MCNAIR BREAKFAST LECTURE THE RULE OF LAW AND INTERNATIONAL ARBITRATION : UNEASY BEDFELLOWS?

Speech by Sir Bernard Eder
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My warm thanks to Khawar Qureshi KC for inviting me to speak today; and a very warm welcome to everyone – particularly to those who have come to London this week.

Any discussion about the Rule of Law with regard to arbitration usually starts with a reference to the famous statement by Scrutton LJ in *Czarnikow v Roth, Schmidt & Co*[1]. when he said in 1922: *"There must be no Alsatia in England in which the King's writ does not run."* In essence, he was saying that arbitration was subject to the Rule of Law. However, as we shall see, it appears that much has changed in the last 100 years.

Credit for coining the expression the "Rule of Law" is usually given to Professor A.V. Dicey, the Vinerian Professor of English Law at Oxford at the end of the 19th century. However, there is no doubt that, as a general concept, it has long roots. In England, there is a common notion that its origin lies in the Magna Carta. But, in truth, it goes back far beyond – to Aristotle, the five books of

[1] [1922] 2 KB 478, 488

Moses and, even further, the Code of Hammurabi. So, it has been around for a very long time.

Equally, there is no doubt of its enduring importance. Thus last year, there was a full debate in the House of Lords on the importance of the Rule of Law; and only a few weeks ago, the House of Lords Constitution Committee announced that it was inviting written contributions into an inquiry *'seeking to understand the rule of law as a constitutional principle and what the state of the rule of law is in the UK'*. According to the announcement, the committee will consider the different understandings of the rule of law, both at home and internationally, and explore how the principle works in practice across parliament, the judiciary and the executive.

The topic was of particular interest to Lord Bingham who gave an important lecture on the subject in 2006 and helped to set up *The Bingham Centre for the Rule of Law* in 2010 shortly before he died. In that same year, he published a book entitled the *Rule of Law* based on that lecture and others in which he sought to explore what he considered to be the ingredients of the rule of law which he summarised in eight suggested principles. He emphasised that there was no "magic" in these principles – and recognised that others might come up with different principles but I think that they provide a convenient benchmark for considering the relationship between the rule of law and international arbitration even though there is only a passing reference in the book to arbitration in a single short paragraph. In passing, I should note that the topic remains of continuing interest – as illustrated by the valuable speech given a few years ago by Foxton J. entitled: *Arbitration and the Rule of Law: The Role of the Court*[2].

In this brief talk this morning, I do not propose to consider all eight of Lord Bingham's principles. Time does not allow that. In truth, some are not directly relevant to international arbitration – for example, his chapters on the

[2] https://www.judiciary.uk/speech-by-mr-justice-foxton-arbitration-and-the-rule-of-law-the-role-of-the-court/

accessibility of the law and human rights – although these are, of course, very important aspects generally of the Rule of Law. Nor do I intend to rehash the views expressed by Foxton J. But there are a number of important points that I will touch upon.

I start with Lord Bingham's discussion on equality before the law and the importance of a fair trial. Here, we hit an immediate problem. As normally understood, the existence of an independent tribunal lies at the heart of the rule of law. However, in arbitration, the normal procedure envisages that each party will select and appoint its own arbitrator with the third arbitrator being chosen by the two arbitrators or some appointing authority or sometimes by the parties themselves. Putting that aside, the fact that the tribunal consists of two individuals selected – and paid for - by the parties does not seem to me to fit easily with the ordinary concept of the rule of law.

The justification seems to be that parties should be entitled – indeed encouraged - to resolve their disputes before a tribunal in a manner freely chosen by the parties. In a sense, it might be said that the rule of law is displaced by the concept of party autonomy.

The problem is, of course, exacerbated by the possibility of repeated appointments – particularly because of the existence of a pool of professional arbitrators some of whom continue to act not only as arbitrators but also as counsel both giving advice and acting as advocates. Inevitably, this gives rise to conflicts which usually do not exist in court litigation as illustrated by the decision of the Supreme Court in *Halliburton*[3]. Of course, the *IBA Guidelines in Conflicts of Interest in International Arbitration* (2024) go some way to addressing these difficulties but problems remain: see, for example, the decision of Jacobs J in *Aieteo Eastern E & P Company Ltd v Shell Western Supply & Trading Ltd & Os*[4].

[3] [2020] UKSC 48
[4] [2024] EWHC 1993 (Comm)

In this context, it is important to bear in mind that the possibility of potential conflicts exists not only prior to appointment but also continues throughout the arbitration: see for example, the recent decision of the in *Vento Motorcycles Inv v United Mexican States*[5] where the Ontario Court of Appeal set aside an award on the basis that, during the course of the arbitration, Mexico offered undisclosed professional opportunities to its party-appointed arbitrator.

There is constant discussion about how to tackle this important issue. I doubt that it will go away. Thus, in his speech, Foxton J. stated:

> *"It has always struck me as strange that parties who have agreed to arbitrate their disputes in part to avoid them being determined in the national courts of one of them should agree to a tribunal where the opposing party can chose one member, although only, of course, in return for a similar right of appointment for themselves. As we ponder the means by which international arbitration can move ever closer to the ideal of the rule of law, the phenomenon of party appointment will merit particular attention."*

The radical solution favoured by some – including, I understand, Chief Justice Menon and Professor Jan Paulsson - would be for the major arbitration institutions to remove the right of party-appointments altogether. I wonder how many in this room would welcome such a radical change. Perhaps that is a matter for discussion at the end.

One of my major bugbears is the increasing practice of interviewing prospective arbitrators prior to appointment. The CIArb have important guidelines – published in 2016 - with regard to the procedures to be adopted in these circumstances[6]. For example, these prescribe the procedures to be adopted and limit the matters to be discussed at such an interview. However, these guidelines expressly provide that there is no general duty to disclose the fact

[5] 2024 ONCA 82
[6] https://www.ciarb.org/media/0v4pnwao/1-interviews-for-prospective-arbitrators-2015.pdf

of such an interview; nor any general duty to keep a record of the content of such an interview although it is said that it is "good practice" to keep a contemporaneous note to address any later suggestions that inappropriate matters were discussed. Whereas these guidelines may have been considered appropriate in 2016, they are, in my view, no longer fit-for-purpose. For example, I would suggest that such interviews be banned completely – or, at the very least, there should be a mandatory requirement that all such interviews are recorded – and a copy of the recording provided to all concerned at least where the candidate is subsequently appointed.

One of Lord Bingham's principles is the requirement of a "fair trial". However, that is not always easy to transport to the world of international arbitration.

In England, the starting point here is, of course, s.33 of the Arbitration Act 1996 which, in effect, creates a fundamental and mandatory requirement *inter alia* that the Tribunal shall *"...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..."*. The existence of such a duty lies at the heart of the requirement that there must be a "fair trial".

However, s.33 must be read together with s.34 of the Arbitration Act 1996 which provides in sub-section (1) that it is for the Tribunal to decide all procedural and evidential matters (including those specified in s.34) subject to the right of the parties to agree any matter. As a matter of practice, there is often much debate as to what must - or must not - be done to ensure a fair hearing. I dare to think of the number of times I have heard a submission that if the Tribunal were to adopt a particular course proposed by the opposing party, it would necessarily mean that the Tribunal would be denying a "fair trial".

These wide powers are often not sufficiently appreciated.

For example, s.34(f) provides, in effect, that it is a matter for the Tribunal to decide whether to apply strict rules of evidence as to the *"...admissibility, relevance or weight of any evidence..."* It is not easy to fit the existencve of such discretionary power within the ordinary concept of the rule of law.

Or perhaps even more dramatic, take s.34(g) which provides, in effect, that it is for the Tribunal to decide *"...whether and to what extent there should be oral or written evidence or submissions."* Thus, in appropriate circumstances, it would be open – at least theoretically - for a Tribunal to decide that there should be no oral hearing at all – and to deal with the dispute entirely on paper[7].

However, to refuse to hold an oral hearing would, on any view, be a very bold step and would almost certainly give rise to the possibility of challenge in the Courts.

Under the UNCITRAL Model Law, there appears to be no broad duty on the tribunal to act fairly although Art 18 does impose a requirement that *"...the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case..."* The result is that whereas in England a challenge might be brought for breach of the duty to act "fairly", in other countries, like Singapore, the same challenge would probably be advanced on the basis of a failure to comply with "*natural justice".* A good example of the latter is where the arbitral tribunal decided to "gate" (i.e., exclude) witness evidence. Held, by the Singapore Court of Appeal that this was a breach of natural justice[8].

If the Tribunal determines that there be an oral hearing, an issue that often arises is the allocation of time between the parties. The general presumption

[7] Of course, the parties may agree that the Tribunal *must* hold an oral hearing for the presentation of witness evidence or oral submissions: see for example Rule 28 of the Singapore Chamber of Arbitration Maritime Arbitration Rules.
[8] *CBP v CBS* [2021] SGCA 4

is that fairness demands that the parties should have equal time[9]. However, the position may be otherwise if, for example, one party presents more witnesses. There are, of course, many other issues which may give rise as to what is – or is not – "fair". For example, whether the parties be allowed to serve written submissions after an oral hearing? Or whether there should be a strict page limit for any written submissions?

Another major issue that I have found recurring again and again in arbitrations involving foreign parties and, more particularly, foreign lawyers is the order and number of speeches. In England, the traditional approach is that the claimant or applicant goes first, followed by the respondent, followed (finally) by the claimant in reply. To many foreign lawyers, this is regarded as an abomination which, I am often told, denies the respondent a fair hearing for two main reasons. First, it gives the claimant two bites at the cherry. Second, it gives the claimant the last word. Perhaps we in England have a lot to learn.

In truth, these are all matters which highlight the flexibility of arbitration.

For present purposes, the critical point is that, if the rule of law requires a fair hearing, what remedy does the disgruntled party have if the Tribunal fails to comply with its overriding duty to act fairly pursuant to s.33? The short answer is, of course, that under s.68, a failure to comply with s.33 is one of the specific grounds provided to challenge an award. However, it is important to note that that remedy is only available *after* the award has been published; and, more important, the number of cases in which the English Court (and also the Singapore Courts) has upheld a challenge under s.68 is truly miniscule.

So far, under this head, my focus has been the application of the rule of law with regard to the actual conduct of the hearing – what one might describe as *procedural fairness* or *due process*. There is no doubt that the importance of

[9] See e.g. UNCITRAL, *Notes on Organising Arbitral Proceedings* (2016) para 118: *"I general, each party is allocated the same aggregate amount of time, unless the arbitral tribunal considers that a different allocation is justified"*

procedural fairness is widely recognised as an aspect of the rule of law applicable to international arbitration.

A much more controversial issue is whether an arbitral tribunal is under a duty to apply the law? In one sense, it might be said that such a requirement is even more fundamental when considering the rule of law. Surely, any suggestion that an arbitral tribunal is not required to apply the law is obviously heretical and wrong. However, that question is much more difficult than might appear at first sight. Time is too short to discuss this important topic at length. It is sufficient to note that Andrew Baker (now Mr Justice Baker) gave a lecture on this topic some 13 years ago – as did I in Dubai in 2023 – and that we both came to the conclusion that an arbitrator was not bound to apply the law[1] . If that is right, there is a strong argument that arbitration is no longer subject at all to the rule of law.

Under the UNCITRAL Model Law, there is, of course, no right of appeal at all on a point of law. That being so, it seem to me impossible to say that the rule of law applies in such cases.

The position in England is, of course, different - s.69 of the Arbitration Act 1996 provides a statutory mechanism to obtain permission to appeal and, if leave be granted, to appeal against an award on a point of law. However, such remedy is expressly excluded by the major arbitral institutions – notably the LCIA and the ICC. Further, there is no automatic right of appeal on a point of law: the disgruntled party must first obtain leave to appeal which is only granted in limited circumstances. I know this only too well because, in a recent arbitration where I dissented on what I considered an important point of law, the Court refused to grant leave to appeal.

[1] [2024] JBL 409 [0]

The result is that the number of appeals reaching the Courts is much reduced. As was previously argued by Lord Thomas in a famous lecture in 2016[1] , decision-making in the courts enables the law to develop in the light of reasoned argument which is itself refined and tested before a number of tiers of judiciary; it enables public scrutiny of the law as it develops and it ensures as a necessary underpinning to public scrutiny that the law's development is not hidden from view. According to Lord Thomas, this has stifled the development of the common law.

Whether that is in fact the case is perhaps a matter of debate. However, there is no doubt that the requirement that the law must be accessible and so far as possible intelligible, clear and predictable is one of the main principles identified by Lord Bingham as being an essential ingredient of the rule of law. If our commercial law is going underground, there is much force in the views expressed by Sir Bernard Rix in another famous lecture viz. that the public interest is being and will increasingly be damaged as more and more decisions on areas of commercial law become inaccessible to the public arena[1] . And, if that is right, it is perhaps difficult to maintain that the rule of law is alive and well in modern international arbitration.

Once again, it would seem that in arbitration, the rule of law is abandoned in favour of party autonomy and in the overriding interest of finality. So far, I have concentrated on international commercial arbitration. However, much, if not all, I have said applies equally to investment treaty arbitration. Moreover, it is, of course, important to bear in mind that investment treaty arbitration generally involves disputes far beyond the ordinary battle between two commercial parties often with huge sums of public state assets at stake. In that context, it seems to me that there is a strong argument in favour of the overriding importance of the rule of law. In recent years, this has given rise to

[1] https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf

[1] *"Confidentiality in International Arbitration: Virtue or Vice?" Jones Day Professorship in Commercial Law Lecture, SMU, Singapore, 12 March 2015.*

much public debate about the process of investment treaty arbitration. It remains uncertain where that debate will lead.

With that uncertainty, my thanks to you all.