HISTORICAL ORIGINS OF ARBITRATION

Delivered by The Rt Hon Sir Ninian Stephen AK, GCMG, GCVO, KBE, LLD
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Since my days of practical experience of arbitration, both as counsel appearing before arbitrators and, on one memorable occasion, as arbitrator, so much has changed, especially in the statutory background to arbitration proceedings, that I was very hesitant in accepting the invitation to deliver this memorial lecture.

My hesitancy has increased by the fact that not only have I been remote from arbitration law for so very long, more than twenty years, but that for the past ten years I have been largely removed from law of any kind, certainly from

JOHN KEAYS MEMORIAL LECTURE

The John Keays Memorial Lecture perpetuates the memory of the late John Keays who was a prominent and highly respected engineer and arbitrator who was very much involved in the formation of the Institute.

daily contact with the courts—and have been blissfully remote from that most tedious and pedestrian of all forms of literature—the Law Reports.

Faced with this wholly unbridgeable gap between my own lack of current expertise and the high professionalism of my audience and of those who are to address you during this conference, I turned for inspiration to the texts. There I discovered what seemed to me remarkable, that the writers of texts on arbitration have either substantially ignored the history of arbitration or have dealt with it in the most dismissive way. I looked in vain in classic sources, in Russell on Arbitration, and in Quinton Hogg's work, and also in current British and Australian texts and Halsbury, for anything like a history of Arbitration.

Whereas writers on aspects of substative law—torts, contracts, real and personal property, criminal law and the like, are usually anxious to provide the reader with historical context, so that the trend-lines of development can be followed and understood and apparent curiousities identified and explained, this is, perhaps understandably, not so much the case with writers on procedural law, on process. And when, as with arbitration, the origins of that process are found to be remote

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from the august precincts of the courts of common law and chancery, authors tend to begin their tale no earlier than the mid-19th century; perhaps because there the legislation of the period lends an air of Victorian-era respectability to arbitration's quite exotic antecedents.

All this suggested to me that for the subject of this memorial lecture I might seek refuge in the past and speak on the history of arbitration as a means of dispute resolution—hence my topic.

I rather hoped that, in tracing the history of arbitration, light might be thrown on the reason for what I regard as an interesting present day phenomenon—the recent extraordinary growth of enthusiasm for alternative dispute resolution mechanisms. One manifestation of them I am personally involved in as chairman of the Banking Industry Ombudsman Council, but ombudsmen of all kinds, both statutory and those that are the creation of particular areas of the private sector, are only a very small part of the array of alternatives to traditional civil process that have developed in the past ten or twenty years in Australia—all the way from small claims courts to conciliation tribunals of various kinds and administrative appeal systems and, of course, arbitration. Whether in fact any conclusions can be drawn had better await the outcome of my attempt to trace something of the history of arbitration and arbitrators.

A further incentive to this quest for historical origins was my recent admission as an honorary liveryman of the company of clothworkers, one of the London Livery Companies, heirs to the mediaeval trade guilds, and my quite accidental discovery that centuries ago the clothworkers guild conducted a very active arbitration system of their own and had an "ordynaunce for controversies to be decided by the master wardenes and assistauntes". That ordinance, although written in the language of some five centuries ago, will nevertheless have a familiar ring to all familiar with submissions to arbitration:

> "Yf any dycorde stryfe or debate at any tyme hereafter shall fortune to happen for any cause or matter whatsoever it be betwyxte one houshoulder and an other . . . of the sayde company or fellowshippe or clotheworkers or betweene them or any of theyr jorneymen servingmen or apprentices or betweene any of the aforesayde persones or any others of the sayde arte or mystery of clotheworkers which without prejudice of the lawes of the realme may be appeased and reformed by good and wyse meanes. That then the sayde parties before they move or attempte by course of lawe any suite betweene them or one agaynste the other in that behalfe shall firste shewe theyr matter and cause of theyr greefe with the circumstaunces of the same to the master and wardenes of the saide arte or mystery of clotheworkers . . . to thintente yf by theyr good dyscretions some quiet order and good ende may be taken therin to the satisfaction of such parties and by their assent accordinge to righte and equitie in eschewinge of further trouble and suite of law."

It is difficult to imagine a more charmingly expressed arbitration clause. The clothworkers company, or to give it its ancient title, The Guild of Fraternity of the Assumption of the Blessed Virgin Mary of Clothworkers in the city of London, was the result of the amalgamation, in the 16th century, of the fullers and the shearmen, ancient branches of Henry I's weavers company.

The English Municipal Guilds, Guilds Merchant and Craft Guilds all were

early involved in dispute resolution by arbitration. As early as the 12th century, in Henry I's reign, the weavers guild was granted a Royal Charter which gave it the right to arbitrate between their members and also to hold a "hallmoot" which had not only a civil but also a limited criminal jurisdiction over "small transgressions" on the part of members, their households (which included apprentices) and their employees. Early documents recording the formation of the worshipful company of grocers refer, in the 1340s, to the resolution of dispute between members by the arbitration of the directors of the company. One of the important features of guilds merchant was the provision of arbitration to resolve disputes between members. Thus such a guild in York that had received its charter as early as 1200 received in 1581, from Queen Elizabeth, the right of its merchant members to elect a governor and 18 assistants who were empowered to try all suits involving guild members. Likewise in London a charter of the reign of Henry III provides for the resolution of disputes among guild members by the decision of four or five citizens applying the law merchant.

But the English guilds were, in the history of arbitration, very much latecomers. Especially in the resolution of disputes between nations or city states, quite well-defined systems of international arbitration existed much more than a thousand years earlier. The Hittites had had recourse to arbitration for centuries before Christ; a recorded instance is of two neighbouring Sumerian cities which could not agree upon the border between them and went to arbitration. And the Persians and Greeks were much addicted to arbitration. Xenophon and Herodotus both speak of the arbitration of what we would now regard as international disputes and Thucydides praises the Spartans, surprisingly because of their warlike reputation, for their occasional recourse to arbitration in lieu of war. From the 7th to the 2nd century B.C. the Greek city states used arbitration extensively to settle disputes between them. A treaty of peace for 50 years between Sparta and Argos, made in 418 B.C. reads much like a modern arbitration clause:

> "If there should arise a difference between any of the towns of the peloponnesus or beyond, either as to frontiers or any other object, there shall be an arbitration. If among the allied towns they are not able to come to an agreement the dispute will be brought before a neutral town chosen by common agreement."

But it was not only international disputes that went to arbitation. In Athens there were both private and public arbitrators. The former, the private arbitrators, were selected by the parties to a dispute and were entrusted by them with its resolution. They took an oath to decide the matter without partiality and, according to Demosthenes, Athenian law provided that when the arbitrator's decision was announced the parties should:

> "Stand fast by his decision and by no means carry an appeal from him to another tribunal but let the arbiter's sentence be supreme."

Arbitration was also known and recognised in Roman times and Cicero writes of disputes being resolved by arbitration.

It has been said, and is much repeated in the texts, that the Anglo-Saxons knew nothing of arbitration. But this seems not to be correct and Professor Murray,

in an article in the Arbitration Journal, the U.S. Periodical devoted to arbitration, discerns "faint glimmerings of arbitration in the Kentish laws of the early 7th century" and specific reference to arbitration by an arbitrator in a civil dispute occurs in Kentish laws towards the end of that century. Much later, in King Alfred's day, there are references to disputes as to possession of land being sent to arbitration.

Following the Norman conquest there are early instances of dispute settlement that seem to have involved arbitration as distinct from what is described as "the rigour of judgment" and the curia regis rolls contain, as early as 1206, a description of an arbitration by five arbitrators, of whom two were nominated by each side.

Professor Murray suggests that the reason why so few of the cases reported in the year books ever appear to come to any definitive conclusion is because arbitration was continuously at work. He bases this on a note to that effect by Sayles, in his Selden Society's Select Cases in the Court of King's Bench. Be that as it may, across the Irish Channel at this time a quite distinctive legal regime seems to have prevailed.

If you are Irish world history does tend to take on a quite special celtocentrical quality, but the Irish claim to very ancient traditions of arbitration is, apparently, well documented. The Brehon code, revised and codified by St. Patrick with the aid of a council consisting of three saints and three poets or bards, is said to have provided for Ireland an excellent system for the arbitration of disputes instead of their litigation in any curial process. Certainly, the composition of St. Patrick's council, with its saints and poets, should be an inspirational staffing model for our various law reform commissions.

The Brehon code was based upon notions of compensation and the arbitrators themselves, the Brehons, and there were many of them, were informal arbitrators of disputes who had virtually unlimited jurisdiction ranging from the theft of a cow to the murder of an Irish king, a not uncommon event. The office of Brehon was hereditary, subject to disqualification for incompetence or incapacity, but only well respected Brehons attracted patronage and thrived; others, whose patronage fell off, withered on the vine; rather like unsuccessful barristers, their practice simply dried up. There was no power of enforcement of their awards but it is said that the reputation of the code and of a venerated Brehon was enough to ensure observance through pressure of community feeling. The origins of the Brehon code of arbitration are hidden in the mists of time, coming, it is said, to Ireland with the Celts as they moved westward across Europe. In its developed form everything had an honour price which could be translated, in those days before inflation, at a fixed rate into cows—so a Bondsmaid's honour price was 1 cumal, pronounced kooal (nothing in Gaelic is pronounced as it is written) which represented 3 cows, while a King's was 21 cumal, or 63 cows. Injury, whether physical or to pride or reputation, was made good by a Brehon in an award of so many kooals.

It is a sad reflection on the history of Ireland that whereas the Brehon code is said, by a learned article in Vol. 11 of the Arbitration Journal, to have been the persisting legal code in Ireland until the end of the 17th century, the edition

of the Encyclopaedia of the Laws of England which gives the fullest historical account of the law, the old pre-Halsbury 1907 ED., contains not a word about the Brehon code. It was something English compilers no doubt regarded as quite literally "beyond the pale". But at least in that edition 53 pages were devoted to the laws of Ireland, whereas my now antiquated 1930s 2nd edition of Halsbury's Laws gives Ireland only some three pages, and that under the title "dominions, colonies, possessions etc." All this is very much in keeping with the tenor of those acts of the Irish Parliament from as early as the 1300's that drew a clear distinction between "the Englishmen on the one hand and the Natives and the degenerate English on the other", the earliest of those statutes being the statute of Kilkenny of 1367, its apparent aim being to prevent any more English settlers in Ireland from becoming "degenerate" by infection from the natives; doing so by forbidding them from attending seductive Irish fairs or adopting Irish customs.

But this is an undue digression from any account of the history of arbitration; it just appealed to me as a Scottish celt from across the Irish Sea. I should leave these celtic mists and return to my subject.

Arbitration, or at least commercial arbitration, depends upon the existence of a degree of commercial sophistication. Arbitration is both a by product of and a nurturer of commerce. After the fall of the Roman Empire, the ages in Europe were indeed dark ones for commerce, the flow of trade substantially ceased and only with the 10th and 11th centuries did it revive. Towns then began to grow again, new land was brought under cultivation and populations were expanding. Between 1000 and 1300AD European populations more than doubled. Gold coins were minted and in circulation again after a lapse of 500 years. It was to be another 50 years before Bubonic plague, the black death, arrived out of Asia and for a time so decimated populations continent-wide that Europe's population fell by something between a quarter and a third in the dreadful seven years from 1347 onwards.

But, in the three centuries before plague struck, the growing populations created growing demand and trade between nations burgeoned.

As Holdsworth tells us, during those centuries it was in the tribunals held at the great annual fairs that the commercial law of the middle ages developed. The needs of merchants called for a speedy system of justice and one that applied principles well recognised by merchants throughout the trading world of the day; arbitration and the law merchant were means of meeting those needs. Those great fairs of the middle ages, held annually at fixed seasons throughout Western Europe, were a response to the general lack of security and difficulty of communication of the times. Travel in company was safer for the ever-travelling merchants and rulers would take special measures to ensure that foreign merchants while at their fairs were protected. In keeping with this is the provision in Magna Charter that:

> "All merchants shall have safety and security in coming into England . . . to buy and sell, without any unjust exactions, according to ancient and right customs".

Fairs were held in many of the major towns of England. At those fairs disputes between merchants were determined not by recourse to the Royal Courts of law nor even to the local customary courts but were instead decided by panels of four or five merchants chosen from those attending the fair.

This came as no oddity to the merchants who traded at these fairs. It was, on the contrary, precisely what they expected, indeed demanded—prompt justice dispensed by fellow merchants familiar with the everyday problems of the market place and who applied, in the resolutions of those problems, the relatively international code of the law merchant.

The Tribunals that administered the law merchant were not only lay tribunals, they were also International in composition. Thus those merchants who formed a market court at Antwerp might, 6 months later, perform the same service at St. Ives across the North Sea. Records exist of the local market court at St. Ives in 1275 and of the summons issued there to all the several foreign merchant communities attending the market calling on them to participate in the adjudication of a case involving a group of merchants accused of the giving of short measure.

The law merchant that governed this international trade had its origin in several sources. Before the crusades, the first of which succeeded in capturing Jerusalem in 1099, the Arabs were the great merchants of Eastern Europe and the East, purveying eastern luxuries to the barbarous west, and the resultant trade contact led to much of what might be called Arabic Law merchant becoming familiar to European merchants who traded with them. Then, on into the 13th century, the International Trade of Venice and Genoa flourished, with the cities of Florence and Pisa supplying their financial and banking skills and all contributing to the body of merchants' law, as did both Roman law and Canon law, and, of course, the evolving customary practice of the merchants. The merchants doing business at the great European fairs, travelling on, as they did, from fair to fair, and carrying their goods with them, goods often imported from the still mysterious east which few Europeans other than Marco Polo and his brother had visited, expected their trade dealings to be closed and completed at each fair before they moved on to the next. The law merchant, declared by the assembled merchants at those fairs, had the necessary supranational validity and universality to meet their needs.

One gets some idea of the size of these international fairs from Beawes' description of one of England's principal international fairs, held annually at Stourbridge. It spread over half a mile square and to it merchants from all the Mediterranean, and from France and the Hansa towns of Northern Europe brought their wares. To it also the exportable products of England and Wales were sent, wool, farm produce and metals, lead, iron and tin.

As Maitland reminds us in his essay on the history of English law, until the reign of Queen Elizabeth England was a thoroughly rustic kingdom and the import and export trade was largely in the hands of foreigners. Their international law merchant was in many cases dispensed by so-called consular courts of merchants, the judges or consuls being either stationed in great market towns

or doing the rounds of the fairs with the merchants, so that these international merchants were, as it were, taking their law and those who applied it with them as they went on their journeying.

A distinction seems to have been drawn at some of the English fairs between disputes between international merchants, which were dealt with according to the law merchant and by essentially arbitral means in these consular courts, and disputes between others at the fair, which the mayor would dispose of at his court of piepoudre, which also dispensed speedy justice, what Lord Coke called "as speedy justice for the advancement of trade and traffic as the dust can fall from the feet"—hence the name courts of Piepoudre—the Curia Pedis Pulverazati, where bargains were enforced between opening and closing of the fair or, in port towns, between one tide and the next.

Fifoot says of this body of the law merchant that "it developed upon the basis of common sense and commercial exigency" and that of it the Royal Courts of England knew nothing. Disputes involving commercial trade, particularly International trade, simply did not reach the regular courts of the land.

As an instance of this Park J., looking to the past when writing what was to be the first English text on marine insurance, published, as it happens, in the same year as the First Fleet set sail for Botany Bay, says that only for rather less than a century had questions of marine insurance at all come before the courts of common law. Fewer than 60 cases of insurance of any kind appear in the reports in the whole 200 years up to 1756, when Lord Mansfield took insurance law, together with much else, in hand and revolutionised, indeed substantially created, much of the substance of mercantile law.

The explanation appears to be that disputes over insurance were as a rule resolved by recourse to arbitration. There is extant a policy of insurance, written in 1555, relating to the voyage of the vessel Santa Crux from Calicut, in India, to Lisbon that exemplifies this; it provides that "If God's will be that the said ship shall not well proceed we promise to remit it to honest merchants and not go to the law".

There was, it seems, for a short time, something amounting, apparently, to a court of arbitration to deal with insurance cases in England at the beginning of the 17th century. In 1601 the policies of assurance court was set up in London, staffed by commissioners, who were to be "8 grave and discreet merchants". However, apart from this record of its setting up, nothing more appears, to my knowledge, in the records, of its proceedings or of its fate.

The history of the development and ultimate fate of the law merchant in England, a process which brought it into the King's courts and made it a part of English law, is directly relevant to the history of arbitration in England.

With the reign of Edward III came change in the pattern of fairs throughout England. The export trade, largely in wool and in cloth, became concentrated in the staple towns, where the crown could more effectively levy taxes on the sales. In return, the crown gave privileges and safeguards to the merchants trading there. It was by the Statute of the Staple (27 ED.III c2) that the law merchant was first formally recognised in England; that statute provided "that all merchants

coming to the staple . . . shall be ruled by the law merchant in all things touching the staple and not by the common law of the land nor by the usage of boroughs".

The law merchant so recognised was administered in the so-called staple courts by the mayor and constables of the staple, not necessarily at all associated with the local municipality but rather with the body of merchants attending the staple. By this means the statute of the staple proposed "to give courage to merchant strangers to come with their wares and merchandise within the realm".

The courts of the staple in the various staple towns kept no records and we know little of their proceedings other than that they were presided over by merchants, not lawyers, and if any question of dispute as to its rulings arose it was a matter not for the courts of common law but for the Chancellor and the King's council.

The statute of the staple instructed the Royal Judges that they were not to attempt to take congnizance of things affecting the trade of the staple but were instead to leave such matters to be settled by the Lay Tribunals elected by the merchants and applying the law merchant. The law they administered is, in one instance, preserved in what is called the Little Red Book of Bristol, a 14th century code of the law merchant as it was administered by the merchants to the exclusion of the Royal Courts.

However, the mercantile community were not destined for long to be allowed in England to settle their own disputes according to their own laws and with their own processes. There were Royal Courts eager to assume jurisdiction and the 15th century saw the beginning of this process. It coincided with the loss of importance of many of the old merchant guilds, the disappearance from the scene of many of the old courts of piepoudre and the gradual decline of the staple.

The Court of Admiralty, established in Edward III's reign, in the mid-1300s, with the principal function of keeping the King's peace upon the seas, applied international maritime law, based on the laws of Oleron and developed under the influence of continental civil law. The Court of Admiralty thus thought itself well suited to administer the law merchant, which stemmed from not dissimilar roots. The early Court of Admirality itself engaged from time to time in processes of arbitration. The introduction to the Selden Society's pleas in the Court of Admiralty Vol. 1 refers to the court's 16th century practice as including arbitration as a common mode of settling disputes in shipping cases. In some cases the judge himself acted as arbitrator by consent; more frequently two or more civilians or experts acted as "aimables compositeurs". The parties would enter into a bond or recognisance to observe the award and there are records of several suits in admiralty to enforce such bonds or compel performance of the award.

As Fifoot puts it, over time the peculiar courts and peculiar law of the merchants, a race apart in mediaeval times, became absorbed in the ordinary law and process of the land. With the decay of the courts of the fairs, trade, "caught in the toils of nationality, was not suffered to escape the shelter of the common law". This they had previously for a time successfully resisted; by two statutes of the

reign of Richard II the admiralty jurisdiction was expressly limited so as to protect the old franchise jurisdiction of market towns. But tudor times saw great growth in the reach of the Court of Admiralty, which Queen Elizabeth particularly favoured. The 16th century was a time during which the special courts at ports and towns where fairs were held ceased to exist one by one, their jurisdiction being taken over by admiralty and also being frequently interfered with by means of prohibition by the courts of common law.

Already in the 15th century the Court of Admiralty had begun to assume jurisdiction over mercantile disputes, especially in the case of contracts made or torts committed overseas and in later tudor times this process accelerated. Thus the records of the time, particularly the black book of the admiralty, show that in the 15th century the Court of Admiralty was involved not only with shipping cases and piracy but also in mercantile cases generally. In the 16th century cases involving contracts made abroad, Bills of Exchange, charterparties and insurance were all claimed as falling within its jurisdiction, to be dealt with according to the law merchant. This immediately aroused the professional jealousy of the practitioners of the common law and this jurisdiction, relatively new for the Court of Admiralty, was soon challenged by the courts of common law, beginning in about 1570. The challenge proved ultimately to be successful. In any event recourse to the Court of Admiralty had disadvantages for mercantile cases; that court used the lengthy procedure of the civil law, not the summary procedure of continental mercantile courts, and certainly did not offer the prompt outcomes which merchants sought. The courts of common law were ruthless in their struggle for mercantile jurisdiction; as one instance, to oust the Court of Admiralty they permitted parties to adopt a fictional venue; thus a contract in fact entered into overseas and hence within admiralty jurisdiction they allowed to be fictitiously pleaded as made in London and therefore properly subject to the common law.

It was not only the courts of common law that were seeking to capture the business of commercial men. The chancery judges also cast jealous eyes on the law merchant jurisdiction. It had, after all, been to the Chancellor that complaint might be made, much earlier, if proceedings in the staple courts were seen as not providing proper justice. However chancery failed in its bid for jurisdiction; one writer of the time described it as ridiculous for judges in chancery to seek to determine merchants' negotiations transacted in foreign parts of which those judges "knew as much as the seats they sit on".

The troubled political times of Stuart Monarchy and of Commonwealth led ultimately to the total victory of the courts of common law, which thereafter took to themselves exclusive jurisdiction over mercantile law.

In effect the battle of jurisdiction may be summarised as, first the usurpation of the law merchant jurisdiction of the local and popular courts and of the staple courts, many of which involved lay judges and processes of arbitration or akin to it, by the Court of Admiralty. Then followed the destruction by the courts of common law of Admiralty's painfully acquired mercantile jurisdiction by means of repeated prohibition and, after the restoration, by political means.

Meanwhile the merchants remained dissatisfied, especially with the processes of the common law and might well have ultimately succeeded in having chancery take over the jurisdiction had not the common law reformed itself by the creation of a whole new area of mercantile law.

Three chief architects of the growth in mercantile jurisdiction of the courts of common law were a formidable trio: Coke, Holt and, above all, Mansfield. Coke it was who, by his attacks, did much to rob admiralty of its promising new jurisdiction. Then, as Holdsworth puts it, from the beginning of the 17th century the common lawyers worked at incorporating the law merchant into the common law, constructing new common law from old commercial custom.

Holt, as chief Justice of King's bench at the end of the 17th century, moulded principles of the common law to fit mercantile needs and prepared the way for Lord Mansfield, who is aptly described as Buller J. as "the founder of the commercial law of this country".

Now, while these battles for jurisdiction were going on, merchants were still resolving their disputes by lay arbitration and on occasion were encouraged to do so by the Crown. One reads of Dr. Lewes, Judge of the Court of Admiralty, making complaint, in 1575, that the Queen, by Royal Charter, was giving corporations of merchants the privilege of settling disputes between themselves rather than going to the Court of Admiralty. Dr. Lewes wrote to the Queen that he was personally in poverty and distress because of the falling off in the business of his court and consequent loss of fees. This he attributed to attacks by common law prohibitions and to the effect of the privileges granted by Her Majesty to merchants trading to Spain and Portugal which allowed them:

> "To hear and determine all suits and quarrels happening among the said merchants or any of them and any other being out of their company".

In the next century one finds corporations like the merchant adventurers at Hamburg and the African Company being given by charter similar rights to hear and determine suits domestically.

Only ten years after Dr. Lewes' complaint and plea of poverty the crown had occasion to rebuke the common law courts for interference in disputes which arose between merchants and which the common lawyers sought to have for their own.

It was of this perhaps unedifying struggle for expansion of jurisdiction by the various Royal Courts, that, in the great case of *Scott v Avery*, Lord Campbell spoke when he said that when emoluments of judges depended largely on fees there was great competition to get as much as possible of litigation into Westminster Hall.

As Holdsworth observes, there was a clear preference at the time on the part of merchants to have disputes over charterparties, salvage, Bills of Exchange, Promissory Notes and the like dealt with by their own arbitration processes rather than by the courts. The result was that arbitrations quietly flourished. The awards made in such arbitrations were usually enforced by means of penal bonds entered into at the time of the submission to arbitration and even if,

as in the celebrated case of Vynior, 8 Co. 80a, in 1609, one party purported to revoke the authority of the arbitrators before award given, the penal bond could still be enforced and was an effective sanction. In Vynior's case the bond was in fact so enforced. However Dicta in Vynior's case was to give trouble 80 years on—that Dicta was to the effect that revocation before award was valid and when, in 1687, it was enacted that penal sums in bonds could not be enforced, the effect of 8 and 9 William III c.11 s.8, the statute of fines and penalties, this meant that only actual damages were recoverable if a party in arbitration proceedings chose unilaterally to revoke the reference. Since the courts of common law stood ready, indeed eager, to adjudicate in such disputes they were not easily persuaded that a party's unilateral revocation, in effect a repudiation, of the submission to arbitration gave rise to any actual damages. How could there be actual damage, they asked, when the lawful courts of the land were available to try the case and resolve the dispute.

This struck a severe blow at arbitration, but the set-back was only temporary. The legislature soon came to the rescue. By 9 and 10 William III c15, commonly described as the first Arbitration Act, it was enacted that a submission to arbitration could be made a rule of court if the submission so provided. Any purported subsequent revocation then became contempt and the efficacy of arbitration was restored. However this first Arbitration Act went no further; there was still no provision to compel witnesses or to ensure a proper hearing.

The next statutory intervention came some 150 years later when, in 1833, 3 and 4 William IV c42 provided that submissions to arbitration should thenceforth be irrevocable except by leave of the court. It also provided for the compelling of the attendance of witnesses and the production of documents.

During all this time there seems to have been a degree of hostility towards arbitration on the part of the courts, a sense that the jurisdiction of the courts was being impaired by this instance of private enterprise justice. As Scrutton L.J. said in 1930, you could sense such hostility right up to the end of the 19th century and this despite the fact that by the Common Law Procedure Act of 1854 the legislature, in its first great revision of the law of arbitration, gave express recognition to arbitration as an alternative means of dispute resolution.

That Act of 1854 allowed parties to a submission to seek the remedy of a stay of legal proceedings if they were brought in breach of an agreement to refer to arbitration. It also strengthened the effect of the Act of 1833 by allowing all written submissions to be made rules of court as of course unless the submission provided expressly to the contrary. It further contained provisions for the appointment of arbitrators, for remission of awards and for the stating of an award in the form of a case. Since 1854 arbitration can no longer be said to be in any sense a covert rival to litigation. Instead it is an acknowledge alternative.

The Arbitration Act 1889 added to the procedural aids to arbitration by making submissions to arbitration irrevocable except by leave and this without the need to have them made orders of court. It also deemed to be part of the submission the now familiar machinery provisions of the schedule to the Act. It also importantly provided for judicial review of questions of law raised in the

arbitration hearing itself, thus further aligning the process of arbitration with curial process.

It was in this state that, until relatively recent and major admendments, the law of arbitation long stood both in Britain and in Australia. It is at this stage that, for my part, the history of arbitration ends; its present state is not history but, rather, the here and now, though only with an understanding of its past history can one understand both the full import of the modern legislative provisions and, more particularly, the procedural context of the older cases.

This scant account of the history of arbitration, drawn from a variety of sources but making no claim to original research, which time did not permit, may do little to explain the current popularity for alternative dispute resolution techniques but it does at least show the abiding preference over the centuries for arbitration on the part of those engaged in commerce.

Nor has this preference by any means been confined to commercial men. It was none other than George Washington who, by his Will of 9th July 1799, directed that:

> "All disputes (if unhappily any should arise) shall be decided by 3 impartial and intelligent men known for their probity and understanding, 2 chosen by the disputants and the third by those who, which three shall unfettered by law or legal construction, declare their sense of the testator's intention and such decision (shall be as) binding on the parties as if it had been given in the Supreme Court of the United States".

In my days at the Equity Bar I am happy to say that testators did not display the same unseemly distaste for curial interpretation of their testamentary intent.

Professor Schmitthoff has written an essay on extrajudicial dispute settlement in which he refers to the modern trend world—wide towards alternatives to litigation in the courts. His thesis is that it is not the fault of the courts that nowadays people tend to shy away from them; there is no question, he says, of the quality of justice that courts administer. But he then goes on to note how often court proceedings are formal, lengthy and costly. He quotes Lord Devlin as saying that in consequence in many cases "injustice will go without redress".

However the causes go deeper, he says, than matters of delay and expense. In the case of ordinary men and women Professor Schmitthoff discerns a deep-seated distrust of lawyers which deters them from recourse to the courts. And in the case of large corporations there is another deterrent—not distrust so much as the fact that their transnational business affairs are often ill suited to adjudication by national courts. "They prefer" he says "their disputes to be dealt with by Judges of their choice, who are acquainted with the atmosphere of international business". This, coupled with the relative finality and privacy of arbitration appeals to them. All this sounds remarkably like the views of merchants echoed down the ages.

Certainly, the history of mercantile disputes in England over the centuries suggests that in the past it has been lay Judges, fellow merchants, that the commercial community has preferred to the judges and juries of the Royal Courts. It was by compulsion rather than by preference that, by the eighteenth century,

mercantile litigants found themselves firmly locked in the embrace of the courts of common law. Perhaps the truth is that it is not so much a case of alternative dispute resolution processes of a sudden gaining in popularity but rather that the superior courts have, over the years, lost the ear, and the special favour, of both legislature and executive and can no longer effectively defend their turf as they once did.

At all events, the remedy that has now been provided by the present legislation governing arbitation, affirming yet again its legitimacy as an alternative to curial litigation while providing safeguards against arbitral injustice and effective means of enforcement, perhaps points one path to the future. It certainly does reflect, in a curious sense, the spirit of the times: in offering parties a free choice of arbitrator, of venue and of timing it may be said to be, in relation to the justice system, a variety of the now fashionable process of privatisation.

LETTER TO THE EDITOR

Sir,

I have recently received notice of a *Call for Papers* for a conference to be held in the United Kingdom in 1992 which may be of interest to readers of The Arbitrator.

The conference is titled "Construction Conflict Management & Resolution". It is the first University of Manchester Institute of Science and Technology (UMIST) international construction management conference and will be held at the Manchester Conference Centre on 25-27 September 1992.

Papers are called for in the following areas: Conflict management, Claims procedures, Litigation/Arbitration, Education, International construction, Alternative dispute resolution, and the Future. Accepted papers will be published in book form.

Deadlines for submission of papers are as follows: Abstracts by 31 October 1991, and Papers by 30 April 1992.

I have some additional information and addresses of conference organisers which I can make available to anyone who is interested.

Yours sincerely,

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