International Lawyer

Volume 13 | Number 2 Article 5

1979

England Reconsiders the Stated Case

Mark Littman

MARK LITTMAN, Q.C.*

England Reconsiders "The Stated Case"

Messrs. McLaughlin's and Holtzmann's articles have given a competent account of broad arbitration trends throughout the world. My subject, "England Reconsiders The Stated Case," is concerned with one special feature of arbitration proceedings in one particular country. It may, at first sight, therefore, seem (by comparison) a somewhat narrow and even rather parochial subject. On the other hand, I am told the subject is one of general interest to those concerned with international commercial arbitration. It is, I think, also an interesting example of one of the trends mentioned in the previous articles, namely, the progressive development throughout the world of centers of arbitration increasingly designed to satisfy the evident needs of the international commercial community for efficiency, neutrality, privacy and finality in arbitration proceedings.

Let me begin with a brief explanation of the somewhat enigmatic title of the article. The "stated case" or, as it is sometimes called in England, "the special case" procedure is one under Section 21 of the English Arbitration Act 1950[1] which provides (in effect) that the proceedings of arbitrators are subject to review by the courts on questions of law. England is exceptional in having this type of judicial review, for the laws of most countries, while providing for judicial review for excess of jurisdiction by arbitrators, for fraud or bias, or for misconduct by the arbitrators, nevertheless tend to leave to arbitrators the final decisions on matters of both fact and law.

England[2] has similar provisions for defects of jurisdiction, bias and misconduct and likewise treats arbitrators as the final judges of fact, but subjects them to judicial review on matters of law.

It does this mainly by the special case procedure but it does so also in one other way to which it is only necessary to refer briefly. I refer to the jurisdiction English courts have to set aside an award for an error on the face of the proceedings. For this to be operative the award itself, or some

*Mr. Littman is a barrister in London.

[1] 14 GEO. 26, C. 27.

[2] "England" in this connection is used to refer to England and Wales.

document embodied in the award, must contain reasons which can be seen to be invalid. The procedure is rarely used and is somewhat ineffective for two reasons:

1. Arbitrators in England frequently do not give reasons or give them only in a separate document which is explicitly not made part of the award; and
2. The existence of the special case procedure, which is a more effective procedure, especially in the respect that its use does not ultimately depend on the decision of the arbitrators but on the decision of a Court.

The main result of this particular jurisdiction is, therefore, to discourage arbitrators from giving reasons—something now generally thought to be desirable. It is not surprising, therefore, and probably sufficient simply to note, that the report of the Commecial Court Committee (to which I shall refer later) has recommended its abolition.

The main procedure for bringing points of law arising in an arbitration before the courts is the special case procedure laid down in Section 21 of the Arbitration Act 1950 which provides as follows:

> *Section 21* (1) an arbitrator or umpire may, and shall if so directed by the High Court, state
> (a) any question of law arising in the course of the reference, or
> (b) an award, or any part of an award, in the form of a special case for the decision of the High Court.

An award in the form of a special case takes the form of a brief statement of the submission to arbitration; the main contentions of the parties; a statement of the facts as found by the arbitrator; and a summary of the point of law at issue. To avoid the necessity for the award being remitted to the arbitrator after the court has decided the point of law, the award usually contains alternative awards which will apply according to the court's decision.

There are various points to be noted about this procedure.

1. It applies only to questions of law. Since under English law foreign law is a question of fact it is rare that a special case is stated under a contract governed by a law other than English law, although there are special circumstances where this could happen.
2. It applies to all arbitrations in England and Wales. A similar provision was introduced into Scots law by the Administration of Justice (Scotland) Act 1972, but with a right to contract out.
3. Either party can ask for a special case and if the arbitrator refuses, an application can be made to a judge to compel him to do so. The court has discretion, but as the Commercial Court Committee report says, "Case law has, or is widely thought to have, established that if any real point of law arises the Arbitrator should adopt the special case procedure even if there is no great sum in dispute, no point of general importance, or the answer is reasonably clear."

4. Perhaps most important of all, it is generally believed to have been established for at least 50 years that parties cannot contract out of the special case procedure. This is thought to have been decided by the Court of Appeal in *Czarnikow v. Roth Schmidt and Co.*[3] The Court, which consisted of Lord Justices Bankes, Scrutton and Atkin, was recently described by Lord Diplock as the greatest in commercial matters that England ever had. The court held that to give effect to a rule in the standard form of contract of the Refined Sugar Association that excluded the special case would be against public policy as ousting the jurisdiction of the court. Bankes, L.J., said, "To release real and effective control over commercial arbitrators is to allow the arbitrator to be a rule unto himself . . . to give him . . . a free hand to decide according to law or not according to law as he . . . think fit, in other words to be outside the law."[4] Lord Justice Scrutton said, "There must be no Alsatia in England where the Kings writ does not run."[5] Lord Justice Atkin said it would enable powerful associations to impose their own arbitration clauses on members and in certain markets, by the use of uniform contracts, upon nonmembers with the result that it would no longer be possible to maintain a uniform standard of justice and a uniform system of law.

The result of all this is that although the great majority of arbitrations in England end without any recourse to the courts, the possibility of such recourse exists in all cases along with the possibility of successive appeals to higher courts.

This result will surprise many who are accustomed (as I believe American lawyers are) to regard as one of the great advantages of arbitration that it avoids court proceedings and makes the arbitrators the final judges of law and fact without appeal.

On the other hand, many English lawyers feel the special case procedure has conferred benefits in promoting the uniformity and development of important branches of maritime and commercial law and in impressing upon arbitrators the necessity for applying the law to the best of their ability and not acting capriciously.

Certainly the existence of the special case has not prevented London becoming one of the world's great centers of arbitration. A recent survey suggests over 10,000 arbitrations take place in London each year. Some of these arbitrations are purely domestic (that is, between English parties and concerning English issues) where it is, no doubt, natural and convenient for arbitration to be in England.

In addition, however, there are a great many arbitrations each year (many international in character) arising from the presence in London or elsewhere in England of certain world recognized markets in shipping, insurance and

---

[3][1922] 2 K.B. 478.
[4]*Id.* at 484.
[5]Id. at 488.

commodities. It is sufficient to mention the names of a few of such markets, for example, the Baltic Exchange, the London Metal Market, Lloyds and the Liverpool Cotton Exchange, to appreciate what is meant. Business on these markets is generally done on standard form contracts containing a London arbitration clause and governed by English law.

Nevertheless, in the last year or two the special case has come under critical review from two main directions.

In the first place, even its strongest supporters have recognized that the special case procedure is being abused for the purposes of delay by unmeritorious defendants. Thus in March 1978 Lord Diplock gave a lecture entitled "The Use and Abuse of the Case Stated" in which he called for reform of the procedure to reduce such abuses. This view has been supported by the Report of the Commercial Court Committee[6] published about three weeks ago. This committee is an official committee appointed by and reporting to the Lord Chancellor and was (to quote its Report) "established in order to provide a direct link between the commercial users of the court and the court itself, thus improving the service which the court is able to offer. The Judges of the Commercial Court are *ex officio* members and the other members represent main categories of users. These are bankers, ship owners, charterers, shippers, underwriters, commodity merchants and dealers, brokers, professional arbitrators, solicitors and barristers."[7] In this Report, presented by the Lord Chancellor to Parliament towards the end of July 1978, reforms are proposed which would, for example,

(i) convert the special case procedure into a right of appeal against reasoned awards;
(ii) permit an appeal only on a question of law and then only by consent of the parties or by leave of the court.
(iii) enable the court to impose conditions (for example, payment of the award or the giving of security) upon the grant of leave; and
(iv) restrict the right of appeal to higher courts.

If these reforms are adopted they would doubtless do much to prevent the parties (to use the words of the report) "avoiding their commitments by use of procedural devices."[8] However, even if all these changes were made there would still remain a right (albeit a restricted right) of appeal on a point of law. The possibility of recourse to the courts would still exist. This brings me to the second basis for reappraisal of the special case.

In discussion with a number of distinguished American lawyers about 18 months ago, I became conscious of the strong feeling that the existence of the special case procedure with its lack of finality and privacy in an important class of arbitrations was a major deterrent to parties and their lawyers choosing England as a seat of arbitration.

The class of arbitrations to which I now refer differs from the traditional

---

[6] REPORT OF THE COMMERCIAL COURT COMMITTEES, CMMD. No. 7284 (1978).
[7] *Id.*
[8] *Id.*

London arbitrations to which I have previously referred. Although not easily defined, they possess certain recognizable characteristics:

1. They are international in the sense that they arise from contracts made between corporations of different countries or between the corporation of one country and the government or the government agency of another.
2. They are not standard form contracts but are usually negotiated by parties at arms-length who are capable of taking care of their own interests and who are in a position to choose any form and any place of arbitration that they wish.
3. Normally these contracts concern large development and construction projects or long-term supply or management arrangements, often in developing countries.
4. The parties to such contracts show a marked disinclination to submit to the courts of the country of the other party, and instead seek truly international arbitration, frequently in a neutral country with neutral arbitrators and with a neutral system of law.
5. The parties frequently seek finality and privacy.

These features are characteristic of many of the submissions to arbitration under the Rules of the International Chamber of Commerce (ICC). My own experience with such arbitrations (which is confirmed by the views of my American colleagues and by the Secretary General of the ICC) strongly suggests that the existence of the special case was an important reason why many parties were avoiding arbitration in London. But for this difficulty, the common language, the basic similarity of law and legal institutions, the developed associations between many American lawyers and their English colleagues, and the availability of libraries would make London a very attractive site for arbitration.

The London Arbitration Group was formed to sound out on an informal basis opinion on the prospects of reform of the law, at least to permit parties to contract out of the special case procedure in international arbitration.

A number of judges, lawyers and arbitrators attended the Group's several meetings over a period of about a year, as did representatives of the Commercial Court Committee and other associations concerned with arbitration. Representatives of several well-known American law firms from several parts of the United States attended and assisted our work very much.

It soon became evident that there was strong support for change in the law to permit parties in this type of international arbitration to dispense with the special case. On the other hand, there was on the part of many a reluctance to dispense *wholly* with the special case in the traditional domestic types of arbitration referred to earlier in this article. The latter point of view found strong support in the views of the Commercial Court Committee.

It also became apparent that the prospects of getting government support for early legislation would be greatly increased if a formula could be evolved which would meet both points of view. There were, therefore,

several discussions between the members of these two groups and eventually a large measure of agreement was reached. This is largely expressed in the report of the Commercial Court Committeee.

These recommendations may be summarized as follows:

1. The substitution of a right of appeal on points of law for the special case procedure, arbitrators being encouraged to give reasons to assist such appeal.
2. Exclusion from this right of appeal of awards arising from contracts expressly governed by foreign law (i.e., a law other than that of the United Kingdom or any part thereof) unless the contract terms call for it.
3. A complete right of the parties to all arbitration agreements to contract out of the appellate procedure after a dispute has arisen and been referred to arbitration.
4. The right to contract out of the appellate procedure before disputes arise. This is obviously the most critical case and it is dealt with in the report in three categories.
   (a) Domestic arbitration agreements (*i.e.*, between two English parties and governed by English law) would continue to embrace a right of appeal without any right to the parties to contract out.
   (b) Special category disputes, *i.e.*, those arising from maritime contracts, contracts of insurance or contracts for the sale of commodities normally traded on a recognized English market. For a period of two to three years the right of appeal on a point of law would remain entrenched with no right to contract out. Thereafter the possibility is envisaged of a change to permit contracting out in writing provided such writing was in a document separate from the contract itself and was registered with the courts.
   (c) Other nondomestic arbitration agreements including the international agreements of the kind described above. The entrenched right of appeal would be abolished, thus permitting the parties to contract out at any time.

The result of all this would be that, except in special category cases or domestic contracts, lawyers could safely advise their clients that they could agree to London arbitration without fear that the matter would end up in the English courts.

Indeed, if these proposals were fully adopted we would in a sense have the best of both worlds, since it would be open to parties to choose whether they would have a judicial review on points of law; parties could vary their agreement at any time prior to a final award.

What are the prospects of these reforms being adopted? I think they are quite good. A few weeks ago Lord Hacking, the partner of a well-known English firm of solicitors practicing in both London and New York, introduced a motion in the House of Lords advocating reforms generally along these lines. They had considerable support in the debate that followed and

succeeded in obtaining encouragement (although somewhat guarded) from the Lord Chancellor. Now that the Commercial Court Committee has published its report, I understand the Lord Chancellor has indicated that the Government is giving the matter urgent consideration with a view to early legislative proposals. We may hope, therefore, that before many more weeks or months pass legislation will be enacted. As a result of such legislation many American lawyers (and not only American lawyers but lawyers from all over the world and in particular from developing countries) may feel encouraged to accept London as a place of arbitration without the fear that they are thereby necessarily involving their clients in the English courts.

Finally, Mr. Holtzmann has noted that he thought there were some inconvenient features of English arbitration law apart from the special case. I do not know what these are, but I can assure Mr. Holtzmann that if I have the necessary particulars we will do our best to see that they too are abolished.

EDITOR'S NOTE: Since this article was written the "stated case" procedure has been reformed by the passage on April 4, 1979 of the Arbitration Act.