



## **Dinner for Diploma in International Commercial Arbitration Course**

**The Hon. Justice Garry Downes AM  
President of the Administrative Appeals Tribunal**

### **Modern International Arbitration**

**29 June 2006**

It is a privilege to have been invited to speak tonight. Although I am now removed from the world of Arbitration on a daily basis I welcome the opportunity to return to it from time to time.

In the past, International Arbitration was the home of an elite. That is not so true now. The explosion of world trade means that international arbitration is no longer small enough to be the preserve of a privileged cognoscente. London and Paris remain centres of arbitration, but they are not the almost exclusive places of work for arbitrators.

The elite world of just a few years ago contained a group of very influential people. I had the privilege of knowing some of them. A number were members of my London Chambers, now called Essex Court Chambers. Sir Michael Kerr is the first to come to mind. He was a giant in world arbitration. Born in Germany, he had a brilliant legal career at the English bar and on the bench before becoming one of the most sought after world arbitrators. He was very important to both the London Court of International Arbitration and to the Chartered Institute. So was Lord Michael Mustill, who still arbitrates from Essex Court Chambers, with his co-author Stewart Boyd QC. On the Continent, Robert MacCrindle QC, who died recently, was a giant. Jan

Paulsson is still amongst the leaders there. In Paris, Alain Plantey, who had been President of the Institut de France, was Chairman of the International Court of Arbitration of the International Chamber of Commerce. He was succeeded by Robert Briner from Switzerland who recently retired from that position.

I would not, however, want you to think that these greats were infallible. Robert MacCrimmon managed to leave us with *Hiscox v Outhwaite*,<sup>1</sup> which went all the way to the House of Lords, as a result of his stating in an award that it was “dated at Paris” when the place of the Arbitration was London. The oral argument in the House of Lords took three days.

The days of a small elite dominating international arbitration are over. This is good news for you. Americans are now significantly involved and Canadians as well. This is also good news for you. I will explain why.

Swiss arbitrators such as Robert Briner have long dominated Continental European arbitration. The reason for this is that they were seen as neutrals in French language arbitrations. Accordingly, they were very prominent in arbitrations in which one of the parties came from France.

Similar reasoning has led to the recent success of English speaking Canadian arbitrators. They are seen as neutrals in disputes between the United Kingdom and the United States. Australia is similarly placed to Canada. I think the future holds a place for Australian arbitrators, who are prepared to travel, in these arbitrations. At the time of my appointment to the bench I had to resign from appointment as chairman in such an arbitration.

For the last four years I have given up international arbitration for administrative review. Unfortunately, this has meant giving up travel which requires a passport for travel which does not.

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<sup>1</sup> [1992] 1 AC 562; 1991 2 WLR 848.

Tribunals in Australia and especially tribunals where work is confined to the review of administrative decisions on their merits, carry out their functions in different ways to courts. The same is true of arbitrations. As tribunal hearings differ from court hearings, so arbitration is different to litigation.

Arbitration provides advantages over litigation for the settlement of international disputes. A major advantage is greater enforceability. Other advantages include the ability to resolve disputes more efficiently.

The relative merits of arbitration and litigation have been the subject of much debate. A very amusing analysis is Sir Michael Kerr's story of the Macao Sardine Case.<sup>2</sup> This has been taken altogether far too seriously by commentators in a number of articles about it.

An old established company in Macao, falling on hard times, finds itself with no option but to meet a contract for the supply of sardines with tins filled with mud. The cost of the tins and the labour was not prohibitive but the cost of the sardines was. It was anticipated that the sardines would not reach a consumer market for many years and maybe never. The goods were accordingly sold and resold on the high seas during an ever rising market. The Macao company flourished. But then disaster struck in the form of a food shortage following an earthquake in the Philippines. The shipment was finally sold for consumption. As Sir Michael Kerr said, quoting Milton's *Paradise Lost* as his source, "all hell broke loose."<sup>3</sup>

The tale catalogues and contrasts the different problems facing purchasers engaged in litigation in Hong Kong (which results in 46 judgments) and arbitration proceedings between the Macao company and its purchaser. As Sir Michael tells the story, the first two years of the arbitration are taken up with "preliminaries to the appointments" of the arbitrators. I will let you imagine what this might have involved. And that is only the beginning.

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<sup>2</sup> (1987) 3 *Arbitration International* 79; [2002] 7 *LCIA News* Issue 2 11.

<sup>3</sup> Milton, *Paradise Lost*, Book 11, line 117.

Sir Michael's conclusion? "Occasionally – litigation is – arguably – not so bad after all!"

The Macao Sardine arbitration is not the model for modern international arbitration. Efficiency is what we now strive for. Interestingly, that is what tribunals in Australia are about.

The *Administrative Appeals Tribunal Act 1975* has always required the Tribunal to proceed "with as little formality and technicality, and with as much expedition as ..." possible.<sup>4</sup> It is not bound by the rules of evidence.<sup>5</sup> Since last year it has been required, much more imperatively, to be "fair, just, economical, informal and quick."<sup>6</sup>

That seems to me not to be a bad description of what international arbitration should be aiming to achieve.

Common lawyers, particularly those insulated from other systems of jurisprudence, such as in the United States and Australia, tend to conclude too readily that the appropriate procedure for an arbitration is to emulate a common law trial. English common lawyers who sit as arbitrators are now more comfortable with a flexible approach. They have to be.

English arbitrators only have to experience one arbitration as party appointed arbitrator where the other party appointed arbitrator is French and the chairman is Swiss to realise that non common law thinking can be compelling.

"How long shall we allow for cross examination of the witnesses," the naïve English silk asks? "Why is there any need for cross examination at all?", chorus the other two arbitrators? "Because that is the way to discover the truth?" Derisive laughter follows, punctuated by suggestions that it is the documents which will disclose where the truth lies not the evidence of self interested witnesses.

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<sup>4</sup> Section 33 (1) (b).

<sup>5</sup> Section 33 (1) (c).

<sup>6</sup> Section 2A.

The Continental tradition has had its influence on the procedures of international arbitrations. I think it has been for the good. Cross-examination can be a very effective tool, but it is rarely decisive in a commercial dispute where the documents, of which there is usually no shortage, give the most accurate impression of the facts.

In the first edition of Mustill and Boyd on *Commercial Arbitration*, published in 1982 the authors suggested, in Chapter 1, that they could advance “with reasonable confidence” the propositions that, one, an arbitrator should adopt a procedure that is adversarial in nature which should, two, be on broadly the same lines as a High Court action.<sup>7</sup> In the second edition, published only seven years later, in 1989, they “doubt[ed] whether [the second proposition can now be sustained].”<sup>8</sup> In the 2001 Companion to the Second Edition the authors said “...[W]e suggest that the reader should no longer rely on Chapter 1.”<sup>9</sup> Such is the speed of change which has occurred in arbitration in recent years. Of course, the authors were heavily influenced by the enactment of the English *Arbitration Act 1996* but that is merely reflective of the change. What is important is that they were talking about domestic arbitration, not international arbitration, where, to my mind, the change has been more extensive and more rapid.

So I suggest you take to your international arbitration careers a passion for efficiency and a willingness to be flexible. By and large the business community will thank you. Only those trying to prop up hopeless claims or to resist strong ones will ask for something different. Indeed there is evidence at all levels that the business community is moving away from determinative procedures for dispute resolution because of the inefficiency and cost. I have to note at this point that Mr Kerry Stokes does not seem to have heard of this. However, his claim may be the exception that proves the rule.

Modern international arbitrators should be looking for the procedure most appropriate to the case. Of course, they should take careful cognisance of

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<sup>7</sup> Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (1982) p17.

<sup>8</sup> Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed, (1989) p17.

<sup>9</sup> Mustill and Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (2001) p118.

the parties submissions about procedure, usually put by lawyers, but where the terms of appointment leave them with the discretion to do so, they should ultimately look to the efficient procedure which most suits the case.

The extent of cross examination is an obvious matter for consideration. So is the manner of adducing expert evidence. Where cross examination of experts is appropriate the technique now generally described as concurrent evidence will often be appropriate. The expert witnesses give their evidence concurrently. They interact with one another. The panel plays an active role. The lawyers ask their questions last. I have found this technique to be very effective. However, it needs to be structured to avoid chaos. You can read more about my views of concurrent evidence in papers published on the Administrative Appeals Tribunal website.

Let me conclude with a particular thought. It cuts across everything else in international arbitration. It is the one thing to remember if all else is forgotten. Robert MacCrindle did not turn his mind to it sufficiently in *Hiscox v Outhwaite*. I am sure he did after that. It is the enforceability of the award.

Judges do not have to think about this. Means of enforcement are a given. But the issue should always be present in the thinking of an arbitrator. If an arbitrator makes a wrong decision he is letting down one party. If he makes an unenforceable decision he is letting down all parties. So simple a slip as writing Paris rather than London above a signature can lead to so much unnecessary litigation. I know about *Hiscox v Outhwaite* because Robert MacCrindle was a member of Essex Court Chambers. Indeed, along with Sir Michael Kerr and others he was one of its founders. I know he went to great trouble in the case to arrange that the award should be published in London. But he missed the fact that it contained a statement to contradict this.

The New York Convention is the friend of those successful in international arbitration but only when the arbitrators have dotted all “i’s” and crossed all “t’s.”