Reflections on some Aspects of International Arbitration

This is the second Arbitration Day co-hosted by the Inter-Pacific Bar Association and the Kuala Lumpur Regional Centre for Arbitration. I am greatly honoured to be invited to make the keynote address on this day. The first day was by all accounts a great success, but I have some trepidation in following in the footsteps of Sir Jack Beatson, who made the widely acclaimed keynote address on that day.

In many ways, I am beginning to feel a little out of date. Although I still practice as an international arbitrator, my chief claim to fame, if that is the right expression, is chairing the Committee that promoted the passage of legislation through the UK Parliament, the Bill that became the Arbitration Act 1996. A main purpose of the Act was to encourage international arbitration to come to London.

That statute is now 20 years old; and I am 20 years older. Much has changed in the world of international arbitration, and I shall touch on some of those changes in the course of this address.

But some things have remained unchanged, and in my view should remain unchangeable.
In Part 1 of the English Act, the part that set out the operative provisions, we made these subject to three general principles. The principles were set out in Section 1 in the following terms:

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this Part.

In essence, these principles encapsulate the idea that arbitration as a method of dispute resolution must involve an impartial tribunal seeking to resolve the dispute without undue delay or expense, in accordance with what the parties have agreed, and with the minimum of interference by the courts.

At this point I should take the opportunity to lay to rest the rumour that when we were preparing the 1996 Act we came under great pressure from arbitrators and arbitral institutions to add a fourth principle, namely that in no circumstances should arbitrators be overworked or underpaid.

I would like to touch on each of the three principles in the course of this address.
Turning to the third of these principles, the relationship between arbitration and the courts is one that in international arbitration has given rise, and continues to give rise, to differences of opinion.

**Appeals on Questions of Law**

A topic of lively interest in the UK at the moment is that of appeals to the court on questions of law arising out of arbitration awards. In Malaysia, of course, you have Section 42 of the Arbitration Act 2005, amended in 2011. Under this Section, there is a right of appeal to the court on questions of law that substantially affect the rights of one or more of the parties. However, unless the parties otherwise agree, this right of appeal does not apply to international arbitrations, but only to domestic ones.

This solution was not available to us in the United Kingdom, since any such distinction would fall foul of European Community law by drawing a distinction between UK citizens and citizens of other Community countries. There are sections of the English Arbitration Act which apply only to domestic arbitrations, but because of the constraints of European Community law these have never been brought into effect. However, now the United Kingdom has voted to leave the European Union, it is possible that there will be a move to resurrect these provisions. I personally hope not as I can see little reason for having two arbitration regimes in the United Kingdom.
In the course of drafting the 1996 Act, there was considerable discussion about this question of appealing to the courts on questions of law arising from the awards of arbitral tribunals. Some were in favour of having no right of appeal at all, (save perhaps where all parties agreed), pointing out that under the UNCITRAL Model Law, there is no such right. In the end, we reached a compromise solution, which in effect only allowed an appeal on questions of law (and only questions of English law) where there was real doubt that the arbitral tribunal had correctly applied the law.

The question of appeals has recently been revived in a lecture given by our Lord Chief Justice. In this lecture the Chief Justice pointed out that the substantial limitations on the right to appeal from arbitration awards have led to many fewer cases coming to the courts, with the result that the development of English commercial law has been seriously hampered. He suggested that consideration should be given to expanding the right of appeal from arbitration awards in order to remedy this position, which he regarded as devaluing the status in which English commercial law was regarded throughout the world.

I am opposed to any such suggestion. To my mind parties choose to arbitrate because they do not want to go to court. Furthermore, I am far from convinced that parties are ready and willing to expend their own time and money in order for cases to come from arbitral awards to the courts, often wending their way up the appellate system to the Supreme Court. To my mind,
to expand the right of appeal to the courts, with all the delay and extra cost this necessarily entails, is hardly consistent with the first of the principles to which I have referred, namely that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal “*without unnecessary delay or expense.*”

If English commercial law is to develop, I do not see why the parties who have chosen to resolve their disputes in a private tribunal should have to pay in extra time and money for that development. In an article I wrote for the London Times newspaper I quoted from something that Lord Devlin said some 40 years ago, when there was a similar argument being raised about the need for appeals from arbitration awards. To those who were urging an extension of the right to appeal he observed: “So there must be an annual tribute of disputants to feed the minotaur. The next step would, I suppose, be a prohibition placed on the settlement of cases concerning interesting points of law.”

In the same Times article, I concluded: “*To expand the right to appeal from arbitration awards would, far from helping to develop English law, be calculated instead to drive international commercial arbitration away from London, to the great loss of this country.*”

In my view, (and of course I would say this!) the balance that we struck in the English Arbitration Act on appeals on questions of English law is a fair compromise between two irreconcilable positions. There are those who regard any such interference by the courts as wholly contrary to the parties’ agreement
to resolve their disputes by arbitration instead of litigation. If the parties agree to litigate, all well and good; but if there is no such agreement, any interference by the court by way of challenge to the merits of the arbitral award in effect ignores and overrides their agreement to arbitrate rather than litigate.

This is a very powerful argument, supported of course by the fact that the Model Law provides for no right of appeal on the merits at all. However, there is a counter argument, which also relies on the agreement that the parties have made. This arises where the parties have chosen the law to govern their relationship, so that any disputes or differences are to be determined in accordance with that law. If, for example, the parties have chosen English law, it can be said with some force that the job of their arbitral tribunal is to decide the matter in accordance with that law. If it is obvious that the tribunal have clearly failed to apply English law properly, then it has failed to carry out the agreement that the parties have made; and only the court can put things right.

The answer that is given to arguments of this kind is that although the parties have agreed that their disputes are to be determined in accordance with their chosen law, their full agreement is that their disputes are to be resolved by their chosen arbitral tribunal applying what that tribunal considers to be the law, and that it matters not that a court would have reached a different conclusion on the law. Many years ago the late Sir Michael Kerr, a former judge of the English Court of Appeal and one of the leading figures in the recent
developments in international arbitration in London, put it thus: “Remember, when parties agree arbitration, they buy the right to get the wrong answer.”

The compromise we reached on what in the end are irreconcilable positions is to be found in Section 69 of the English Arbitration Act. Unless the parties otherwise agree, an appeal will only be granted where the court concludes that: -

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

It remains to say that under the English Arbitration Act, the parties are free to exclude the right of appeal given by Section 69; while arbitral institutions such as the LCIA and the ICC, do likewise in their rules, either excluding the right of appeal altogether or providing that the parties must opt in to such a right rather than opt out. I should note at this stage that there seems to be some international misapprehension over the frequency with which Section 69 is successfully invoked in the United Kingdom, with people expressing the
view that there is a constant stream of court cases. This is not so. In the last three years only about ten appeals were heard each year of which about six were allowed. Most of these, some 75%, were shipping cases. Over this period there were only five appeals to the Court of Appeal, of which only one was successful. There was only one appeal that reached the Supreme Court.

During the last few months there have been a number of seminars in London considering whether the 1996 Act, after twenty years, is now in need of reform. I am glad to report that the general view on this question of appeals to the court, is that the Act does not need to be changed.

The Stay of Legal Proceedings

In many jurisdictions, the courts deal with applications for a stay of legal proceedings allegedly brought in breach of an arbitration clause by applying a *prima facie* test in order to decide if there is arguably an arbitration agreement. If the answer is in the affirmative, the court refers the matter to the arbitral tribunal for decision. For example, in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] 1 SLR 373*, the Singapore Court of Appeal held that a court hearing an application for a stay should grant it, deferring the actual determination of the tribunal’s jurisdiction to the tribunal, if the applicant is able to establish a *prima facie* case that:
(a) there is a valid arbitration agreement between the parties to the court proceedings;

(b) the dispute in the court proceedings falls within the scope of the arbitration agreement; and

(c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

The reasoning behind applying a *prima facie* test is that for a court to give instead a definitive ruling would undermine the principle of *kompetenz-kompetenz*, enshrined in the Model Law, and which gives the arbitral tribunal the power to decide questions of its own jurisdiction. It is the case, as I understand it, that most Asia-Pacific jurisdictions have gone down the route of applying a *prima facie* test.

The English Courts have taken a rather different view. Under Section 9 of the Arbitration Act 1996 the Court must grant a stay of legal proceedings “unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.” These words are, of course, those of the Model Law and the New York Convention. Section 30 of this Act enshrines the doctrine of *kompetenz-kompetenz* in the following terms:
“Competence of tribunal to rule on its own jurisdiction.

(1) 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.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

The Courts in England have drawn a distinction between cases where the very existence of the arbitration agreement is in question and where the issue concerns its validity. In the former case the courts will in effect decide the point one way or the other, whereas in the latter case the courts presume that the parties wanted their chosen tribunal to decide such matters. Thus, generally speaking, under Section 9 of the Arbitration Act 1996, the court will make a binding decision on the question whether or not the arbitration agreement exists, while if the issue goes not to the existence of the agreement, but its validity, if the court will, in effect, remain unsatisfied that the conditions of Section 9 have
been met and will stay the legal proceedings. See *Premium Nafta Products Ltd v Fili Shipping Co.Ltd* [2007] UKHL 40 and *AES Ust-Kamenogorsk* [2013] UKSC 35.

My own view, for what it is worth, is that to apply a *prima facie* test across the board in all cases is to go too far in support of the arbitral process. If the question is whether there was any arbitration agreement at all, whatever the tribunal concludes will not be binding on the party disputing its jurisdiction, since the doctrine of *kompetenz-kompetenz*, while enabling the arbitral tribunal to decide questions of its own jurisdiction, cannot make it the final arbiter. If in truth there never was an arbitration agreement binding the parties, the arbitral tribunal simply has no power to decide otherwise. To suggest otherwise involves begging the very question in issue, namely by assuming that the tribunal has the very jurisdiction that is in question. In a case where the very existence of the arbitration agreement is in issue, the net result of applying a *prima facie* test will be likely to be to force the parties into going through an arbitration process for what, in my view, would be no good reason, since even if the arbitral tribunal decides that it does have jurisdiction, this can be challenged in court. See, for example, *Dallah Real Estate & Tourism Holding Co. v Pakistan* [2010] UKSC 46. In truth, to my mind the main purpose behind the doctrine of *kompetenz-kompetenz* is to avoid delays and difficulties when a question is raised as to the jurisdiction of the tribunal. Clearly the tribunal
cannot be the final arbiter of a question of jurisdiction, but without having the power to consider questions of jurisdiction the door is open to recalcitrant parties to delay the proceedings indefinitely by making spurious challenges to its jurisdiction. I am not persuaded that the court, by making definitive rulings at the outset on whether the arbitration agreement exists, makes any inroads at all on the principle of kompetenz-kompetenz.

Confidentiality

The question of confidentiality in arbitral proceedings is one that we shall be considering in the course of today’s proceedings and I am particularly looking forward to the session devoted to this subject.

I believe that one of the chief attractions of arbitration is the belief that it provides a private means of dispute resolution. In his 1995 Bernstein lecture Sir Patrick Neill QC stated that it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principle of confidentiality and privacy.

I agree. But you will look in vain in the English Arbitration Act to find any mention of confidentiality or privacy. Likewise, the Model Law.

So far as the Arbitration Act 1996 is concerned, the reason why we did not include any provisions about privacy or confidentiality was that we
concluded that any attempt to formulate statutory principles would, far from solving difficulties, be likely to create new ones; and that the way forward was to leave the courts to develop the law on a pragmatic, case by case basis.

The difficulty with confidentiality and privacy mainly lies in the exceptions and qualifications that have to be made. Knowledge of the proceedings (and the result) have to be shared with many non-parties, such as parent companies, insurers, guarantors, partners, licensors and licensees, as well as arbitral institutions playing a part in the proceedings, to mention but a few. Furthermore, the duty of companies to shareholders means that they have to make disclosure of, for example, arbitration proceedings and actual or prospective awards which have an effect on the financial position of the company. Enforcement of awards under the New York Convention through the courts almost inevitably leads to publicity.

It is, however, noteworthy that in one jurisdiction an attempt has been made to legislate in detail for confidentiality and privacy. I would like to read this provision to you, since its exceptions and qualifications demonstrate the limits on confidentiality in arbitration. In a Schedule to the Arbitration (Scotland) Act 2010 there is the following provision:

26(1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure—
(a) is authorised, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorised),

(b) is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration,

(c) is required—

(i) in order to comply with any enactment or rule of law,

(ii) for the proper performance of the discloser's public functions, or

(iii) in order to enable any public body or office-holder to perform public functions properly,

(d) can reasonably be considered as being needed to protect a party's lawful interests,

(e) is in the public interest,

(f) is necessary in the interests of justice, or

(g) is made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory.

(2) The tribunal and the parties must take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration.
(3) The tribunal must, at the outset of the arbitration, inform the parties of the obligations which this rule imposes on them.

(4) “Confidential information”, in relation to an arbitration, means any information relating to—

(a) the dispute,

(b) the arbitral proceedings,

(c) the award, or

(d) any civil proceedings relating to the arbitration in respect of which an order has been granted under section 15 of this Act,

which is not, and has never been, in the public domain.

Section 15 of this Act gives the Court power to prohibit the disclosure of the identity of parties in civil proceedings relating to an arbitration.

This is not a mandatory provision so the parties can contract out of it if they so wish. It is, in my view, a brave attempt to legislate on this subject, but whether it will succeed in its purpose remains to be seen. There remain problems, such as how to enforce the obligation of confidentiality and how to assess damages for its breach.

Although I have no doubt that confidentiality and privacy are very important to those who choose arbitration as their preferred method of dispute
resolution, it must not be forgotten that there are many who view the matter in a different light. In his recent lecture, to which I have already referred when discussing the question of appeals to the court, Lord Thomas, the Lord Chief Justice of England and Wales, said that other issues arose from the resolution of disputes firmly behind closed doors –

“retarding public understanding of the law, and public debate over its application. A series of decisions in the courts may expose issues that call for Parliamentary scrutiny and legislative revisions. A series of similar decisions in arbitral proceedings will not do so, and those issues may then carry on being taken account of in future arbitrations. As has been put: Arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs... Such lack of openness equally denudes the ability of individuals, and lawyers apart from the few who are instructed in arbitrations, to access the law, to understand how it has been interpreted and applied. It reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the court. As such it reduces individuals’ ability to fully understand their rights and obligations, and to properly plan their affairs accordingly.”
This too is powerful stuff, and from the point of view of a Chief Justice wanting to promote English law in general, and commercial law in particular, is wholly understandable.

Lord Neuberger, the President of the UK Supreme Court, gave an address last year at the Hong Kong Chartered Institute of Arbitrators Centenary Celebration Conference, entitled *Arbitration and the Rule of Law*. In the course of this address, Lord Neuberger pointed out that the most obvious human right engaged by arbitration is the right to a fair trial. This is reflected in the first of the principles to which I referred at the outset of this address; and indeed is enshrined in Article 10 of the Universal Declaration of Human Rights. But, as Lord Neuberger said, “one of the most important limbs of a fair trial is open justice, whereas arbitration almost always takes place in a private context. Open justice is essential because the judge must be publicly accountable and independent of all outside influence, and justice must famously be seen to be done.” He suggested accordingly that the credibility of arbitration, and therefore the self-interest of all those involved in arbitration, pointed firmly in the direction of more transparency. He observed that if there is no transparency, many arbitrators will feel free to do what they want rather than give effect to the law. “This,” he said, “is a temptation which is particularly great now that it is so difficult to appeal an arbitration
award.” He also made much the same point as the Lord Chief Justice made in the lecture to which I have referred, about the common law becoming ossified through an increase in awards and a concomitant decrease in judgments, though he did not suggest that this could be remedied in the way suggested by the Lord Chief Justice. What he did welcome was the increase in the publication of awards and the fact that many international investor dispute arbitrations are not merely the subject of published awards, but are routinely held in public. He also made the point that the increased involvement of states in arbitration is another factor against privacy: “it raises serious questions of accountability if large amounts of public money are to become payable pursuant to awards made by tribunals which hear evidence and arguments in secret and even whose decisions may be secret.”

A recent and, if I may say so, wholly admirable example of applying openness and transparency is the published award of the arbitral tribunal in the recent arbitration between Malaysia and Singapore over Malaysian railway land in Singapore.

There are undoubtedly are extremely important considerations relating to privacy and confidentiality in arbitrations, and I agree with Lord Neuberger that the arbitration community cannot afford to be complacent about calls for greater openness. However, I remain
unpersuaded, especially in the context of international arbitration, that private parties, as opposed to public bodies, who wish to resolve their disputes privately through arbitration should be prohibited from keeping their chosen method of dispute resolution private and confidential if they wish to do so. To my mind any suggestion that privacy and confidentiality should be watered down, notwithstanding the views of the parties, runs counter to the second of the principles I mentioned at the outset, namely that the parties should be free to agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest. I cannot accept that the public interest is such that the parties’ desire for privacy and confidentiality should be overridden against their wishes. And as I have just pointed out, there are already wide-ranging exceptions and qualifications to privacy and confidentiality as a matter of common law.

**Emergency Arbitrators**

In the 1990s, when we were drafting what became the Arbitration Act 1996, the concept of emergency arbitrators was yet to come, but in recent years emergency arbitration provisions have been included in many institutional rules, including the 2014 London Court of International Arbitration (LCIA) Rules, the 2012 International Chamber
of Commerce (ICC) Rules, the 2012 Swiss Rules, the 2013 Singapore International Arbitration Centre (SIAC) Rules, the 2013 Hong Kong International Arbitration Centre (HKIAC) Rules, the 2010 Stockholm Chamber of Commerce (SCC Rules), as well as the Kuala Lumpur Regional Centre for Arbitration (KLRCA) Rules current here. There is no doubt that it has been considered across the world of international arbitration to be worthwhile to incorporate provisions in the rules of arbitral institutions.

The basic reason for a system of emergency arbitrators is that parties who have chosen to resolve their disputes through arbitration may be in urgent need of interim measures before their tribunal can be constituted. There may, of course, be as there is in London, an expert Commercial Court which can provide interim relief. This is provided for in Section 44 of the 1996 Arbitration Act, though we were careful to ensure that the court could only act “if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”

In the case of London, I am not sure whether emergency arbitrators fulfill any useful purpose, given there is an expert and internationally accepted commercial court which is ready and willing to act extremely
quickly to provide interim relief. I recall myself, when sitting as the judge in charge of the London Commercial Court, making interim orders within only an hour or two of the application. The court also has the power, which so far as I know, no emergency arbitration rules possess, of acting on what used to be called an *ex parte* basis, namely where one party makes an application without notice to the other parties. Where there is shown to be a risk of the disposition of assets or evidence, notification of the application could well be self-defeating, allowing the Respondent an opportunity to transfer assets or dispose of evidence before the hearing.

I do see the value of emergency arbitrators in jurisdictions where the courts are unable to act quickly or lack the expertise to deal with the matter. I also accept that there is something to be said generally for emergency arbitrators, in the sense that by signing up to the rules of arbitral institutions, the parties have in effect agreed, as part of their decision to use arbitration as their preferred means of dispute resolution, to cover through arbitral means rather than the courts, disputes that require an immediate ruling.

I should add that I am opposed in principle to any provisions that would enable an emergency or indeed any arbitral tribunal to act without notice to all parties. So far as English arbitration is concerned, power to act on the application of one party without notice to the other would to
my mind run counter to the general duty of arbitral tribunals, set out in Section 33 of the English Act, namely to “act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.” This reflects, of course, Article 18 of the original Model Law. You may not be surprised to learn that I am not in favour of the 2006 amendments to the Model Law allowing (under Article 17B) a party to apply for what are called preliminary orders without notice to the other party. I am afraid that to my mind such provisions are simply incompatible with the original Article 18, which still appears in the revised Model Law, that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

Article 18 of the Model Law and Section 33 of the English Arbitration Act, and indeed Section 20 of the Malaysian Arbitration Act 2005 (amended in 2011) all reflect what is one of the most important rules of justice – audi alteram partem, which can be translated as – hear all sides. It has equal status with another basic rule – nemo iudex in causa sua. No-one should be a judge in his own cause.

These rules are often referred to as rules of natural justice. I used to refer to them as such for many years, until Lord Mustill, now sadly no
longer with us, observed that if such rules formed part of natural justice, what then was unnatural justice!

Applications to any court or tribunal without notice to the other party or parties break the first of these basic rules of justice. They do so on the grounds that justice can only be truly served if the rule is disregarded. But the dangers of doing so are very great. The very fact that such an application has been made may have an immediate, devastating and irreversible effect on the business of the respondent even before he is given an opportunity to put his side of the case. The voluminous case law on without notice applications demonstrates the complexity of the problems that arise and the need for the most careful approach to all such cases. It also requires the highest standards of probity and common rules governing the conduct of legal representatives making such applications. Despite the laudable efforts of the International Bar Association, the highest common standards of probity and common rules of conduct are not always present in international arbitrations. I am firmly of the view that as matters at present stand, applications without notice are the business of courts, not arbitral tribunals.

The Independence of Arbitrators

The second basic principle, *nemo iudex in causa sua*, leads to an observation I have made on several occasions, and is often met with
disagreement. This is the provision found in Article 12 of the Model Law and indeed in many jurisdictions including Malaysia, that in effect arbitrators are precluded from acting and may be removed if there are or arise justifiable doubts as to their impartiality or independence.

The need for independence as well as impartiality has long puzzled me. It is difficult to see how a lack of independence, or justifiable doubts as to independence, is of any concern unless it gives rise to partiality or justifiable doubts as to impartiality. If, as indeed may very often be the case, lack of independence gives rise to justifiable doubts as to impartiality, then the position is covered by the use of the word impartiality. So logically the use of the word independence could only be justified if it covered cases where the lack of independence, or justifiable doubts as to independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.

When we were preparing the English Arbitration Act we asked whether justifiable doubts as to independence added anything to justifiable doubts as to impartiality. No-one was able to persuade us that there were cases where lack of independence which did not give rise to justifiable doubts as to impartiality that needed to be covered.
The phrase *Justifiable doubts as to impartiality or independence* has a fine sounding ring to it, but to my mind it has its dangers, chief among which is the scope it gives recalcitrant parties to delay proceedings by calling in aid any connection, however remote, and without any suggestion that it cast justifiable doubts as to impartiality, to challenge the “*independence*” of an arbitrator.

It was for these reasons that in the 1996 Arbitration Act we did not use the Model Law phrase, but confined ourselves to justifiable doubts as to impartiality. In this connection it is noteworthy that even the oath taken by those appointed to the International Court of Justice refers only to impartiality. The oath that I took, when appointed a High Court Judge, and again when I became a member of the United Kingdom Supreme Court, similarly contains no reference to independence. I swore to do right to all manner of people, without fear or favour, affection or ill-will. If independence were to be included as a separate requirement, then there would indeed be difficulties, since judges are paid by the state and their courts and administration organised by the state, so they could hardly be described as independent of the state; and thus could not sit on any case to which the state is a party.
At this stage, may I mention something about which I am often asked, which is why the United Kingdom did not opt simply to adopt the Model Law.

There are several reasons why we took this course, but I cannot emphasize too strongly that when we were drafting the Bill which became the Arbitration Act 1996, our starting point was the Model Law, and the Act follows closely both the structure and content of the Model Law. It would be accurate to say that the Act is based upon the Model Law. We only departed from or added to the Model Law where there were very good reasons for doing so. There is only time to mention a few examples, though I would refer anyone interested to the two reports that we wrote at the time, which set out in full the reasons for drafting the Act in the way that we did.

For example, under Article 10 of the Model Law, failing the agreement of the parties, the number of arbitrators shall be three. We preferred the existing English rule of one, (now found in Section 15 of the Act) since three arbitrators are likely to cost three times as much as one, and we felt that this extra burden should not be imposed on the parties without their agreement.

Again, under the Model Law, there is a requirement that the arbitration agreement be in writing. In view of rapidly evolving means of
recording we expanded the meaning given to “in writing” from that found in the Model Law. In addition, we considered that the definition we adopted was more consonant with that contained in the English text of the New York Convention.

We altered the wording of the Model Law so that counterclaims were encompassed.

We set out specific provisions providing arbitrators with immunity from suit unless they were shown to have acted in bad faith, and (in Section 74) provided a like immunity to arbitral institutions with regard to the appointment of arbitrators and anything done by arbitrators appointed by them.

But at the end of the day there is no doubt that the English Act is firmly and clearly based on the Model Law. It should always be remembered that the Model Law was never intended as a complete code for international arbitrations, as Lord Mustill, who represented the United Kingdom during the UNICTRAL meetings leading to the Model Law, frequently pointed out.

I referred a moment or two ago to the judicial oath which I took. Without telling you who it was, (save that it was not me!) it so happened when our Supreme Court was opened that one of the Supreme Court Justices who took the oath misread from the card; and instead of swearing
to do right to all manner of people, without fear or favour, affection or ill will, promised to do right to all manner of people without fear or favour, affection or goodwill!

I now look forward to the rest of today’s proceedings, particularly to listening to those who may well disagree with some of the views that I have expressed.

Mark Saville.

Kuala Lumpur

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