

THE LEGAL DEVELOPMENTS OF ARBITRATION IN ENGLAND AND WALES

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ABSTRACT

Arbitration is now the best form of dispute resolution in commercial matters internationally. Arbitration faced a lot of hostility from courts, from decades. Arbitration is now internationally recognised in many continents, due to the role played by England, in enforcing the arbitration clause. It's important to understand how the modern arbitration in England developed from hostility to harmony, in solving commercial disputes or contractual obligations of international

commerce. This article fills in the developments of modern arbitration in England and Wales. This article will focus developments of arbitral provisional measures, and also provide if there is a need for reform, in arbitration. This article provides an understanding of some of the trends concerning those measures and assist in shaping such trends; mainly the Arbitration Act of 1889, 1950, 1979 and 1996.

Key Words: *legal, arbitration, England, Wales*

INTRODUCTION

It is of great importance to know how the historical legislative frame work in arbitration laws played a pivotal platform in granting arbitration jurisdiction to grant arbitral provisional measures. London is a leading hub for international commercial arbitration due to its eminence as the centre for shipping, insurance and finance. England is the mother of common law, in all its common wealth countries; it offers a legal regime to lawyers to handle arbitration disputes.¹ All arbitration proceedings were based on adversarial, instead of an inquisitorial approach.² All the power to handle arbitral proceedings was thus vested in municipal courts, until the early 20th century that maritime and commercial disputes increased rapidly and thus triggered municipal courts to accept assistance from arbitral tribunals, as a mechanism necessary for effective international commercial disputes and effective distribution of justice.³ The development of arbitration in England falls into six distinct periods namely; common law which governed arbitral proceedings until legislative provision was enacted in Statutes 9 and 10 of 1698. Then further statutory provision was made in the Common Law Procedure Act 1854, before the first specific Arbitration Act was enacted in 1889.⁴ Arbitration was revised at chronological intervals, until the most recent, the Arbitration Act of 1996.⁵

¹ See Goldstajn, "Choice of International Arbitrators, Arbitral Tribunals and Centres; Legal and Sociological Aspects; in Peter Sarcevic (ed) Essays on International Commercial Arbitration (Graham & Trotman/Maritus Nijhoff Publishers 1989 at 46.

² See Civil Procedure Act 1833 and the Common Law Procedure Act 1854, see the Administration Act S.16 of 1920.

³ See Geneva Protocol of 1923-27 and the New York Convention 1958.

⁴ See Andrew Tweeddale & Keren Tweeddale, Arbitration of Commercial Dispute: International and English Law and Practice (Oxford Press 2005) note 31 at 1.

⁵ See Andrew Tweeddale & Keren Tweeddale, A Practical Approach to Arbitration Law (Oxford University Press 1999) note 13 at 1.

THE ADVERSARIAL APPROACH OF COMMON LAW (ARBITRATION ACT 1889)

The English merchants applied arbitration to settle disputes according to customs and practice,⁶ since the first arbitration came in force in 1698.⁷ The merchants applied arbitration to settle disputes according to customs and practice.⁸ However, there were different concepts of provisional measures, due to the case system.⁹ The concepts were based on the historical proximity between the arbitral tribunal and municipal courts,¹⁰ which was not a benevolent one.¹¹ Later the common law Procedure Act 1884, improved the granting and enforcement of arbitral provisional measures.¹² The arbitration practice was then codified by the Arbitration Act 1889 and a ‘statement of case where the award was deemed to be made according to the law as supervised by the judicial courts. There was political bias as evident in the comments of Hardwicke in the case of *Wellington v Mackintosh*, where he took the view that “*persons might certainly have made such an agreement as would have ousted this court of jurisdiction but the plea here goes both to the discovery and the relief; and if I was to allow the plea as to relief, I could not as to discovery, and then the court too must admit a discovery, in order to assist the arbitrators, which is not proper for the dignity of the court to do.*”¹³

This trend of inferiority complex of courts, continued in the case of *Kill V Holster*,¹⁴ where the courts took the view that the agreement of the parties cannot oust the court’s jurisdiction. In addition, in *Mitchell v Harris*, it was held that “*I have looked into many cases at law, where the subject matter of the reference became afterwards the subject of action, and it is not said in any, that a mere agreement to refer can take away the jurisdiction of the court in Westminster Hall. If an award had taken place, and was pleaded, it would be examined in a court of law, and also in a court of equity, if impeached upon an equitable matter.*”¹⁵ The same principle was further adopted in the case of *Thompson v Charnock*, where Kenyon LJ said that “*an agreement to refer all matters in difference to arbitration is not sufficient to oust the court of law and equity of their jurisdiction.*”

⁶ See Arbitration Act 1889 S.4.

⁷ English law is inherently superior to other legal systems due to the doctrine of “*satere decis*,” for example; Lord Diplock’s 1978 Alexander Lecture 45 Arbitration 10 at 21, as well as his speech at the House of Lords on 15th May 1978. Lord Denning MR, Said that “*owing to arbitrations and cases which are stated for the opinion of the court, the commercial law of England is the commercial law of the world. Other countries do not have procedures like ours by cases stated to get the points of law before their courts.*” (HL Deb 12 Dec 1978) 397 cc434-64.

⁸ See Arbitration Act 1889 S. 4. Total autonomy of arbitral proceedings was monopolised by courts in England.

⁹ See Sir Frederick Pollock and Frederick William Maitland, *The History of England Law* 667 (2nd edn 1889).

¹⁰ See Scruton J J, in *Re Olympia Oil & Cake Co & Mac Andrew Moreland & Co* [1918] 2KB at 771-778. Where he said that judges have frequently expressed their reluctance to be invoked at all by a party to an arbitration agreement and the jurisdiction of courts cannot be ousted by agreement of the parties.

¹¹ Arbitration Act 1889, S.4 (1), which provided that the courts had discretion to act on grounds of vexatious and stay an action brought in defiance of arbitration agreement. There was a clear supremacy of the courts and there was no parallel in the English law of arbitration to what is known in French as “*amicable composition*,” under which the parties bind themselves to treat the arbitration award as conclusive, and are thereby debarred from resorting to the courts.

¹² Ibid S.2 and 28, which provide the powers of the arbitrators in the Schedule to the Act. This was implemented in S.8 of the Arbitration Act 1934

¹³ See [1743] 2 568.

¹⁴ [1793] 2 Ves June 129.

¹⁵ Ibid.

Indeed it is true to assert that the reasons why the courts were not so respectful to arbitration was purely based on public policy reasons and jealous in order to protect the common law, and that it was against the spirit of common law and equity that a party, by agreeing to refer a dispute to arbitration, deprived of the right to apply to a court of equity. The author argues that the reasons entirely based on either judicial jealousy or public policy in the form of an attempt to safeguard the jurisdiction of the courts. It should however, be noted that an arbitration agreement was effective to the extent that an action could be brought for damages for breach of it, and where an award was granted before the authority of the arbitral tribunal had been revoked, the award could be enforced.¹⁶

The public policy narrative was adduced by the comments of Campbell LJ in *Livingston v Ralli*, where he said that “ *legislature has recently in the Common Law Procedure Act 1854, S.11 made a provision that not all arbitration agreements shall be pleadable in a bar, but that the court may stop the action. This shows the opinion of the legislature that such agreements are not contrary to public policy.* ”¹⁷

Indeed, Campbell LJ,¹⁸ reiterated this opinion again in *Scot v Avery*,¹⁹ and similar views were expressed by Watson LJ, where he commented that “ *the rule that a reference to arbitration not named cannot be enforced does not appear to me to rest on any essential consideration of public policy. Even if an opposite inference were deducible from the authorities by whom it was established, the rule has been so largely entrenched upon which it was originally based could now be regarded as of cardinal importance.* ” The doctrine of party autonomy was not given effect, to arbitral proceedings.²⁰ Scott was followed by subsequent cases for example; *Scott v Corporation* and ²¹*Braunstein v Accidental Death Insurance Co.*²² Accordingly to decide cases above it is clearly adduced that there were no clear grounds of public policy to wreck arbitration proceedings, but the only grounds were based on jealousy, in order for the courts to safeguard their jurisdiction, which was perceived as threatened by the arbitral tribunal, for example in the case of *Vynoir*,²³ Cook LJ characterised the proximity of courts and arbitral tribunal as that of agent and principal, thus ensuring the revocability of the arbitration agreement at common law. It should be noted that the doctrine of hostility to arbitration at common law originated from the context of ancient courts for expansion of their jurisdiction.²⁴

No subsequent cases have denied this approach, in fact recent cases have approved such views, for example; Moulton LJ in *Doleman and Sons v Ossett Corporation*, said that “ *the courts will not allow their jurisdiction to be ousted as their jurisdiction is to hear and decide the matters of the action and for a private tribunal to take that decision out of their hands,*

¹⁶ See *Bishop v Bishop* (1640) 1 Chan Rep 142.

¹⁷ See [1855] 5 EL & BL 132.

¹⁸ *Ibid.*

¹⁹ [1856] 5 HLC 811 at 1121.

²⁰ See *Scot v Avery* [1856] 5 HL 811 at 1130.

²¹ [1858] 3 De G & J 334 at 368.

²² See [1861] 1B at 797.

²³ [1609] 8 Co. Rep 81b.

²⁴ See *Scot v Avery* at 853.

and decide the question the questions itself, is a clear ouster of jurisdiction.”²⁵ It should be noted that the municipal courts, under common law approach of development, felt that it was of great importance that the law was kept uniform so as to avoid arbitral tribunal from interpreting the law in different ways, and this was clearly expressed by Atkin LJ in *Czarnikow*, where he observed that “ the policy of the law given to the High Court large powers over inferior courts for the purpose of maintaining a uniform system of law.”²⁶

It is clear that the courts were jealous of their jurisdiction, and did not want their jurisdiction to be usurped by arbitration tribunals.²⁷ Arbitral tribunals were inferior and they had no power rule on their jurisdiction on any matter, since all the powers were reserved to judicial courts. There was no party autonomy to parties’ at all,²⁸ since citizens could not make their own laws,²⁹ they had to rely upon the courts to be a vehicle for resolving their disputes, where the contract was interpreted according to the laws of contract, subject to damage awarded by the courts. The courts considered arbitration to be within their jurisdiction, thus the users of arbitration became victims with threats from the courts to intervene in arbitral tribunal jurisdiction. England was slow to remedy to this negative perception by enacting arbitral laws that provided exclusive jurisdiction to arbitral tribunals. It’s probable that the advantages of arbitration had been to some extent under estimated by lawyers and exaggerated by commercial people, hence these shortcomings led to the Arbitration Act 1950 in Oder to harmonize arbitration proceedings in England.

ARBITRATION ACT 1950

The hostility of arbitral tribunals and municipal courts continued,³⁰ and this was evident when one considers the special case procedure.³¹ Under this procedure, either party to the arbitration agreement could apply to the arbitration tribunal to a state a special case to the high court for judicial opinion on some point of law arising in the course of arbitration. When an application was made by one of the parties’ the arbitrator had the discretion as to whether or not to state a special case., if he refused a party could apply to High Court for an order compelling the arbitrator to state a special case. The main purpose of the state procedure was to ensure that the law applied correctly in arbitrations. However, the procedure was to ensure that the law was applied correctly in arbitrations. However, the procedure became abused particularly after *Halfdam Grieg & Co v Sterling Coal & Corporation (The Leyland)*,³² where the Court of Appeal ordered that the case be stated over the arbitral ‘s objection, on the grounds that disputes under the arbitration agreement in London had been made under the

²⁵ Ibid.

²⁶ [1922] 2 KB 478 at 491.

²⁷ See Arbitration Act 1889 S.13 (3), see *Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592.

²⁸ Ibid S.8 (3).

²⁹ See Bankers LJ in *Czarnikow v Roth Schidt & Co* [1922] 2 KB 478 at 491.

³⁰ See Kerr LJ in *Mavan & Bank Mellat V Hellinki* [1973] QB 291, where he cited S.12 of the Arbitration Act 1950 that provisional measures should only be granted by the judicial courts. See *SA Coppee Lavalin NV v Ken-Ren Fertilizers and Chemicals* [1994] 2 WLR 631.

³¹ See Arbitration Act 1950 S.21.

³² [1973] 2 ALL ER 1073.

assumption that the point of law could be referred to the judicial jurisdiction for determination.³³ Under the special case mechanism, a party could delay arbitral proceedings, because the tribunal was required to spend time preparing the consultative question or alternative awards, and the courts had to set a hearing date with the possibility of an appeal from the High Court to the Court of Appeal. This meant that the party favoured by the arbitral award or provisional measure, would in the meantime be denied the award. Thus the case stated procedure, delayed arbitral proceedings, and also increased the cost of the arbitral process. Parties were unable to exclude review under case stated mechanism as this was deemed contrary to the public policy.³⁴ The arbitral tribunal had no jurisdiction to grant provisional measures even where the arbitration agreement provided for this,³⁵ since courts perceived arbitrators as incompetent to deal grant arbitral provisional measures.³⁶ Parties to arbitration agreement could only apply for costs from the arbitral tribunal, but with reference to a judge and subject to a long period of fourteen days.³⁷ The long delay provided a negative narrative that arbitrators could not grant provisional measures, emanating from the arbitration agreement.³⁸

To make matters worse the fees of arbitrators were not set by the tribunal but paid according to the Rules of the courts as in litigation proceedings, on the argument that the tribunal had no authority to enforce arbitral proceedings without the intervention of the case mechanism or courts.³⁹ Although both the tribunal and courts in England operated an adversarial system of achieving justice,⁴⁰ arbitrators used to take a back seat, expecting municipal courts to come armed with a team of lawyers.⁴¹ It should however be noted Part II of the Arbitration Act 1950, introduced the commencement of arbitral proceedings and enforcement of provisional measures under the Geneva Convention, which was superseded by the New York Convention of 1958. The courts developed a concept of procedural mishap, which allowed the requirement of misconduct. This was achieved by elevating remission from mere remedy for misconduct to a right available whenever something had gone wrong during proceedings.⁴² For the first time in history arbitrators were first allowed to grant provisional measures

³³ See Lord Denning MR, who set the circumstances in which an arbitrator could state a special case. These included that the point of should be real and substantial and such as to be an open and serious argument and appropriate for decision by a court of law. Lastly, the point of law should be of such important that the resolution of its is necessary for the proper determination of the case as a distinct from a side of little importance.

³⁴ See Kerr LJ, who recognised this problem in *The Karvopeiratis* [1972] 2 Lloyd's Rep 344 at 349, where he said "that nowadays many complaints that our special case procedure in commercial arbitration is being abused. Special cases used to be the exception, but they are becoming the rule and increasingly frequent as means of delaying the speedy resolution of commercial disputes for which arbitration was designed."

³⁵ See Arbitration Act 1996 S. 38 and 39, which now gives jurisdiction to arbitral tribunals to grant provisional measures with no interferences of municipal courts.

³⁶ See Arbitration Act 1950, S.12 (6), which provide that " the High Court shall have the power of making orders in respect to security for costs (arbitration cases) as it has for the purpose of an action in the High Court."

³⁷ Ibid S.26 (6).

³⁸ See *Consolidated Investments and Contracting Company v Saponaria* [1978] ALL ER 988.

³⁹ See Arbitration Act S. 27.

⁴⁰ See Nicholas Gould, International Business Conference Summer School (August 2003).

⁴¹ See *Libra Shipping & Trading Corporation Ltd v Northern Sales Ltd (The Aspen Trader)* [1981] 1 Lloyd's Rep 273, see *Comdel Commodities Ltd v Siporex Trade SA* [1990] 2 ALL ER 552.

⁴² See *King v Thomas Mckenna Ltd* [191] All ER 53.

namely; the ability to cross –examine a witness under oath, register oaths and to award costs, due to Lord Lister’s support of independence of the tribunal and the ability to grant provisional relief. The arbitration Act incorporated an implied term into every arbitration agreement to the effect that where a reference was to two arbitrators, the two were obliged to appoint an umpire immediately following their own appointment,⁴³ however, if the two arbitrators never reached an agreement, arbitral proceedings could not proceed and could be subject to municipal courts. Indeed this common law approach restricted the freedom of the arbitrators to give free reasons,⁴⁴ and at the same time had a desirable effect of accentuating the rationality of the arbitral process.⁴⁵ The Act was more theoretical than reality due to courts dominance in arbitral proceedings.⁴⁶ This was evident in the case of *Coppe-Lavalin NV v Ken Ren Chemicals and Fertilizers*, where an application was made to an English court for an order for security for costs, on the basis that Ken-Ren was insolvent company, as provided by the International Chamber of Commerce Rules. Coppee-Lavalin argued that there was a residual power of the court grant such provisional measures, although such power should be used in exceptional circumstances. The House of Lords held that it did have the power to order the respondent to provide security for costs and that there were exception circumstances justifying such provisional measures. Due to court intervention in arbitral proceedings, such episode led to international commercial centres being established outside London, for example; France, Sweden, The Netherlands, and the Far East tried to seize a share of the multi-billion pound industry.⁴⁷

THE ARBITRATION ACT 1979

The 1979 Arbitration Act was an attempt to redress the disincentives, which were turning parties away from London. The motivation for reform was principally because of the concern over the relationship that existed between judicial courts and arbitral tribunal jurisprudence and the abuse to which the system lent itself.⁴⁸ The Act derives from the recommendations of the Commercial Court Committee; the commercial judge made known their concerns about the defects in the prevailing law and how it might be corrected in both judicial and extrajudicial capacities. The main objective of the committee was to grant the arbitral tribunal authority to grant provisional measures such as final awards.⁴⁹ One of the particulars forces was the 1978 Alexander Lecture entitled “*Cases stated; its use and abuse*,” and delivered by Diplock LJ, outside the judicial arena, to the London arbitration group,⁵⁰ the joint committee of the London court of Arbitration,⁵¹ the Institute of Arbitrators and the London Maritime Association.⁵² The Report was published as a command paper. The government was quickly

⁴³ See *Rew v Cox* [1995] The Times 29 November.

⁴⁴ See Arbitration Act 1950 S.22 and 4.

⁴⁵ Ibid S.21, which enacted provisions similar to Common Law Procedure Act of 1854.

⁴⁶ Ibid S.31 (2).

⁴⁷ See Magret Rutherford and John Sims, *Arbitration Act 1996; A Practical Guide* (FT Law & Tax 1996), note 28 at 6.

⁴⁸ See D Rhidian Thomas, ‘ An Appraisal of the Arbitration Act 1979 (1979) LMCLQ at 200.

⁴⁹ See the Commercial Court Committee Report, July 1978.

⁵⁰ See an Association of concerned British Lawyers under the chairmanship of Mark Littman QC.

⁵¹ See Now the Chattered Institute of Arbitrators.

⁵² See under the chairmanship of Clifford Clark.

satisfied with the merits of the reformist case and the Bill was brought forward in the House of Lords, and received Royal assent on 14th April 1979. The Arbitration Act 1979 was tremendous enforcement of arbitral awards,⁵³ whereby it tried to shift the balance between finality and legal accuracy towards finality,⁵⁴ and abolished both state procedures and the power of the High Court to remit an award on the grounds of errors of fact or law on the face of the award.⁵⁵ The historical and traditional posture of court intervention was restructured and rationalised, where arbitral decisions were to a certain degree respected by the courts.⁵⁶ This was expressly demonstrated by rendering valid exclusion clauses in arbitral agreements,⁵⁷ by virtue of which the risks of application to the courts and appeals from awards or provisional measures on question of law were excluded, but limited to historical ethos.⁵⁸ According to Mustil Boyd, there was a major usage of arbitration; where by about 10,000 arbitral references were instituted annually in England, but the number of disputes on point of error of law that reached the High Court by way of special case procedure was reduced to around 20-30 per annum.⁵⁹ Despite the enactment of this Act, intervention of the courts continued.⁶⁰ The courts applied S.1 of the 1979, in interpreting the word “substantial” as granting leave of appeal, as demonstrated by the application *Tankers Inc v Hemisphere Shipping Co Ltd*.⁶¹

The House of Lords, tried to address this mischief in *BTT*, where Diplock LJ laid down guidelines for the granting of leave to appeal, which was reaffirmed in the *Antaios Naviera SA v Salen Redererna AB (The Antaios)*.⁶² There was race for power between the two jurisdictions.⁶³ The power of the tribunal to rule on its jurisdiction was restrictive and hence the shortcomings were to be settled by further arbitration enactment, in order to harmonise arbitral proceedings. The jealous and mistrust continued despite the legislative address of judicial jealous and intervention.⁶⁴ The 1979 Act provided an overriding impact to arbitrators, and this was achieved by keeping a check on the municipal court’s intervention and procedure abuse; hence the powers of the courts to intervene in arbitral proceedings were no longer curious, but only subject to review of interim measures if an error of law appeared and subject to stringent condition. The harmonisation efforts on the rule of law introduced the idea of Model Law on arbitration, which was adopted by England to revise arbitration, and as result a result the current system is largely regulated under the Arbitration Act 1996.

⁵³ See D. Rhidian Thomas, *The Law and Practice Relating to Appeals from Arbitral Proceedings* (Lloyd’s of London Press Ltd 1994) at 43.

⁵⁴ See *Eagle Star Insurance v Yuval Insurance* [1978] 1 Lloyd’s Rep 357.

⁵⁵ See Arbitration Act 1979 S.1 (1).

⁵⁶ See Samuel Rosenbaum, *A Report on Commercial Arbitration in England*; Bulletin XII (American Judicature Society), at 31.

⁵⁷ See Michael Mustil, *Transnational Arbitration in English Law* (1979) at 15-35.

⁵⁸ See *Chrysalis* [1983] 1 Lloyd’s Rep 503.

⁵⁹ See Mustil, *The Growth of Arbitration* at 03 of the article which refers to the judgement of *Salter Refischel and Co v Mann and Cook* [1991] 2 KB 432.

⁶⁰ See Goff LJ in *The Oinoussian Virtue*, [1981] 1 Lloyd’s Rep 633 at 25.

⁶¹ [1987] 2 Lloyd’s Rep 308.

⁶² [1984] 3 WLR 592 at 248.

⁶³ See *Dunn LJ in Lloyd v Wright* [1983] 1 QB 1065 at 1075.

⁶⁴ See Clive Schmitthorff, *Law Reform in England* (Steven & Sons) at 30.

THE ARBITRATION ACT 1996

The enactment of Arbitration Act 1996 was intended to be a departure from the traditional close supervision of the courts and to reinforce the principle of party autonomy. Lord Steyn commented on the historical relationship between courts and arbitration in England.⁶⁵ UNCITRAL Model Law, wa gaining international momentum, this prompted the English Legislators consulted the Department of Advisory Committee on Arbitration (DAC) to consider whether the United Kingdom should adopt the UNCITRAL Model. Mustil LJ, published a report which rejected the Model Law but accepted its logic.⁶⁶ The main reasons for rejection were; first that the Model Law provides only international commercial arbitration and that introducing it to England would lead to divorcing of arbitral regimes; domestic and international.⁶⁷ Secondly, the whole adoption of the Model Law would remove the power of the English courts to correct the errors of the law in arbitral proceedings. The consequence of that was thought to be unsatisfactory, as concern of the DAC related to the existing law without a sufficient remedy. The third concern by DAC related to the existing law, legal frame work and experience of the English lawyers and arbitrators in England. The report however, recommended that a new Arbitration Act should be promulgated to cater for the needs of modern commerce and reflect the spirit Model Law.⁶⁸ The DAC pointed out that the Model Law was regarded as skeletal and enacting it without substantial changes would and additions would resurrect all the uncertainties of the English law had grappled with and solved. It should be noted despite the challenges' and criticism; the current Arbitration Act 1996 derives from the Model Law as confirmed by the Consultative Paper on the Arbitration Bill.⁶⁹ It's submitted that the desire to keep London as a leading centre in the world, though this was not addressed in the DAC Report.⁷⁰ The view that London is an international centre was echoed by Savile LJ.⁷¹⁷²

THE PHILOSOPHY OF THE MODEL LAW AND ITS EFFECT ON THE ENGLISH ARBITRATION ACT 1996

Since English derived or is similar to the Model Law, it is worth examining the philosophy of the UNCITRAL Model Law, it's worth examining the philosophy of the UNCITRAL Model Law. A working Group on International Practices was established, which had the tusk of drafting the Model Law.⁷³ This law went through five drafts and the Working Group adopted the final one. The Model Law considered that the Model Law should be based on the principle of the freedom of the parties (party autonomy), and that the parties should be free to

⁶⁵ See Lord Steyn, England's Response to UNCITRAL Model Law of Arbitration (1994) 10 *Arbitration International* 1 at 10.

⁶⁶ See Department of Advisory Committee on Arbitration Law, Mustil Report on the UNCITRAL Model Law on International Commercial Arbitration, note 1.

⁶⁷ See Wilberforce LJ comments in Hansard Col 778, 18 January 1996.

⁶⁸ See Tweeddale & Tweeddale, *Arbitration of Commercial Disputes International and English DAC*.

⁶⁹ See Consultative Paper on Arbitration Bill (July 1995) par 6.

⁷⁰ See DAC Report par 109.

⁷¹ See Savile LJ, *The Arbitration Act 1996*; (1997) *LMCLQ* at 517-518.

⁷² Lee Anna Tucker, *Interim Measures and Revised Under Revised UNCITRAL Arbitral Rules: Comparison to Model Law Reflects Greater Flexibility and Remains Uncertainty*, American University of Washington (2011).

⁷³ DAC par 27.

submit their disputes to arbitration and to provide for rules that would be in accordance with their specific needs,⁷⁴ with no courts restriction or any peculiar rules of procedure. Hence in absence of arbitration agreement the tribunal has jurisdiction or considerable autonomy.⁷⁵ The third principal of the Model Law is that Courts should have limited role to play in arbitral proceedings.⁷⁶ The Model Law expressly provides that no Court shall intervene in arbitral proceedings except where the Model Law provides for support of the arbitral process.⁷⁷ Fourthly the Model Law seeks to ensure that fairness and due process of the system and municipal courts should only be involved during the post award stage.⁷⁸ Indeed the main aim was to restrict court intervention in arbitral process to promote the doctrine of party autonomy and promote a high degree of harmonisation.⁷⁹ The wording of the Model Law is extremely general and this is due to difficulty in drafting an instrument to be adopted by countries with different legal cultures and drafting techniques. As the adoption of the Model Law became increasingly widespread, however, the deficiencies in English arbitration law were exposed and calls for a system overhaul grew. There was a great feeling that English Arbitration Act should take into account of the needs and the wishes of the commercial and trading community.⁸⁰

THE STRUCTURE OF THE ARBITRATION ACT 1996

The proposal for developing the English Arbitration Act 1996 was designed in a friendlier manner and language than had been customarily hitherto, in order to reflect the provisions of the of the Model Law in simple English and with a logical format. The main aim was the appointing of arbitral tribunal or arbitrators, conduct of proceedings, and grant of provisional measures and awards. The arbitration Act was a remedy that repealed entirely the Arbitration Acts of 1950 and 1979 and established the general principles on which arbitral proceedings should be adopted, thus the Arbitration Act defined the jurisprudence of Arbitration, which Lord Savile once described, stating that “ *we have highly developed rules and principles governing all aspects of arbitration which is one the reasons why this country has been and still is a world centre for arbitration.*”⁸¹

The most important part of the project was the modification to party autonomy.⁸² The role of the courts was more supportive than supervisory.⁸³ It should be noted that the parties under party autonomy are designed to ensure that minimum standards are maintained in the conduct of arbitral proceedings and that municipal courts have the necessary power to provide assistance to the arbitration; for example, with regard to freezing orders and anti-suit

⁷⁴ See Model Law Article 24 (1).

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid Article 11 (3),11 (4) and 34 (2).

⁷⁸ DAC Report 1996 at 138.

⁷⁹ DAC Report 1996 at 138.

⁸⁰ See Rutherford & Sims, Arbitration Act 1996; A practical Guide (FT & Tax 1996) note 28 at 5.

⁸¹ Ibid

⁸² See Arbitration act 1996 & S. 34(1) see S.4 (1)

⁸³ See DAC report 1995.

injunctions.⁸⁴ The author does not agree with the principle of court intervention in arbitral proceedings, since the Model Law which was adopted provides that no courts “shall” intervene in arbitral proceedings.⁸⁵ Indeed the main aim of the 1996 Act was to reduce judicial intrusion by courts,⁸⁶ and therefore the courts to respect the doctrine of party autonomy.⁸⁷ The arbitration Act 1996 is only limited to England and Wales,⁸⁸ nevertheless, some provisions of Part 1 still apply if the seat is not England, for example; S.9-11 dealing with stay of legal proceedings and S.65 dealing with enforcement, apply where the seat is not England. It may be argued that if legal proceedings have been brought in England in breach of an arbitration agreement in another country, the municipal courts of that other country may not have the power to restrain the English proceedings by an injunction or may feel unwilling to act in any way which may be thought to trespass on English sovereignty. In such circumstances there is a reason to permit and require the English municipal courts to intervene with their own remedies in aid and support of the arbitration.⁸⁹ In addition, it would be absurd if arbitration resulted in an award and this could not be enforced against the assets in England. The power of the arbitral tribunal with regard to provisional measures⁹⁰ is also supported by international conventions and arbitral rules.⁹¹ Thus the Act complies with Model Law to a certain degree but not entirely.⁹² One of the main limitations of the Act is that it does not provide a definition of arbitration or provisional measures, thereby inviting the courts to come with their judicial technicalities or case law provided definitions. The absence of definitions under the Arbitration Act 1996, and even Model Law is problematic and is likely to become more so with the increasingly autonomous status that arbitration is gaining relative to litigation. It will therefore, be important to determine these issues that are arbitrable in order to ensure that arbitrators are clear on the remit of their jurisdiction.⁹³

The author recommends that the power of the tribunal to issue provisional measures at both domestic and international level should firstly consider whether the parties have an arbitration agreement between them. If so, then the arbitration agreement between the parties’ should have an opt-out clause if they wish to disregard the courts’ involvement, in the granting of provisional measures.⁹⁴ The irony is that even where an opt-out clause is inserted for the courts not to intervene in arbitral proceedings, the court have the power outside the Arbitration Act for example; under S.37 of the Supreme Court Act and Civil procedure

⁸⁴ Arbitration Act 1996 S.12. see Clause 1 of the DAC Report

⁸⁵ See CPR r6.20.

⁸⁶ See *Dubai Islamic Bank v Paymentech Merchant Services Inc* [2001] 1 Lloyd’s Rep 65.

⁸⁷ See DAC Report February par 19-20.

⁸⁸ See Arbitration Act S.3 which defines the seat of arbitration as the judicial seat of arbitration designated by the parties’ to the arbitration as the judicial seat of arbitration institution or a person vested with powers in that regard by the parties’ to the agreement. See *ABB Lumus Global Ltd v Keppel fcls Ltd* [1999] 2 Lloyd’s Rep 24.

⁸⁹ See *Philip Alexander Securities and Futures Ltd v Bamberger* [1997] 1 ILPR 73 at 104.

⁹⁰ See Longmore LJ in *GEC Alstom Metro Cammel Ltd v Firema Consortium* [1997] Unreported. See also Robert Merkin, English arbitration Act 1996 at 88.

⁹¹ LCIA Rules 1998, ICC Rules Article 223, ICSID Rules Article 39 and 47., Arbitration 1996 S. 34.

⁹² See Model Law Article 19 (2), S.1 and S.34.

⁹³ DAC Report 1996. See *Court of Bermuda in IPO International Growth Fund Ltd v OAcT Mobile* [2007] Bermuda LR 43 (Bermuda CA).

⁹⁴ See ICC International Court of Arbitration Bulletin 11 (1) Spring (2000) at 19-36.

Rules.⁹⁵ The tribunal should be given the power to examine the validity of the parties' agreement,⁹⁶ instead of the courts doing so, and also to determine whether a measure is suitable for arbitration. The author argues that the power of the courts should only be limited to S.66, 44 and 45 of the Arbitration Act in circumstances of urgency of evidence, making orders relating to property subject to proceedings of the sale of goods. The tribunal is limited to the application of the law in arbitral proceedings.⁹⁷ It should however be noted that the Arbitration Act 1996, has not taken into account the main purpose of limiting the court intervention in arbitral process.⁹⁸ The doctrine of party autonomy is associated with the freedom to exclude local or municipal courts, and is accordingly, incompatible with judicial review or intervention now expressed by English courts for security in international arbitral proceedings, the fact that one party has its central management and control outside English law is now a prohibited ground for granting such a relief.

CONCLUSION

The article examined the historical development of the legal frame work for arbitration from 1889 to the current Arbitration act 1996. This chapter discussed the connotations of politics and jealousy surrounding arbitration and how the municipal courts dominated arbitral proceedings.

The article examined some of the problems and suggested solutions to issues that have not been resolved by the Arbitration Act 1996; one of them was to preclude the courts in arbitral proceedings, which is now manifested in the Arbitration Act 1996. Accordingly, the 1996 Act provides only one general power exercisable by the tribunal in granting provisional measures under S.39 (1), which provides that "*the parties are free to agree that the tribunal shall have the power to order on provisional basis any relief which it would have the power to grant in a final award.*" In addition, S.39 (2) provides only two measures, (a) a provisional order for the payment of money or the disposition of property as between the parties or an order to make an interim payment of money or the disposition of property as between the parties .(b) an order to make an interim payment an account for costs of the arbitration. The tribunals' power to grant provisional measures in granting provisional measures is limited, even if the tribunal use S.48 in trying to give remedies, under S.48 (3)-(4). It is not expressed in the enactment that S.48 was to allow the tribunal to order all provisional measures the restriction for an arbitral tribunal to order only two particular types of provisional measures seems out of date in comparison with the scope of the interim orders that can be granted by courts and even arbitral tribunals themselves according to the amendments made to the UNCITRAL Model Law, (originally adopted in 1985) in 2006.⁹⁹ The clarity and limited scope of arbitral power under 1996 Arbitration calls for some reform in order to broaden that scope, in order

⁹⁵ See Julian Lew, *Achieving the Potential of Effective Arbitration* (1999) 65 *Arbitration* 282 at 290.

⁹⁶ See George Jessel MR in *Printing and Numerical Registering Co v Sampsons* [1875] LR 19 Eq 462 at 465.

⁹⁷ See EAA 1996 S.46, see Stewart Shackleton, *The Applicable Law in International Arbitration Under the New English Arbitration Act 1996* (1997) *Journal of Court of International Arbitration* LCIA Vol.13 No.(4) (1997) at 389.

⁹⁸ See Robert Merkin, *Judicial Support Anti-suit Injunctions* (2009) *Arbitration Law Monthly*, 9(2).

⁹⁹ See UNCITRAL Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law (Interactive),(1985) 2006.

to avoid the problem of earlier enactments with regards to arbitration competence to grant provisional measures.

The arbitration Act is too restrictive, being limited to only England and Wales, and should be modernised to meet the demands of commerce internationally, especially in relation to issue of the granting and enforcement of provisional measures. The principle of party autonomy should be protected and all procedures with regard to the competence of arbitral proceedings and arbitration agreements should be left to the tribunal, since the parties chose arbitration in order to avoid the complexities of litigation and also to maintain the status quo. Since it was adopted on the recommendation of the DAC committee which was to adopt the Model Law, it would of great impetus of the current registration mirrored the Model Law.¹⁰⁰ In order to meet the demands of justice, the Convention on Human Rights needs to be addressed in a new reform in arbitration, so that ex parte orders are not seen as a violation of Article 6 of the Convention on Human Rights.

¹⁰⁰ See Article 5 which provides that no Court shall intervene in arbitral proceedings