A BRIEF HISTORY OF THE ARBITRATION ACT 1996 AT 25 YEARS

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31ST JANUARY 2022 MARKS THE 25TH ANNIVERSARY OF THE IMPLEMENTATION OF THE ARBITRATION ACT 1996; PROF. JOHN UFF CBE QC LOOKS BACK AT HOW THE ACT CAME INTO BEING, AND THE VARIOUS CHALLENGES ON THE WAY.

As one of the surviving members of the original DTI Advisory Committee on Arbitration Law I am conscious that most practitioners and certainly their clients will, today, have little notion of how the 1996 Act came into being. Sadly, the original chairmen, Lord Mustill and Lord Steyn, are no longer with us but both left a rich legacy of reports as did the third and final chairman, Lord Saville. The final reports[1] on the Bill, commenting on the sections in detail, give the impression that the production of the Bill was simply the result of applying the best available expertise; and the two reports on the working of the Act after 10 and after 20 years in operation have confirmed that there is no strong case for any major change. However, the Law Commission is currently considering a review of the Act and has put forward suggestions for topics for possible review including the introduction of a summary judgment-style procedure, a power to strike out unmeritorious claims, review of the procedure for challenge and appeal of awards and other issues. But it is clear that the basic structure of the Act will remain in its present form, and it is fitting for this quarter-century acknowledgement of the merits of the Act to recall how, to put it colloquially, it came to be as good as it is.

The 1996 Act replaced the Act of 1950 which was itself largely inherited in its form and content from the 1934 Act. Vestiges of both these Acts are still seen in various parts of the British Commonwealth where the local statute law has not yet been updated. One of the features of English arbitration law is the provision of various routes by which an Award may be challenged, particularly by an appeal on a point of law. In the older statutes this was by way of "case-stated" which required the arbitrator to express the decision in the form of a question of law to be referred to the court for decision. This reflects the long-standing English tradition of appointing "trade arbitrators" who were not expected to know the law, in contrast to the Civil Law system in which arbitrators were invariably lawyers thereby avoiding, supposedly, any need to appeal. By the 1970s the use of case-stated had become a serious problem for the increasing volume of international cases being heard in London, such that London was being accused (mostly by the French) of no longer being a fit place for international arbitration.

So come 1979, enter the Law Lords who, led by Lord Diplock, promoted and largely drafted the Arbitration Act of that year in which case-stated was abolished but replaced by a right of appeal, apparently intended to be available in only the rarest case, save that the Act itself did not make this clear. There were other "improvements" to the existing legislation but by the mid-1980s it was apparent to both users and practitioners that a new Arbitration Act was needed by the commercial community. Nevertheless, to convert a need into a new statute required a great deal more than goodwill. Something was needed to spur the Government into giving priority to Arbitration law over many other competing good causes. This was a challenge that was taken up by Arthur Marriott, a London solicitor and international arbitration practitioner. He took on the task, with a group of supporting law firms and chambers (including Keating), to raise funds to instruct a specialist draftsman to produce a model Arbitration Law, which was duly presented to the Department for Trade and Industry (DTI) and publicised throughout the profession. The result, after much delay, was the setting up of the DTI Advisory Committee (DAC), chaired by Lord Mustill. However, before considering the Marriott draft Bill the DAC decided that a more urgent task needed to be addressed, namely whether England and Wales should adopt the UNCITRAL Model Law on commercial arbitration, a draft law which had been issued in 1985 and was currently being adopted by many states throughout the world.

The outcome, which was not without controversy, was that Arbitration law in England and Wales was regarded as so well developed and so well embedded in commercial practises, that the Model Law should not be adopted but should be taken into account in the drafting of a new Bill. So it was that the DTI now set about the task of producing a new updated Arbitration law. But with little support from the Government, the DTI insisted on adhering to its traditional practises of producing recommendations which were then turned into draft legislation by the DTI's parliamentary draftsman and simply presented to the committee without any direct discussion or debate. The DTI also declined to take any account of the Marriott private draft despite its wide support. The resulting draft Bill contained much from the 1950 Act including the use of "implied terms" imported into arbitration agreements. A full draft was

1 The DAC issued two reports on the Arbitration Bill in 1996 which remain aids to construing the Act.

circulated in 1993 and was the subject of a major conference held at Kings College London, jointly organised with the Centre of Commercial Law, Queen Mary University. The theme taken up by many of the distinguished speakers was whether the commercial community should settle for what was regarded as "half a loaf". The overwhelming response of delegates was a resounding NO. The commercial community wanted something better!

At this point external factors began to play a role. The UK Government under John Major lost its parliamentary majority and, although it was to remain in office until 1997, it was clear that no controversial legislation could be put forward. Instead, the Government turned to draft legislation which would command general support and high on the list of potential Bills was Arbitration law and, incidentally, a Bill on construction contract reform. For the Arbitration Bill the rejection of the 1993 draft was duly noted and measures put in place to produce a new draft. Two important steps were taken at this point: first, the appointment in 1994 of Lord Saville to oversee the DAC; and second, the replacement of the DTI parliamentary draftsman by a new team with a forward (and European) approach to drafting. The new draftsman was Geoffrey Sellars who was, incidentally, also given the job of drafting the new proposals for what became the Housing Grants, Construction and Regeneration Act ("HGCRA"), which explains the use of common provisions in the two Acts. Lord Saville also brought into his secretarial team Toby Landau, (QC 2008) who became responsible for much of the research and collating needed to ensure the workability of the new Bill.

The new team was thus able to start afresh with a new draft Bill which bore little or no resemblance to the previous drafts and indeed started with an entirely new (and European) approach of setting out the General Principles on which the new Act was deemed to be founded (section 1). At the outset, the Act declares that the object of arbitration is *"to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"*; that the parties should be *"free to agree how their disputes are resolved"* subject to safeguards in the public interest; and that *"the court should not intervene except as provided"* in the Act, thereby settling many matters which had previously been either controversial or in doubt. For the still controversial issue of appeals, the Bill adopted the now well-embedded procedure of requiring leave, drafting into the Act the basis on which leave should or should not be given. It is of interest that this model has been adopted and adapted in other common law countries, where the merits of allowing some form of appeal on a point of law is recognised. Following the general principles, particularly on what is now universally known as "party autonomy", most of the rules governing the conduct of arbitration are drafted as provisions applying, subject to the parties' agreement.

The Arbitration Act 1996, as we now know it, was passed in the dying days of the Major government and came into force on 31 January 1997. Later that year Arthur Marriott's work was recognised by his appointment, along with Lawrence Collins, as the first solicitor QCs. But what of the Model Law? In his 1993 Freshfield Lecture, Lord Steyn referred to the Model Law as the single most important influence in the shaping of the Bill and that influence remained in the final draft Bill produced under Lord Saville. Still, England had decided against adoption. One of the members of the DAC, however, was Lord Dervaird, a former Scottish judge. After the DAC's activities had been concluded, Lord Dervaird chaired a Scottish committee which decided that, by contrast, Scotland would adopt the Model Law which it duly did by the Arbitration (Scotland) Act 2010. However, the English Act has continued to be used as a model for arbitration law reform in many other common law countries including Australia, New Zealand and Singapore. In most cases the Model Law has been made available as an option, following the principle of party autonomy.

In the field of construction disputes, the HGCRA was enacted at the same time as the Arbitration Act and brought in the statutory right to Adjudication in respect of any dispute falling within that Act, which has included the great majority of domestic construction disputes. However, the principle of party autonomy also applies to adjudication, so that arbitration remains an alternative to adjudication as well as the forum for a re-hearing where the Adjudicator's decision is challenged. But for international construction disputes, Arbitration remains the overwhelmingly preferred forum, whether the dispute is seated in London or elsewhere. Annual statistics from the ICC and elsewhere regularly confirm London as one of the most favoured venues for multi-national arbitrations where, in most cases, the Arbitration Act 1996 will apply including the supportive powers of the English courts and, unless contracted out, the procedures for challenge and appeal. The 1996 Act has thus come of age but can look forward to more decades of successful application in the service of both the UK and the international commercial community.