arbitrators and judges, together with mediators, provide a comprehensive dispute resolution service for the commercial community they serve. The more the providers of these services respect and tolerate each other, the more efficient the service will be.

Maritime arbitration, I suggest, is truly international, but there is no demand, so far as I am aware, for it to become transnational, or supranational, or to lose its national roots. Shipping contracts are governed by national laws, and usually it is not difficult to identify the national seat of arbitrations which take place under them. Far from resenting interference by the Courts, maritime arbitrators in England and elsewhere welcome guidance from the Courts on questions of law — witness the widespread support in the maritime community, though not a majority, for wider grounds of appeal under the current English statute. They also appear to accept that national courts should have power to assist and supervise the arbitration process, as well as to enforce their Awards, and that it is necessary to strike a balance between the parties' right to choose their own Tribunal, and their expectation that disputes will be resolved in accordance with their chosen law.

I have said much of Cedric Barclay's respect for judges and the law; but he was not starry eyed, about legislation in particular. Thanks to a diligent and time consuming search made by Dieter Griebel, for which I am most grateful, I have seen the draft paper which Cedric Barclay intended to deliver during ICMA IX in this very City of Hamburg.

He was greatly concerned with the increasing costs and complexity of arbitration, and it must be said that he was not a fan of the Arbitration Act 1979 or of Parliamentary interference generally. This explains, I think, the quotation from the English poet John Dryden with which he concluded his draft paper —

"Nor is the people's judgment always true.
The most may err, as grossly as the few".

I conclude this tribute to him by quoting the two lines of verse which immediately precede that couplet, from the poem *Absalom and Achitophel* —

"For who can be secure of private right,

If sovereign sway may be dissolv'd by might?"

Arbitrators, I suggest, are concerned with private rights; those are made secure by sovereign power, exercised ultimately by national Courts.

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