Arbitrations and Judges – how much interference should we tolerate?

by Mr Justice Coleman, Master's Lecture, 14 March 2006

Can I start by offering my really sincere apologies for not being Mr Justice David Steel? I know that this lecture was advertised originally as one to be given by him. I also know that, until about two weeks or so ago, I did not know either that he was going to give this lecture or that I was. I can only say that many of you, or some of you at any rate, will have endured talks by me on previous occasions, so if anybody wants to leave, now is the time to do so. But, I have to say – and I do not know whether the management will support this – that there may be considerable problems in getting a refund.

I chose this title "*Arbitrations and Judges – how much interference should we tolerate?*" because I am conscious of very widely differing views on the relationship between arbitrations and the courts. Since I have been judging in the Commercial Court for 13 years am therefore one of those whose responsibility it is to monitor the working of the Arbitration Act 1996, I would like this evening to try to highlight the extremely delicate conceptual balance which the 1996 Act did try to achieve and to explore with you – and you, I am sure, will not be slow to express your views later – whether, from your perspective or my perspective, what is really happening does, indeed, achieve that balance.

I am going to look at three aspects of the 1996 Act.

First of all, leave to appeal against an award, which is perhaps the one which gets most people hot under the collar; secondly, the determination of the substantive jurisdiction of the tribunal; and, thirdly, the intervention of the Courts in cases of serious irregularity affecting the tribunal, the proceedings or the award.

Let us start with leave to appeal: those of you – and I am sure that is practically everybody – who are conversant with the 1996 Act will know that means section 69 and many will know, though maybe, depending on when you started practice in this field, not everybody, that this was substantially derived from section 1 of the 1979 Act which had revolutionised the whole conduct of arbitrations in this country. I say the 1979 Act, although I really mean the 1979 Act as interpreted by Lord Diplock in *"The Nema"* because if you look at section 1 of the 1979 Act, it is not at all obvious that you arrive at the result which Lord Diplock arrived at, contrary to the view of, as he then was, Mr Justice Robert Goff in *"The Nema"*. The thinking

behind this revolutionary idea was essentially a compromise, and it is a compromise which confronts us all the way through these three areas of arbitration law. The compromise in the case of section 69 and, before it, section 1 and, indeed, in relation to the other areas I am going to talk about, was a compromise between two policy objectives which were in conflict.

First policy objective: party autonomy and the desirability for finality of awards.

Second objective: the need to preserve and develop English commercial law as a valuable national asset.

Let us recall that the whole motivation for changing English arbitration law was market-driven and an important feature of the market-driven aspect of this was that English commercial law was a high-quality product which was distinctly marketable all over the world, if only one provided the right marketing environment.

Now both of these objectives, as I say, had their ultimate goal, therefore, of ensuring that London maintained its position as a world centre for arbitration and, indeed, turned itself into the world centre for international arbitration. The 1979 Act was introduced on the back of a very strong belief that the position of London and English arbitration was being seriously eroded by court interference in arbitration awards by means of the "special case" procedure. Only those who were in the field of arbitration 25 years ago will actually have experienced the peculiar environment of the special case. An award in the form of a special case for the opinion of the Court on any matter of law arising in the arbitration could be requested by either party, however hopeless the point of law. But it had the great advantage to the loser of being able to postpone the evil day when the award had to be satisfied and there was a mandatory requirement that the Court should respond to a request for a special case. This facility certainly had an upside as well as a downside. It was obviously a means of abuse. It was an engine for delay. But the upside was that it allowed the development of English commercial law by, particularly, the Commercial Court and, to some extent, by, as they were then called, Official Referees in the field of construction and building work, in a way that was logical, coherent and where the principles became established as and when the decisions were reported.

Now at this point it is necessary, I think, to identify two quite distinct fields of arbitration because these two distinct fields of arbitration in many ways reflect and are reflected by the

division in opinion as to what should happen to arbitration in this country today and how close the Court's involvement in arbitration ought to be.

First of all, there are what could be called the domestic and London market arbitrations: arbitration agreements, for example, in building and construction contracts for performance in England, arbitration agreements in standard form contracts such as one finds in the commodity trade, e.g. GAFTA and FOSFA contracts. One finds similar kinds of arbitration agreements in the shipping world. The charterparty arbitration clauses were in very widespread use in the 20th century, as, indeed, they still are, and very often one found that they selected English law, even though they were essentially international contracts - English law because a lot of the contracts were broked in London and they were using English law forms: the Baltic Exchange forms. Even the New York Produce Exchange form in the shipping industry either had arbitration in London or New York.

That was one lot of arbitration, a field in which the Courts had over the years developed a consistent body of commercial law which not only had an English impress on it, but which was copied, relied upon and used internationally, particularly in the shipping world.

Then there was a completely different field of arbitration: what one might call the genuinely 'international', international arbitration, where you would find not that there would be the usual crowd from the London arbitration scene involved, but maybe one distinguished member of the tribunal would be from London, but the other two were as likely to be well-known figures from Zurich or from Stockholm or from the Netherlands or from other countries anywhere in the world. Those international arbitrations were often tremendous disputes about such things as derivative contracts between banks and customers internationally, disputes about joint venture agreements and the energy industry involving the former Soviet territories, disputes about mineral concessions almost anywhere in the world. Those arbitrations were really more concerned with trying to feel their way toward a neutral tribunal and a neutral body of law. It is true that London was often chosen as a venue for those arbitrations, as it still is, because it is seen as a neutral venue. It is seen as a place where the Third World is happy to join in arbitration disputes with, for example, a Canadian party or an American party and where, on the other side, the Americans or the Canadians, or whoever they are, are quite happy to have a common law jurisdiction in London. Also, the perception of those who get involved in these big international arbitrations – and I mean, in particular, the parties – is very often that awards should not be exposed to court interference

at all and that there should, in fact, be as far as possible a neutral environment untouched by domestic courts. Indeed many people will go further than that and say: "Well what we really want is a lex Mercatoria", something which is not strongly flavoured [NOTE TO DR – yes, he means flavoured !!] by the common law, but which is an international, global arbitration and substantive body of rules which can be recognised and respected by the Third World, by the newly developing industrial powers such as China and India and as well-respected by the common law countries and, indeed, by the civil law countries in the EU. There was very strong feeling that the special case procedure was inimical to encouraging that kind of arbitration to come to London and hence the feeling that, unless something was done about it, all these arbitrations would go off to Geneva or Zurich or Stockholm or Paris. Because of this the 1979 Act was passed and, from the 1979 Act, there was born after some 17 years the 1996 Arbitration Act.

Now, the abolition of the special case by the 1979 Act and the regime which it created has, of course, been continued in substance in the 1996 Act. There has been an attempt to reconcile the two objectives to which I referred before, namely, on the one hand, the finality/party autonomy objective and, on the other hand, the maintenance of the purity of English commercial law objective. Essentially, this has been done by closing off the Courts from considering challenges to arbitration awards by having reasoned awards and only permitting appeals if in an ordinary case a relevant point of law in the award was obviously wrong as it is said - that is the wording that is used "obviously wrong" – or, in a case where the point is one of general public importance, as it is so described, the award is open to serious doubt. And in both cases, before leave to appeal is given, the Court has got to take the view that, despite the agreement of the parties to arbitrate, it is just and proper in all the circumstances that the Court should determine the question in issue.

So the hurdle of launching an appeal is placed very high. Only issues of law can be the subject of appeal and not questions of fact. "Obviously wrong" involves this situation. There may be many issues of commercial law and construction of commercial contracts which are very complex. One has only got to see some of the building and construction contracts, or some of the commodity trading contracts, to appreciate this. I well remember when I first encountered the bankruptcy clause in GAFTA Form 100 - a sort of nightmare situation which took many hours of cold-towel-round-the-head to understand. Since "obviously wrong" looks very like a first blush reaction of the Court to the tribunal's reasoning on a first reading,

the question is: "Can that really be the right approach?" One has these very, very complicated issues of law which can arise in contracts such as this and yet, so it seems, the Court is supposed to arrive at a decision on the basis of a first blush reaction.

What is "obviously wrong"? Is the obviousness something which one arrives at, as I say, on the first reading over a good bottle of Chablis and some pleasant smoked salmon or is "obviously wrong" the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter.

Then there is the question of general public importance. Now, outside the field of arbitration, "general public importance" has a very specific meaning. It is, of course, often that the Court has to test things by reference to general public importance, something the Court arrives at by taking a view as to the wider impact of its decision. But "general public importance" means, first of all, "general" and, secondly, "public". It does not mean "confined to the members of, for example, the Liverpool Cotton Exchange". It is something which has a much wider and a much broader aspect than the interests of a particular trade or industry.

Now, what the 1996 Act has done is to divide up the tests for giving permission to appeal between these two extremes. On the one hand, there is the case which is not by definition of general public importance and there it has to be "obviously wrong" for there to be permission to appeal. On the other hand, if the case is one of general public importance, which is not defined in the Act, then one has the "serious doubt" test. Now, of course, there is nothing wrong with the "serious doubt" test – it is intrinsically something one can get one's mind round – but, is it right that permission to appeal ought to be divided between these two polar extremes: public importance and non public importance? And one can ask that question against the background of what was going on in fact before the 1996 Act was passed and by way of application of section 1 of the 1979 Act. I have done them both, so I know. Under the 1979 Act, there was a sort of sliding scale, but it was not defined by reference to general public importance: at one pole, it was defined by the marvellous Diplock criterion of the "one-off" case and this was a very useful concept because the "one-off" case identified the issue of law which was intrinsically unique to the parties. In other words, it was an issue of law which arose because they had a particular dispute, an issue which was peculiar to that dispute and one which therefore attracted the very highest hurdle on permission to appeal. That attracted an "obviously wrong" hurdle.

But then there was a huge number of cases in between that and the case which had a general impact, as it said in one of the cases, on the development of English commercial law. In the latter category, the test that was applied was: "if the Court took the view that the decision might well be wrong". It was quite a low hurdle: it did not involve a concluded view about it, it was simply more than arguability and it was probably "strongly arguable that it was wrong". But then there was the case of the true meaning of the 'invoicing back' provisions in the Liverpool Cotton Exchange Rules, confined to a limited number of participants in a trade - hardly describable as of general public importance. Not only has the general public probably never heard of the Liverpool Cotton Exchange but they have certainly not heard about the 'invoicing back' provisions in its Rules. Those cases were treated benevolently by the Courts when it came to permission to appeal, because the commercial judges saw a need for the Courts to test and set out the principles applicable to standard form contracts which might not be all that popular, but which were likely to be in use in the future. In other words, the test that was applied tended to be not "obviously wrong", but a test which was somewhere between "obviously wrong" and "open to serious doubt", an in-between test on a sliding scale which depended upon a view of the prevalence of the issue arising in the future.

Now, I thought that worked very well. It let just about enough cases through – some people thought it let too few through, some people even may have thought that it let too many through, but I believe that it let just enough cases through for points of construction of standard form contracts in a particular trade or industry to be tested out in the Courts.

Well, what we seem to have got into now is a situation where, in fact, there are indeed very few appeals under section 69 of the 1996 Act which get through the net. During the period from January 2005 to March 2006, there were 52 pure applications for permission to appeal under the 1996 Act. By "pure", I mean applications which are not tacked on to any other application. There have been another 12 which have been tacked on to applications under section 68 to set aside awards for serious irregularity and there have been other applications tacked on to section 67, or both of those two. During the same period, 12 of those applications have been sent off by the Commercial Court to other courts, such as the Chancery Division or the Technology & Construction Court because they involved issues which are peculiarly part of the jurisdiction of those courts and we send off such applications for permission to appeal to those courts. That left 40 applications – live applications – in the Commercial Court. Of these 40, 8 are still pending, 4 have been discontinued and, of the

remaining 28, 19 were refused and 9 were given leave, so about one-third of the live applications in the Commercial Court were, in fact, given leave to appeal. I do not, I regret to say, know how many were successful on the appeal, but what is not known is how many were given leave because they were obviously wrong and how many were given leave because, on a matter of general public importance, they raised a serious doubt. Now, of course, one way of looking at these statistics is to congratulate the commercial arbitrators on a splendid performance and, even if one assumes that there were some cases where they were obviously wrong and other cases where their awards were open to serious doubt, there were only 9 such cases in 14 months where there was a successful application for leave to appeal in the Commercial Court.

Now this may be very encouraging indeed for those who wish to minimise court intervention, but for those whose concern is that English commercial law should be developed by the Courts on the basis of awards, it is pretty minimal fare, particularly when one takes into account that in 14 months – and this is the perhaps more remarkable statistic – there were only 3 substantive appeals against arbitrators which were heard in the Commercial Court. And you say "Well, how does that fit in with the other statistics? It fits in because 6 others have been fixed, but they have not yet been heard. Of the 19 applications that failed, a good many of them had argued that the awards, of course, had been wrong, but not obviously wrong, but they were refused leave to appeal. Now, also, of course, those other awards where leave was refused may have raised very interesting points of commercial law which were not of general public importance, but they did not get permission either.

So we can probably deduce that the effect of section 69 and the perception of the legal profession as to the manner in which the Courts apply it is that there are relatively few applications for leave to appeal at all and the height of the hurdles is probably acting as quite a strong deterrent to the legal profession to advise their clients that there should be an application for permission to appeal and the actual level of interference with the end result by the Courts is absolutely minute and the finality and party autonomy lobby can therefore be well satisfied that it has won a significant victory by the terms of section 69 of the 1996 Act.

But is that acceptable? Speaking for myself, I would prefer a greater flexibility than the way in which "general public importance" is used as a test. I believe that the "open to serious doubt" test should apply to any non one-off issue of law which is likely to be encountered in future disputes affecting a particular trade, industry or profession, and that would take

account of the trades-specific issue which was not a one-off case. It seems to me that the Courts ought to be able to contribute to the way in which trade and industry is run in this country through the processes of review of arbitration awards to that limited extent. Serious doubt as to whether it is correct is a hurdle. It is not something like the special case where you could apply on any issue of law at all. It involves a distinct value-judgment by the Courts but I do think it operates and is capable of operating as an effective hurdle. After all, let us not forget that, if the parties are indeed hell-bent on preserving party autonomy, they can always enter into an exclusion agreement under section 69 of the Act which starts with the opening words "Unless otherwise agreed by the parties".

Let me now move to what is perhaps one of the more remarkable compromises in the 1996 Act. I refer to the great *Kompetenz-Kompetenz* compromise. In a nutshell, section 31(4) and section 67 lay down an extraordinary regime for resolving the issue as to the tribunal's substantive jurisdiction. Let us just consider very briefly two provisions and in particular section 31(4) which says:

"Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may

(a) rule on the matter of an award as to jurisdiction; or

(b) deal with the objection in its award on the merits."

ie there are two possible things the tribunal can do.

Then there is section 30(1) which describes what is meant by "substantive jurisdiction": "Unless otherwise agreed by the parties the arbitral tribunal may rule on its own substantive jurisdiction, that is as to (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement".

Now, the most prevalent of these, so far as the Courts are concerned, is (a), whether there is a valid arbitration agreement. It arises this way: one side, of course the defendant, alleges that it is not bound by the arbitration agreement at all and in those cases the 1996 Act allows three possibilities. We have seen two of them. The arbitral tribunal can make a preliminary award, ruling on jurisdiction. Secondly, the arbitrators can go on with the hearing and rule on

jurisdiction in a final award and, thirdly – and this is the extraordinary provision - either party can apply to the Court to determine jurisdiction under section 32 of the Act, either with the agreement of all other parties or with the permission of the Tribunal when the Court is satisfied on this particular course.

So, whether the tribunal does produce an award as to jurisdiction as a preliminary award or incorporated in a final one, either party can challenge that award by application to the Courts, but the challenge is something very special. It is not a challenge which depends upon any sort of filter system. It is not a challenge which depends upon the arbitrators having produced an award which was open to serious doubt or an award which was obviously wrong. It is re-trial of the issue and what it involves very often so far as our Courts are concerned – and the Commercial Court is concerned - is the calling of evidence, expert witnesses on foreign law – all sorts of additional material which may or may not have been before the tribunal when it decided on jurisdiction. The thinking behind this has therefore been that *Kompetenz Kompetenz* can be taken only so far. The arbitrator is perfectly free to produce an award but it is not court-proof - and the whole issue, therefore, can be re-opened. What does this lead to? A most extraordinary result – and it happens time and time and time again in the Courts: a trading company in - shall we say not more than 1,000 miles from Beijing – has entered into a contract to purchase $10m worth of widgets from a famous manufacturers just outside Birmingham and the widgets are, of course, delivered but somehow or other there is a delay in payment and then a tremendous dispute, not about the quality of the widgets, but about whether the 'Hu Flung Dung Company' just outside wherever actually was a party to the contract. The widget manufacturers appoint an arbitrator and Hu Flung Dung Company says: "Get lost. We never made a purchase contract with you at all. Therefore the arbitration agreement contained in it is not binding on us. In fact, it was our associate company, the Hu Fling [NOTE TO DR yes, Fling not Flung] Dung Company that made the agreement and, as it so happens, of course, you have got a contractual time bar written into this which has now expired".

Now what happens is that, when the widget manufacturer turns to the tribunal and says: "Will you determine whether there is a binding arbitration agreement?", the tribunal may or may not produce an award which concludes that there was a binding arbitration agreement and then the question arises: "Can it stand up in the Courts?"

It may well be that if it is decided by the tribunal that there is no binding arbitration agreement and therefore no sale contract, the widget manufacturer then goes to Court and the whole issue is then re-opened under section 67. Now this is really, to my way of thinking, an absolutely bizarre procedure because it does both preserve what on the face of it is the principle of *Kompetenz-Kompetenz* and thereby reflects the UNCITRAL Rules, but on the other hand it allows the intervention of the Courts simply to produce a completely different result to the arbitrator's. I know because I have done it myself!

Now, is this a good idea? Is it taking logic just too far? Or illogicality? Is it trying to balance too many balls in the air at the same time? Well, I am bound to say it does seem to me that there is a great deal to be said simply for saying at the outset: "If there is an issue as to whether there is a binding arbitration agreement we will let the Courts decide".

Because what is happening here is that the Courts are not only deciding whether there is a binding arbitration agreement, but they are actually being called upon by virtue of that issue to decide the main issue in dispute between the parties which, if there were a binding arbitration agreement, would have to be determined by the tribunal. Let us not forget, its decision on whether there was a contract in the first place gives rise, at least in English law (assuming it governs the contract) to an issue estoppel. So, there you are – a very peculiar result.

Let us look finally at section 68, procedural irregularity. Now, it is a section on which I have got very strong views indeed - at least. I have not got very strong views on the section itself, but I do happen to think it is actually extremely well drafted. My strong views are on the complete inability of a very large number of members of the legal profession in London to understand what the section means, judging by some of the applications which are run in the Commercial Court, particularly those which seek to establish that there has been serious irregularity on the basis that the tribunal has not dealt on a blow-by-blow basis with each submission in relation to the evidence. This is quite extraordinary. The idea that section 68 is not there to look after a case where the arbitrator simply says "I find as a fact A, B, C and D" without mentioning the fact that the parties or either all or other of them have made very detailed submissions and should find A or B or C or indeed Z seems to pass by everybody, or a very large number of those who ought to know a lot better. The arbitrator is king of fact. For those who conduct the proceedings in accordance with the basic provisions under the Arbitration Act as to how an arbitration should be fairly conducted, he does not have to

produce an award which describes on a blow-by-blow account why he does not agree with a submission which has been made. He does not have to mention the submission at all. The key thing is that the award has to deal with all the bases of claim and all the bases of defence; by the bases of claim and the bases of defence, I mean what would be basically included if you were setting the issues out in a Statement of Claim or Defence or a Reply. The Award really does not have to go into any greater detail than that, but if it fails to deal with those issues, then the tribunal is in trouble and that is when failing to deal with a matter which has been raised and is in issue between the parties produces what is potentially serious irregularity. But, of course, they should be aware that it does not necessarily get them back to the tribunal because the Court might well say "Well, it may have been an irregularity to fail to deal with it, but it has not produced substantial injustice". By this means you get what I regard as a very salutary fetter on the ability of the parties to re-open arbitrations and to use what may be very detailed procedural omissions by the arbitrator in order to destroy an award. Let us not forget that some of these awards are enormous and very complicated – I am sure you have all seen them - and it is very easy – I can say that as a Judge – it is very easy not to deal with something, even if it is a pleaded issue, because it may be that you think that the parties have put it aside or it does not really matter very much. But has it produced substantive injustice if you did not deal with it? That is the very salutary factor which I think is very properly in the 1996 Act and, if you look at any of the things I have said in the Commercial Court over the last few years, you will see constant references to what was alleged as substantial injustice but in fact show a complete misunderstanding of what the Act really means by that expression.

Now the fact that we judges see only those arbitration awards where something is said to have gone wrong tends to hide the fact that in countless other cases the awards have been above reproach – above reproach of even the most committed appealer and even those who fail to understand the workings of the 1996 Act more than others and even the reproach of the most dedicated pedlar of serious irregularities and that is because, happily, you professional arbitrators are consistently producing awards of exceptional clarity and accuracy into which a huge amount of very hard work has gone and it is for that reason that I really feel particularly honoured that I was asked to give this address in such expert company.

If I have expressed some unease about the way section 69 is drafted and operated, that does not reflect a feeling on my part, of any lack of confidence in your work as arbitrators and

your ability to attract to London and to this country more and more international work. I do believe, however, that commercial law would benefit from just a few more published judgments on issues which really matter to commercial men and those who advise them. In conclusion, I would just like to leave you with that thought.

Thank you.