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COMMERCIAL DISPUTES AND ARBITRATION

When I was asked to speak to you I was told to choose my own subject matter. The title of the paper was not selected by me and is patently designed to afford me precisely that freedom of choice. Being quite shameless I want to say a few words about four quite disparate topics. Firstly I wish to address a new method of arbitration, by a Judge. Secondly, there is the procedure which has been recently suggested by the English Court of Appeal in circumstances where there are multiple arbitrations concerning the same subject matter but involving different parties. Thirdly, I should like to speak about a new suggestion for dealing with lengthy and complex arbitrations. Finally, I should like to draw your attention to what can only be described as a frightening prospect for justice, the notion of a "satisfactory" as distinct from a "fair" trial or arbitration.

For a long time there has been debate by lawyers and arbitrators as to whether in given circumstances, it was preferable to litigate disputes or to arbitrate disputes. Supposed advantages were propounded for each course. Now there is a new test whereby this long standing dispute may be evaluated. By the English Administration of Justice Act 1970 provision is made for the appointment of a Judge of the Commercial Court in England as arbitrator or umpire. It has to be said, at the outset, that the circumstances in which a Judge may be so appointed are fairly rigidly circumscribed. Firstly, the provision is available to be utilised only in the case of "commercial disputes". Secondly, the Lord Chief

Justice of England has to be satisfied that the state of business of the High Court is such that a Judge can be made available. Thirdly, the Judge himself has to be willing to accept the appointment. On appointment he has only the powers of an arbitrator or umpire except that any jurisdiction which might otherwise exist under the Arbitration Act in relation to the arbitration and exercisable by a Judge of the Commercial Court shall be exercisable instead by the English Court of Appeal. I should add that unfortunately the fees payable in respect of the Judge/Arbitrator are paid to the Consolidated Revenue and not to the Judge.

Interestingly, in the 13 years or so that the Act has been in force, there have only been a handful of arbitrations under the provision and only one of any real importance, that determined by Mr. Justice Staughton, in relation to the ships marooned by the Iran/Iraq war.

If arbitration is such a desirable commodity, why has this provision been so little used? In 1962, the Commercial Court Users' Conference recommended that a Commercial Judge should have power upon the application of both parties to sit in private as an arbitrator. It was thought that such a move would meet the criticism most frequently advanced by the commercial community in respect of litigation that concerning the publicity and formality of proceedings in open Court. It was apparently also thought that arbitral awards would be more readily enforceable outside in England than was the case of judgments.

As an aside I might mention that when the Arbitration Bill was introduced in the House of Lords, it sought, at the same time, to remould the procedure of the Commercial Court to enable the same supposed advantages of privacy and absence of rules of evidence to be available there also. That provision excited so much opposition that these provisions of the Bill were lost in the committee stages in the House of Commons. However the provision as to Judge/Arbitrators was enacted into law.

I have said earlier that it is for the individual Judges' discretion as to whether he accepts an appointment or not. In the very nature of things a Judge is unlikely to accept unless there is something exceptional or special in the proceedings in question. A suitable case would be one involving a question of principle or a difficult or important question of law or otherwise a case of general importance or one involving large sums of money. (cf "Commercial Court Judges Acting as Arbitrators (1974) NLJ 4 (an article written by the present Master of the Rolls then Donaldson L.J.). It is hardly likely that a Judge would either be offered or would accept an appointment as an arbitrator where it concerned the quality of goods or was a dispute which required experience and special knowledge of a particular trade or business or was one of a purely factual nature.

With regard to the arbitration before Mr. Justice Staunton - The Bamburi (1982) 1 Ll.R 312, there were some 70 vessels trapped in the Shatt Al - Arab water way.

The underwriters, who were the actual respondents in the arbitration invited the Judge - Arbitrator, with the concurrence of the applicants, to travel outside the confines of immediate dispute and provide the underwriters with authoritative guidance in dealing with the other similar claims. Thus the arbitration produced, not only a binding award, as between the immediate parties, but als o what might be called a quasi declaratory award. The appointment of a Judge/Arbitrator in those circumstances was singularly apt. There were important and difficult questions of law in issue. A significant sector of the commercial community and the London insurance market were affected. The sums involved must have been large. Also whilst there has been no appeal from Mr. Justice Staughton, it is unlikely that the determination of a non-judicial arbitrator would have been accepted with equal readiness. In any event even if there is an appeal there would be one less link in the appellate chain. As has been said by a commentator in Lloyds Maritime & Commercial Law "Judicial commercial arbitration is a hybrid phenomenon drawn from the parentage of the Commercial Court and Commercial arbitration. As with all successful hybrids, it emphasises and displays the most advantageous features of the separate parent stock. It introduces into the arbitral process an expert and experienced commercial lawyer eminently equipped to resolve difficult questions of law. To this it couples privacy of proceedings which is such a cherished phenomenon of the arbitral process. The result is a form of arbitral institution which when appositely utilized offers advantages over both the commercial court and the traditional arbitral forum".

I think that what the new institution throws into high relief is that in given situations e.g. a quality dispute, arbitration by an expert is the obviously preferable course. In other disputes e.g. where a major point in issue is a point of law, either Court proceedings or arbitration by a lawyer, is to be preferred. In such circumstances if the Commercial Court can provide privacy and an absence of formality then it could supersede arbitrations by lawyers.

The next topic I wish to deal with, is one that arises quite frequently in building arbitrations and in arbitrations concerning the sale of goods. In the case of building disputes it frequently happens that work carried out by a sub-contractor is impugned by the head contractor and in turn by the owner. There then follow arbitrations between sub-contractor and head contractor and owner and head contractor. In the same way where there has been a sale of goods down the line and the end purchaser is dissatisfied with the quality of goods there may be quite a considerable number of arbitral proceedings instituted between the various purchasers and vendors. Common sense suggests that all these disputes, involving as they do substantially the same point, should be heard by the same person. However that is not always appropriate and even where otherwise appropriate it may not be easy to bring about. The problem has recently received consideration at the hands of the English Court of Appeal in Abu Dahbi Gas Liquefaction Co. Ltd v Eastern Bechtel Corporation & Anor 1982 2 Ll. R 425. Huge tanks were built for the liquefication of gas from oil. Cracks appeared in one of them. The cost of repairs ran into millions of

pounds. The question arose as to who was responsible for the repairs. The owners claimed against the main contractors. They claimed against the sub contractors. Applications were made to the Court for the appointment of an arbitrator and the question arose whether the same person should be appointed in each arbitration. Mr. Justice Bingham held that two separate arbitrators should be appointed. An appeal was taken from his decision to the Court of Appeal. It was allowed.

The reason for the primary Judge deciding that there should be two arbitrators was the well known one, that in the event that the arbitrator should decide in the first arbitration in favour of the claimant, it might be thought that his decision would thereby be affected in the second arbitration. On the other hand, there is the danger, if there are two different arbitrators, of inconsistent findings. Lord Denning, the former Master of the Rolls, thought that there was a way of resolving this problem. He accepted that the Court could not impose conditions on the appointment of arbitrators. He thought that the same arbitrators should be appointed in both arbitrations "but at an early stage should have what may be called a pre-trial conference with all the parties in the two arbitrations. At that pre-trial conference there should be a segregation of issues. There will be some issues which can be separated and can be decided by themselves. They should be decided in the first arbitration at that stage. At the second stage he may well think it right to be relieved from arbitrating any further in the arbitration. He can then be replaced by a new arbitrator in respect of those issues. That can

be done on application. In that way all the parties can feel that there has been a fair hearing; and that they will not be prejudiced by any preconceived notions of the one arbitrator."

Lord Justice Fox put the matter in a way which deserves full quotation:-

> "There is in my view a great general advantage, in a case as complex as this, in appointing a single arbitrator and, indeed having a single hearing. The advantage of a single arbitrator is that it will avoid the inconsistencies which may arise if two arbitrators are appointed, one for each arbitration. The difficulty in relation to the appointment of a single arbitrator in practical terms is this, that it may be that matters will be determined and evidence will be heard in the first arbitration by the single arbitrator in the absence of the sub-contractor which may be to the prejudice of the sub-contractor and which will in some way effect the arbitrator's judgment or attitude to the case when he comes to hear the second arbitration. If in fact there is a single arbitrator and he can at a preliminary stage separate the issues, it may be that the decision on one or more of such issues will very much shorten or perhaps eliminate any further dispute. But, it is said, we are still left with the risk that the single arbitrator may be affected in the second arbitration by what

passed in the first. As to that, I think there are two matters to be borne in mind. First, I am not myself convinced that with an arbitrator, such as either of those who have been suggested in this case, the risk of such an event occuring is other than slight. If in fact he feels that there is a possibility of prejudice at the time he has completed the first arbitration, or at some point of time before that, he can himself seek release from the second arbitration. The second point is that, if the parties consent, there could be liberty to either side to apply to a Court if at any stage before the first arbitration is finished, they feel that there are risks of some prejudice arising in the second arbitration by reason of what has occurred in the first. There should then be liberty to apply to the Court for the appointment for a second arbitrator in the second arbitration".

There is thus a ready and workmanlike solution to a problem which is likely to arise more and more often in the future.

The third topic on which I wish to say a few words is a fairly new development in attempts to resolve arbitrations or cases in court which threaten to be of a long and complex nature. A recently propounded solution is holding a mini-trial.

The mini-trial is a carefully structured and refined method that enables the principals in a dispute to settle

the merits. In its most familiar form, the mini-trial blends selected characteristics of the adjudicative process with arbitration, mediation, and negotiation.

The typical mini-trial contains only one of the two features of a trial: after a short period of pretrial preparation, the lawyers (and their experts, if desired) make informal, abbreviated, and confidential presentations of each side's best case. The mini-trial drops the second main feature of a trial: no third party pronounces judgment. The most distinctive characteristic of the mini-trial is that the lawyers present their cases not to a judge, an arbitrator, a jury, or any other third party with the power to make a binding decision, but rather to the principals themselves.

In the classic mini-trial with corporations involved, the principals are business executives with settlement authority. The lawyers design their presentations to give the parties a clear and balanced conception of the strengths and weaknesses of the positions on both sides. In other words, the principals receive a crash course on the subject of the dispute conducted in an informal setting but through the adversary process. The purpose of the presentation phase is to exchange information. The principals enter confidential settlement negotiations immediately afterwards.

In the classic format, mini-trials have been presided over by a jointly selected "neutral adviser". The adviser moderates the proceedings, poses questions, and highlights crucial facts and issues. But during the

the presentation phase, he does not preside like a judge, an arbitrator, or even a mediator. If the principals do not reach settlement quickly after the information exchange, they may ask the neutral adviser to give a nonbinding opinion about how a judge or a jury would decide the case and why. With these views in hand, the parties then resume direct negotiations.

The mini-trial is not arbitration, a close relation with which it is often confused. Unlike the mini-trial, arbitration is characterized by a final, binding result (often a compromise) announced by a third party after formal and complete presentaiton by trial lawyers for each side, with little or no participation by the clients.

Finally, I should like to draw your attention to the absolutely frightening concept which has found expression in the speeches of the Law Lords in Paal Wilson & Co.v Partenreederei Hannah Blumenthal (1983) 1 A.E.R. 34. Incidentally this decision is notable for deciding that not only can an arbitrator not dismiss arbitral proceedings for want of prosecution but also it cannot be held that the proceedings have been terminated by frustration by reason of lengthy inaction. However, what I want to get out of the decision is something different. The sale in question took place in 1969. The dispute arose in 1972. In 1980 the sellers commenced proceedings for a declaration that the arbitration should not be permitted to go ahead by reason of the lengthy delay. The proceedings went from a Judge to the Court of Appeal and finally to the House of Lords. Every single Judge who dealt with the matter was of the view that by

reason of the delay a fair hearing could not be held. Witnesses and documents who or which might have been available at an early date were no longer available. Notwithstanding this, the arbitration was required to proceed. Two of the Law Lords expressed the view that even though the result would not be a "fair trial" nonetheless there could be provided what was termed, a "satisfactory" trial. The trial would be satisfactory in the sense that the evidence that was available could be considered. Lord Roskill explained that this was no different from the ordinary run of the mill case. It often happens that not all the evidence is put before the Court, even if a trial is held with all due dispatch, a witness may have died or be unavailable and documents may have been destroyed. Sometimes witnesses were available to parties but not to the Court since, for what is thought to be good reason, under our adversarial system, they are not called or available documents may not be put into evidence. The tribunal must do its best with the material placed before it. The tribunal cannot "add to that material however much it may wish to do so and if in the end the result is not satisfactory the blame lies not with the tribunal but with the parties. In such an event I do not think the result can be said to be unfair"(p53) Now this is a horrifying concept. At present it is settled law that the disappointed client cannot sue his barrister for negligence. The Court cannot ensure that the just result is reached if the barrister fails to call all the available evidence. Somewhere along the way the notion of justice seems to have been lost.