ENGLAND'S RESPONSE TO THE MODEL LAW OF ARBITRATION

by Lord Justice Steyn[1]

The importance of the Model Law

England's response to the challenge of UNCITRAL's Model Law on International Commercial Arbitration has been to use it as a yardstick by which to judge the quality of our existing arbitration legislation and to improve it. After a gestation period, which has been elephantine in its proportions, a draft Arbitration Bill has now been prepared and when a consultation paper has been completed the consultation process will start. The single most important influence in the shaping of the Bill has been the Model Law.

The genesis of the Model Law was the idea that trading nations would benefit by having available an international text as a basis for harmonizing national legislation by adopting the text *en bloc* or by revising national laws in accordance with desirable features of it. It was an ambitious project, notably because arbitration is concerned with the procedure of dispute resolution and the relationship between arbitration and national courts. The divergences between national laws on arbitration are great. And it is usually more difficult to achieve harmonization of national laws in procedural as opposed to substantive matters. That was the principal reason why the technique of a model law as opposed to a convention was adopted.

The Model Law text was settled in 1985 after many lengthy sessions spread over several years. Thirty-two states were represented by delegations. The United Kingdom delegation included Lord Justice Mustill (now Lord Mustill). A further 20 states sent observers. So did 14 international organizations. Lord Wilberforce represented the Chartered Institute of Arbitrators. Mr Martin Hunter was the delegate of the International Bar Association. All contributed in an active way in discussions. Inevitably, there had to be compromises between common law and civil law points of view, and the concerns of other legal cultures had to be taken into account. No international text ever satisfies everybody. But the Model Law was a remarkable achievement by UNCITRAL, ranking in importance with the New York Convention of 1958.

1. Lord Justice of Appeal; Chairman of the Departmental Advisory Committee on Arbitration Law since 1990.

The text is arranged in logical order, and its provisions are expressed in simple language, which will be readily comprehensible to international users of the arbitration process. Substantively, the solutions adopted by the Working Group reflect a widespread *consensus* as to what is practical and feasible in international commercial arbitration. It is therefore not surprising that 16 states have already based new legislation on the Model Law.[2] Germany and New Zealand may follow the same route. And other states are revising their arbitration laws in the light of the Model Law.

The decision not to adopt the Model Law

It is pertinent to ask why the Departmental Advisory Committee on Arbitration Law (the DAC) recommended that England should not adopt the Model Law? Cynical foreign observers say that the decision is in character with England's role in the process of harmonization of international trade law. Typically, they say, England is voluble at international congresses in promoting common law solutions in the framing of a convention and, having achieved significant success in that pursuit, England then rejects the convention as being inferior to native English law. This criticism is obviously too extravagant in its scope. But it is not entirely groundless. The Vienna Sales Convention has been ratified by 34 nations, including almost all the member countries of the European Economic Community, and most of the major trading nations of the world. My understanding is that Belgium, Japan, and New Zealand will also ratify. Yet England delays. I believe the reason is to be found in the deep-seated antipathy of English lawyers towards multi-lateral conventions. The purity of the common law prevails over the needs of international commerce, and our own trading position. Moreover, as Professor Barry Nicholas, a United Kingdom delegate at the Vienna working sessions, pointed out earlier this year, it is vital that the United Kingdom should ratify the convention quickly, so that the experience of English lawyers and of the Commercial Court can influence the way in which the convention is interpreted and applied.[3] I would argue, however, that the decision of the DAC to recommend that England should not adopt the Model Law was justified on special grounds. And it is right to point out that the committee took this decision under the chairmanship of Lord Justice Mustill and after a most detailed and rigorous examination of the merits and demerits of the Model Law as compared with English law.

2. Legislation based on the Model Law has been enacted in Australia, Bermuda, Bulgaria, Canada, Cyprus, Hong Kong, Mexico, Nigeria, Peru, Russian Federation, Scotland, Tunisia and, within the United States of America, California, Connecticut, Oregon and Texas.

Not all the reasons put forward in 1989 for not adopting the Model Law seem as compelling today as they did then.

The committee stated: [2]

> "The arguments in favour of enacting the Model Law in the interests of harmonisation, or of thereby keeping in step with other nations, are of little weight. The majority of trading nations, and more notably those to which international arbitrations have tended to gravitate, have not chosen thus to keep in step."

That was a judgment made four years after the publication of the Model Law. Today one would have to revise that judgment. Less than a decade after its first publication the Model Law has proved popular internationally and has become a benchmark by which the quality of national arbitration laws is judged. Nevertheless, in my view the decision taken in 1989 was right for England. I say that for two reasons. First, although our principal statute, the Arbitration Act 1950, is of poor quality, England already has a well developed and comprehensive arbitration system which since the watershed of the Arbitration Act 1979 has by and large proved satisfactory domestically and popular among international users of the arbitration process. In comparison the Model Law quite understandably is more skeletal in its treatment of the arbitration process. It contains many gaps which would have to be filled. Secondly, much of arbitration law is concerned with the relationship between arbitration and national court systems, and in the English system that relationship involves greater supervision of the arbitral process than is envisaged by the Model Law. Subject to two qualifications to which I will turn later, the prevailing domestic view has been that England has found the right balance between party autonomy and judicial scrutiny of the arbitral process. In combination these two factors justified the decision taken in 1989 not to adopt the Model Law.

3. The United Kingdom and the Vienna Sales Convention: Another case of splendid isolation? March 1993, Centro di studi e ricerche di diritto comparato e straniero, No. 9. In a paper under the heading The Vienna Sales Convention: A kind of Esperanto? which was presented at an All Souls seminar in April 1993 I considered the arguments for and against England ratifying the Vienna Sales Convention.

[2] par. 89

The way forward

In its 1989 report the Mustill committee recommended that a statute should be drafted which would "comprise a statement in statutory form of the more important principles of the English Law of arbitration, statutory and (to the extent practicable) common law".[5]

The committee advised that [6]

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

The government accepted this advice.

The initiative to translate the idea of a new statute into action came from Mr Arthur Marriott. It involved the privatized drafting of a new statute. It was funded by a large group of law firms, barristers' chambers and arbitration institutions. The Marriott Group engaged the services of Mr Basil Eckersley, a distinguished barrister and arbitrator. That was an inspired choice. He produced an Arbitration Bill and a Commentary. It was a tour de force and a convincing refutation of the notion that only a lawyer trained in the office of the Parliamentary Draftsman is capable of drafting a statute. Nevertheless the DAC resolved that the new statute should be drafted by somebody trained as a parliamentary draftsman. That decision puzzled many experienced observers. It was yet further testimony to the astonishing awe in which Whitehall holds Parliamentary Draftsmen. As Sir William Dale pointed out legislative drafting in England is endowed with a mystique which it does not possess in civil law countries.[7] The decision of the DAC was the outcome of realpolitik. The DAC was advised by the Department of Trade and Industry that it was essential, in view of a crowded legislative agenda, to obtain government support for the new measure and that such support would not be forthcoming if the bill was not drafted by a lawyer trained as a parliamentary draftsman. The DAC was motivated by one desire only: that England should have the best possible new arbitration statute as soon as possible. The committee accept the advice it was given, as it had to.

5. par. 108
6. ibid
7. Legislative Drafting: A New Approach, 1977, 339

The Marriott Working Group instructed a former parliamentary draftsman to prepare a Bill. Unfortunately, his draft failed the threshold requirement of following the structure of the Model Law. The committee rejected it as a basis for future work. The Group instructed another former Parliamentary draftsman. The committee accepted her first draft as a working draft. The committee then advised on successive drafts of the Bill.

Until 1992 the project had been financed and directed by the Marriott Working Group. By April 1992 it had become clear to all concerned that it would be more sensible for the project to become a public one. The DAC recommended that the Department of Trade and Industry should take over responsibility for work on the Bill and that it should be carried forward as a Government Bill. The government accepted this recommendation.[8] That is the basis on which the DAC has advised on the drafting and redrafting of the bill. Nevertheless the work of the Marriott Group, and Mr Eckersley's draft, proved of immense value in the second and public phase of the project. Without that work we would not today have an Arbitration Bill. And the DAC has been able to draw on the very extensive experience of the Marriott Group because two leading members of the Group, Mr Arthur Marriott and Mr Anthony Bunch, generously agreed to join the committee.

The structure of the Bill

The Bill looks very different from the existing arbitration legislation. The structure is different. For example, the draftsman of the 1950 statute thought it right to start the statute with a provision on the revocation of the mandate of the arbitrator, and to scatter provisions about the challenge to arbitrators across the statute. Generally the structure of the 1950 statute was illogical and confusing. The Bill has a clear and logical structure taken from the Model Law. This is an important point because it was a prime objective of the DAC that the bill should improve the accessibility of our arbitration legislation to domestic and international users alike.

8 In the course of his lecture "The Competitive Society", the 1993 Combar lecture given on 18 May 1993, the President of the Board of Trade explained the Government's approach as follows:

> "We do very well in the arbitration field. But our law, built up over years, is becoming incomprehensible to the people who want to use it. Other countries have updated and clarified their law. Others are in the process of doing so. If we do not do the same, and keep abreast of them, we will lose business.
>
> I am pleased to be able to say that, having had the arguments put to me, I was able to agree to my Department taking on responsibility for preparing a new Arbitration Bill. This is being done in full cooperation with the Committee and others with direct interest."

The 1950 statute repeatedly uses the drafting technique of deeming provisions, which provide that "unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that . . . . . ". Like the draftsmen of the Model Law the DAC ultimately put its faith in simplicity. The deeming provisions have been replaced by straightforward prescriptive statements, sometimes mandatory in character and sometimes not. Another new feature is that the Bill emphasizes the principle of party autonomy. It also seems to me that generally the language in which the Bill has been expressed has been improved and that it is likely to be reasonably intelligible to laymen.

Some major issues:

It will not be possible to discuss the Bill in detail. But it might be useful to consider briefly a few features of the Bill, which either involve or might arguably involve important changes in the law, as well as certain major issues which are not at present affected by the Bill but nevertheless lie at the heart of the current debate. The matters which I propose to discuss are:

1. Kompetenz/Kompetenz and the separability of the arbitration agreement.
2. Evidence
3. Procedure
4. Immunity
5. The relationship between the courts and arbitration:
   (a) Remission
   (b) Special categories
6. Equity clauses.

Kompetenz/Kompetenz and the separability of the arbitration agreement

The doctrine of Kompetenz/Kompetenz, that is the question whether arbitrators may decide on their own jurisdiction, causes difficulties in some countries. In England the position is straightforward. Arbitrators are entitled, and indeed required to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties, and the court has the last word. The new Bill does not change the law. It merely contains a provision declaratory of the common law position. Given the fact that the Commercial Court has the capacity to decide such preliminary issues speedily, the DAC took the view that the existing practice in England is probably satisfactory. Accordingly, the Bill contains no

provisions comparable to Article 16 (2) of the Model Law, which requires a denial of jurisdiction to be raised not later than when the defence is served, and Article 16 (3), which requires' an application to court challenging the arbitrators' decision to be made within 30 days. If the consultation process reveals strong support for corresponding provisions in our legislation, the committee will have to think again.

Until recently the doctrine of the separability of an arbitration clause contained in an integrated written agreement was not fully developed in England. Thus it was thought that a dispute whether a written agreement reflected the true intention of the parties and can be rectified always fell outside the scope of the arbitration clause in the contract. In 1987 in *Ashville Investments Ltd. v. Elmer Contractors Ltd* [9] the Court of Appeal finally laid to rest this absurd notion. The judgments in that case were a notable contribution to the development of the doctrine of the separability of the arbitration agreement. But there was still a problem. The orthodox view was that disputes as to whether a contract was invalid or illegal *ab initio* always fell outside the scope of an arbitration clause in that contract. Earlier this year *Harbour Assurance Co. (UK) Ltd v. Kansa General International Assurance Co. Ltd.*[10] the Court of Appeal held that an arbitration agreement in a written contract could confer jurisdiction on an arbitrator to decide on the initial validity or illegality of the written contract provided that the arbitration clause was not directly impeached. I respectfully applaud the judgments in the Court of Appeal in *Harbour Assurance.* England has now adopted the approach of the Model Law. Article 16 (1) of the Model Law reads as follows:

> "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

That provision is the most compelling evidence of the workability and desireability of a fully developed separability doctrine. Given that the relevant law has now been satisfactorily developed and settled in *Harbour Assurance,* some may think that there is no need for legislation. It is true that there will be no appeal to the House of Lords in *Harbour Assurance.* But there is the risk that the point may come before the House of Lords in another case.

9. [1988] 2 All ER 577
10. [1993] 3 All ER 897

And the infallibles may say that it is all far more difficult than the Court of Appeal realised, and they may reverse the beneficial development of the law. That has been known to happen. In order to guard against that risk the Bill contains in section 3 (2) a separability provision squarely based on Article 16 (1) of the Model Law.

Evidence

In recent times it has been assumed by authors that arbitrators are bound by the technical rules of evidence unless the parties expressly or implied agree otherwise.[11] This assumption is understandable since in enacting the Civil Evidence Act 1968 Parliament assumed that the technical rules of evidence apply to arbitrations.[12] That was, however, a mere assumption and it has no prescriptive force. If there is any such rule, it must therefore be found in the case law. Here I am fortunate. In an important paper Mr Richard Buxton Q.C., a Law Commissioner, and about to become Mr Justice Buxton, examined the relevant case law with great care.[13] His conclusion was that, contrary to what was generally believed to be the position, there is no binding authority which holds that the technical rules of evidence are applicable in arbitrations. And there are *dicta* the other way. That is a view which I respectfully share.

Looking at the matter more broadly it is difficult to see why the technical rules of evidence should apply to arbitrations. A term to that effect cannot be implied in the arbitration agreement. If there is such a rule, it must therefore be a rule of positive law. But what can be the rationale for such a rule? It can only be that the rules of law governing court proceedings and arbitrations must in all respects be the same. But that is a false premise because one of the purposes of arbitration is to avoid the over elaborate procedure of court proceedings and the technical rules of evidence. It is also difficult to see why, in the thousands of domestic arbitrations conducted every year by architects, engineers, surveyors and other lay men, the arbitrators should have to master technical rules of evidence which sometimes baffle the House of Lords. Moreover, in international commercial arbitrations, where the parties have selected London as the venue because of the quality of our international arbitrators and the quality of our substantive law, it is difficult to justify the application of our technical rules of evidence.

11. Mustill and Boyd, Commercial Arbitration, 2nd edn. 352; Russell on Arbitration, 20th edn., 273.
12. section 18 (1)(b)
13. The Rules of Evidence as Applied to Arbitrations, The Journal of the Chartered Institute of Arbitrators, 1992, volume 58, 229

And where London is imposed on the parties by the decision of the International Chamber of Commerce, or another arbitral institution, the absurdity of applying our technical rules of evidence is even greater. It is true that most institutional rules expressly exclude the rules of evidence. It is also right that the rules of evidence are usually ignored in arbitrations. These are not, however, reasons for maintaining such a rule: these are added reasons for abolishing it. Lastly, it is relevant to note that the technical rules of evidence are under siege even in the court system. The centrepiece of the technical rules of evidence is the hearsay rule. That is the rule which led the House of Lords to conclude in *Myers* [14] that the factory records containing the engine block numbers of cars cannot be used as evidence to identify the cars since it was hearsay evidence. The fact that such evidence was rationally superior in quality to any evidence given by employees did not help. The statutory reversal of the particular decision in *Myers* has left unaffected the impact of the hearsay rule on many classes of rationally superior evidence. Since Mr Buxton's paper was delivered, the Law Commission has convincingly demonstrated that the hearsay rule has no place in a modern court system and recommended that in civil proceedings evidence should not be excluded on the ground that it is hearsay.[15] There is, however, a risk that a court may convert the *communis error* that the technical rules of evidence apply to arbitrations into the *ratio decidendi* of a case. It is the unanimous view of the DAC that the inapplicability of technical rules of evidence to arbitrations should be made plain by legislation. Section 11 (1) of the Bill provides:

> "the tribunal shall determine all procedural matters including the admissibility, relevance, materiality and weight of any evidence."

This provision is taken verbatim from Article 19 (1) of the Model Law. If it becomes law it ought to remove any suspicion that in splendid isolation England insisted on applying the technical rules of evidence to arbitrations.

That leaves one loose end under the heading of evidence. The losing party in an arbitration, who can identify no true question of law, frequently applies for leave to appeal under section 1 of the Arbitration Act 1979 on the ground that there was no evidence to support a finding of fact. The argument is that such a question is a question of law under section 1. To the best of my knowledge such submissions never succeed.

14. [1964] 2 All ER 881
15. Law Com. No. 216 (Cm 2321)

But does the supposed rule exist? Mustill and Boyd have argued that the rule has not survived the changes introduced by the reforming measure of 1979.[16] I respectfully agree. But this relic from the last century, which was invented to control the decisions of illiterate juries, is still around and provides a convenient basis for attacking arbitrators' decisions on matters of pure fact [17]. The Bill does not expressly deal with this point. One would hope that with the final demise of the idea that arbitrators are bound by the technical rules of evidence this related rule would also perish. But one can imagine counsel arguing that the rule should be adjusted to provide that the issue where there is relevant evidential material, as opposed to technically admissible evidence, in support of a finding of fact is a question of law. In drafting legisation one cannot, however, guard against every absurd argument. On balance I am confident that, if section 11 (1) of the Bill is enacted, it should put an end to all arguments that it is a question of law whether there is material to support a finding of fact.

Procedure

It has been a conventional wisdom of English arbitration law that there is a rule of law requiring an arbitrator to conduct a reference in an adversarial as opposed to inquisitorial fashion unless the parties have agreed otherwise. In *obiter dicta* Lord Roskill [18] and Lord Donaldson of Lymington[19] have said so. Distinguished authors have also said so.[20] But there appears to be no binding precedent containing a ruling to that effect. Moreover, the powers vested in arbitrators by section 12 (1) of the Arbitration Act do not appear to be tied to the adversarial system. It contemplates that the arbitrator will examine the parties to the dispute, and presumably also their witnesses. Morevoer, in sweeping terms section 12(1) provides that the parties shall "do all other things which during the proceedings on the reference the arbitrator . . . may require". That hardly looks like a legislative prescription for a rule requiring arbitrators to conform strictly to the adversarial model of the court process.

It seemed to me that the point should be reseached. Here too I have been fortunate. I had had the advantage of meticulous historical and legal research done by Claire Blanchard.[21]

16. Commercial Arbitration, 2nd edn, 596
17. In the *Baleares* [1993] 1 Lloyd's L.R. 215, at 228 and 231-232 I explained in some detail why in my view this supposed rule should now be rejected.
18. *Bremer Vulkan v. South India Shipping* [1981] AC 909.
19. *Chilton and Another v. Saga Holidays PLC* [1987] 1 All ER 841, at 844
20. Mustill and Boyd, Commercial Arbitration, 2nd edn.
21. A barrister practising in 4 Essex Court, Temple, London EC4, my former chambers.

A good starting point is to ask why English civil court proceedings acquired their distinctive adversarial character. Historically, the general mode of trial was by a judge and jury. The dynamics of a jury trial required one predominantly oral hearing, and involved a relatively passive judge, who left the deployment of the evidence and arguments to the lawyers. [22] There was no reason why this procedural framework should be imposed on arbitration as a matter of law. On the other hand, it is easy to see that historically the habits of the courtroom would often have been carried over into arbitration. Between 1694 and 1889 a number of textbooks were published on arbitration law. These books stated that the procedural powers of arbitrators are wider than those of judges; that arbitrators are not bound by rules of practice; and that arbitrators may in their discretion either examine the parties and their witnesses or leave it to the lawyers.[23] The contemporary case law provides an inconclusive picture. One must, of course, put to one side cases concerning court arbitrators, who were the predecessors of official referees. Clearly, it was only natural that such arbitrators would follow the same procedure as the court from which it received its authority. Subject to this qualification, and subject to the further qualification that arbitrators must always obey the principles of natural justice, there is nothing in the decided cases to show that there was an established rule requiring arbitrators to adopt an adversarial procedure. In 1889 the Arbitration Act provided by paragraph (f) of its First Schedule as follows:

> "The parties to the reference . . . . shall, subject to any legal objection, submit to be examined by the arbitrators . . . and shall, subject as foresaid, produce before the arbitrators . . . . documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require."

That provision was the forerunner of section 12(1) of the Arbitration Act 1950. It did not impose an adversarial framework on arbitrators. On the contrary, its language contradicts the notion that arbitrators are rigidly tied to adversarial procedures. Given these statutory provisions, it is not surprising that there is no binding precedent requiring arbitrators as a matter of law to follow the adversarial procedure of the White Book. It is realistic, however, to accept that throughout this century lawyers trained in civil court proceedings in fact allowed that experience to govern arbitral procedure. And it is a fact that arbitrators and lawyers generally assume that they are bound to adopt adversarial procedures.

22. Lord Wilberforce, "Written briefs and oral advocacy", 1989 Arb. Int. 348
23. Cleeve, The Law of Arbitration, 1694, 18; Kyd, The Law of Awards, 2nd edn, 1799, 96; Caldwell, The Law of Arbitration, 2nd edn, 1825, 53; Watson, The Law of Arbitration and Awards, 3rd edn, 1846, 117; Redman, The Law of Arbitrations and Awards, 1st edn, 88; Russel, The Power and Duty of an Arbitrator and the Law of Submissions and Awards, 3rd edn, 1864, 183.

Under the Model Law system arbitrators have wide procedural powers to proceed in accordance with adversarial or inquisitorial methods or in accordance with a mixture of both methods. Article 19 provides as follows:

> "(1) . . . . . , the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate."

The DAC unanimously took the view that it would benefit English arbitration to make clear that, subject to the terms of the arbitration agreement and to the overriding principles of natural justice, arbitrators may adopt inquisitorial powers. It does not at all follow that the essentially oral character of contested hearings will be dramatically changed if our proposal is adopted. On the other hand, such a provision may be a useful weapon in the uphill fight against ever longer and costlier hearings. In order to achieve this policy objective, section 11 (1) of the Bill in substance enacts the Model Law provision.

Before I leave the subject of procedure, there are two qualifications which ought to be mentioned. First, if an arbitrator exercises inquisitorial powers, the risk of him committing technical misconduct will become greater. After all, it is easier for an arbitrator to hold the scales fairly if matters are left to the parties. But our arbitrators would not be assuming unique burdens. After all, the adversarial system is unknown in half of the industrialised world. Secondly, my impression is that in sectors of the construction industry the idea is gaining ground that arbitrators are entitled to exercise procedural powers contrary to the wishes of the parties. That is wrong. The principle of party autonomy requires the tribunal to respect any agreement of the parties whenever it may be concluded and however informal it may be. It is enshrined in section 11 (1) of the Bill.

Immunity of Arbitrators

In a collection of comparative law essays edited by Dr Julian Lew it is demonstrated how widely national laws differ on the immunity of arbitrators.[24] During the sessions of the Working Group, which led to the adoption of the Model Law, Canada proposed that the Model Law should confer immunity from liability for negligence on arbitrators.[25]

24. The Immunity of Arbitrators, 1990.
25. Holzmann and Neuhaus, A Guide to the Uncitral Model Law on International Commercial Arbitration: Legislative History and Commentary, 1989, 1148.

It proved to be a highly controversial proposal. The draftsmen of the Model Law were seeking common ground. It is therefore not surprising that the Canadian proposal was rejected.

In England the question whether under the common law arbitrators are immune from actions in contract or tort alleging breach of a duty of reasonable care is probably still an open one.[26] The question before the DAC was whether a statutory immunity should be conferred on arbitrators. This subject was a very controversial issue in the discussions of the DAC. The opposition to such a provision took various forms, covering outright rejection of the idea as a matter of principle, difficulties of definition and the pragmatic view that in a complex area of the law the matter is best left to development by the courts. By a very narrow majority the DAC recommended that an immunity provision should be included in the draft Bill. It seems to me that the better view might be that under the common law arbitrators, because of the judicial character of their duties, already have the benefit of an immunity from liability for negligence. I would also not oppose the enactment of a statutory immunity in favour of arbitrators. On the other hand, I do not regard this aspect as one of the critically important parts of the new legislation.

The relationship between the courts and arbitration

The supervisory jurisdiction of English courts over arbitration is more extensive than in most countries, notably because of the limited appeal on questions of law and the power to remit. It is certainly more extensive than supervisory jurisdiction contemplated by the Model Law. Nevertheless the Sub-committee on Arbitration Law of the Commercial Court Committee, which was chaired by Mr Justice Mustill and reported in October 1985, recorded that in an extensive consultation process it received no representations for a change in the law. Similarly, the Mustill Committee, which was appointed in 1985 and reported in 1989, received no proposals for a change in the law. In its second report of May 1990 the DAC endorsed the earlier decision to maintain the *status quo*. But eventually it became clear that further thought had to be given to the so-called special categories under section 3 of the Arbitration Act 1979 and to the ambit of the power to remit under section 22 (1) of the Arbitration Act 1950.

26. *Arenson v. Arenson* [1977] A.C. 405.

Special categories

Section 3 of the Arbitration Act 1979 recognises the contractual freedom of parties under non-domestic arbitration agreements to exclude at any time appeals on questions of English law to the High Court under Sections 1 and 2 of the Arbitration Act 1979. That contractual freedom is restricted by Section 4 (1) of the Act. It provides that an exclusion agreement made before the commencement of the arbitration shall have no effect if the question of English law arising under the award or in the course of the reference relates to any of three special categories, namely maritime, insurance and commodities disputes. Section 4(3) of the Act provides that the Secretary of State may either limit or remove these special categories by statutory instrument.

The only justification for the restriction of the freedom of contract of commercial men engaged in shipping, insurance or commodities was that it was needed to protect the standing of our commercial law. In the debates in the House of Lords Lord Diplock made clear that the special categories were inteded to apply for an "experimental period during which it will be possible to see how the section works" [27] After some 14 years it seemed right to review the matter. There was also considerable criticism from commentators. They argue that the standing of our commercial law is secure enough not to need the protection enshrined in the special categories provision. The DAC recently issued a consultation paper in order to invite comment on the desirability of maintaining the special categories. On this occasion that process has been specially targeted on users of the arbitration process. The DAC will want to pay the closest attention to the wishes of the markets.

Remission

Section 22 (1) of the Arbitration Act 1950 provides in sweeping terms that the court "may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator". On the face of it section 22 (1) creates an entirely open textured discretion permitting a court to order the re-opening of the arbitration in circumstances where an appellate court would be empowered to order the re-opening of High Court proceedings. Since judicial intrusion in arbitration proceedings should be less extensive than the full appellate process applicable to court proceedings such an unlimited power of remission would be surprising. And the imperative of protecting the finality of awards militates strongly against it.

27 House of Lords debates, 15 February 1979, 1477

Not surprisingly such a wide power of remission does not exist in most countries. And the draftsmen of the Model Law rejected such a wide power of remission. [28]

A jurisprudence grew up in England which in practice restricted the power of remission to four grounds: (1) error of law on the face of the award which is now of academic importance only; (2) "misconduct" by the arbitrator: (3) the arbitrator's request to correct an admitted mistake; and (4) material fresh evidence discovered after the award. [29] This approach kept the power of remission in tolerable bounds.

In the last four years three judgments have been given which significantly expand the power of remission. In *Indian Oil* [30] a judge of the Commercial Court remitted an award to arbitrators to consider a point which at the hearing the applicant's legal representatives consciously and deliberately had decided not to advance. In *King v. Thomas Mc Kenna* [31] the Court of Appeal examined the scope of the power to remit. That case also concerned an application for remission as a result of a mistake made by the applicant's lawyer. Lord Donaldson of Lymington gave the leading judgment. Lords Justice Ralph Gibson and Nicholls agreed. Lord Donaldson observed that the jurisdiction was unlimited. Turning to the way in which the jurisdiction is to be exercised, Lord Donaldson stated: [32]

> "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 as 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.

28. Article 34 (4) of the Model Law does, however' contain a narrow point of remission. It reads as follows:
    > "The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."
29. Mustill and Boyd, Commercial Arbitration, 2nd edn, 549 et seq.
30. *Indian Oil Corporation v. Coastel (Bermuda) Ltd* [1990] 2 LIR 407
31. [1991] 2 QB 480
32. 491 C-F

> In so expressing myself I am not seeking to define or limit the jurisdiction or the way in which it should be exercised in particular cases, subject to the vital qualification that it is designed to remedy deviations from the route which the reference should have taken towards its destination (the award) and not to remedy a situation in which, despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which was not that which the court would have reached. This essential qualification is usually underlined by saying that the jurisdiction to remit is to be invoked, if at all, in relation to procedural mishaps or misunderstandings. This is, however, too narrow a view since the traditional grounds do not necessarily involve procedural errors. The qualification is however of fundamental importance. 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 adopted will be fair and appropriate."

These two cases concerned mistakes of a party's lawyers. Given the terms of Lord Donaldson's judgment, logically the next step was to allow remission in the event of a mistake of a party.

That is what happened in *Breakbulk Marine v. Dateline.*[33] A judge of the Commercial Court decided that he had jurisdiction to remit an award in circumstances where the applicant had failed to find a material letter before the award, although such letter was in no sense fresh evidence.

For my part I regard this development as a retrograde step. In the field of international commercial arbitration it will be regarded as an excessive judicial intrusion in the arbitral process.[34] I would respectfully suggest that in the light of the conflicting state of the authorities a re-examination of the scope of the power to remit is not precluded. In the meantime the DAC was faced with a difficult problem. On the one hand, there was something to be said for spelling out in the Bill the circumstances in which a court may exercise a power of remission. It is however, an exceptionally difficult exercise. And the DAC did not want to enshrine the effect of *King v. Thomas McKenna* in a statutory provision. On balance the best course seems to be to retain the language of section 22 (1) in the Bill in the hope that developing case law will confine the power to remit more narrowly.

33. 19 March 1992; unreported
34. V.V. Veeder, Q.C., Remedies Against Arbitral Awards: Setting Aside, Remission and Rehearing, 1993 Yearbook of the Arbitration Institute of the Stockhold Chamber of Commerce, 125 *et seq.*

Equity Clauses

Article 28 (3) of the Model Law provides as follows:
"The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so."

As a broad generalization that provision mirrors a type of arbitration which is quite common in civil law countries. States in the common law family of nations are usually less comfortable with motions of good faith, and that type of arbitration is less common.

It is necessary to consider whether English law at present recognizes such a form of arbitration. Equity clauses are common in reinsurance contracts made in England. On the other hand, such clauses have been given only a limited effect. If an equity clause is expressed to involve a power in arbitrators to disregard the rules of substantive law, the orthodox view is that English law does not at present recognize the concept of arbitrators acting in this way. [35] This is, however, a complex subject and it is not impossible that the courts may liberalize our arbitration law. The fact that distinguished commentators such as Sir Michael Kerr, [36] Mr Stewart Boyd Q.C.[37] and Mr V.V. Veeder Q.C.[38] have argued in favour of such a development guarantees that the prospect must be taken seriously. But in our case law the supporting planks for such a development are as yet insecure.

Protagonists of a *lex mercatoria* were encouraged by the important decision of the Court of Appeal in *Deutsche Schachtbau v. Ras al Khaimah National Oil Co.* [39] The case concerned a Swiss arbitration and a Swiss arbitration award. The arbitrators recorded that they were applying "internationally accepted principles of law governing contractual relations". The issue was whether an English court should enforce the award under the New York Convention of 1958. The Court of Appeal held that the award was enforceable. The critical point is that the court held that there was no head of public policy militating against the enforcement of the award. A contrary decision would, of course, have placed England beyond the pale among the signatories of the New York Convention. But the judgments do not tell us what the position would have been if the arbitration had taken place in England and if it had been an English award.

35. *Orion v. Belfort* [1962] 2 Lloyd's Rep 257; *Eagle Star Insurance Co. v. Yuval Insurance Co.* [1978] 1 Lloyd's Rep. 357; *Home Insurance Co. v. Administratia* [1983] 2 Lloyd's Rep. 674; *Overseas Union Insurance Ltd. v. A.A. Mutual International Insurance Co.* [1988] 2 Lloyd's Rep. 63.
36. "Equity" Arbitration in England, 1993, 2 American Review of International Arbitration 377
37. 6 Arbitration International 122 (1990)
38. British Insurance Arbitration Lecture 1992
39. [1987] 2 Lloyd's Rep. 246

In *Home and Overseas Insurance v. Mentor Insurance Co. (UK) Ltd* [40] the validity of an equity clause was again considered by the Court of Appeal. Lord Justice Parker made clear that he regarded an arbitration clause allowing arbitrators to decide according to good conscience as invalid. Since Lord Justice Balcombe agreed with this judgment I regard Lord Justice Parker's view as the *ratio decidendi* of the case. In a lengthy judgment Lord Justice Lloyd commented on *DST v. Rakoil.* He said: [41]

> "[Counsel for the Plaintiffs] argued that *DST v. Rakoil* was concerned only with the enforcement of a foreign award, and that it has no bearing on the present case, where the contract calls for arbitration in London. But why not? If the English courts will enforce a foreign award where the contract is governed by "a system of law which is not that of England or any other state or is a serious modification of such a law", why should it not enforce an English award in like circumstances? And if it will enforce an English award, why should it not grant a stay?
>
> [Counsel] argued that it would be impossible for the court to supervise an arbitration unless it is conducted in accordance with a fixed and recognisable system of law; he even went so far as to submit that the arbitration clause in the present case is not an "arbitration agreement" at all within the meaning of the Arbitration Acts 1950-1979. It is sufficient to say that I disagree. I would only add (although it cannot affect the argument) that if [he] is right, no ICC arbitration could ever be held with confidence in this country for fear that the arbitrators might adopt the same governing law as they did in *DST v. Rakoil.*

I share Lord Justice Lloyd's instinctive reaction. But it seems to me that we are dealing with a complex and fundamental problem which will require further analysis. If a wide equity clause is invalid, it must be because it is subversive of a head of public policy governing arbitrations conducted in England and awards made in England. About that point *DST v. Rakoil* can in truth tell us very little. On the other hand, some seventy years after *Czarnikow v. Roth Schmidt & Co.,* [42] it may be arguable that there is no longer such a head of public policy. That issue may turn on an historical review of the swing of the pendulum from excessive judicial scrutiny to a better recognition of the imperative of party autonomy.

40. [1989] 1 Lloyd's Rep. 473
41.
42. [1922] 2 K.B. 478

It may be possible for a court to rule that an award made under an equity clause is nevertheless an arbitration award governed by our arbitration statutes. Conceivably, a court might also rule that such an award is not subject to the limited appellate jurisdiction under section 1 of the Arbitration Act 1979. On the other hand, even if a court regarded such a development as beneficial, the court might take the view that it is a matter for reforming legislation. Uncharacteristically, I will not express any concluded view on the point. But I am firmly of the view that the issues have not yet been comprehensively debated in a English court and that *stare decisis* ought not to preclude a re-examination of this question.

Lastly, if the consultation process shows that there is a widespread desire on the part of commercical men to be able to arbitrate in England under fully effective equity clauses that might be a factor which could conceivably weigh with a court seized with the problem. After all, while our courts do not have the advantage of Brandeis briefs, judges do like to have a window to the real world. And, if such a development is beyond the capacity of the courts, a widespread desire for such a liberalization of our arbitration system may have to be considered by Parliament.

Conclusion

In conclusion I would only say that, while I have sketched some of the policy objectives of the DAC, it will be essential for the DAC to examine the whole Bill in the light of the responses to the consultative process. There will be ample scope for further improvements of the Bill. But something broadly like the Bill represents the best attainable arbitration legislation in England. And it would represent an enormous improvement of our arbitration legislation.