Arbitration: The Commercial Way to Justice?

Geoffrey M. Beresford Hartwell**

Tomorrow the Chartered Institute of Arbitrators, originally a British institution but now an international institution with world-wide membership of lawyers and others, begins a conference here in Boston under the title "The Commercial Way to Justice."

I am not a lawyer; I am an engineer. It is hard to imagine two professions further apart. The laws which bind me are not created by man. They are laws of nature. Unforgiving. Immutable.

When the dam bursts or the refinery explodes, when the ship sinks, we cannot prevent it from happening by argument or sophistry. We cannot prevent it by an act of Parliament or Congress. We can only prevent it by ascertaining what the Natural Law is and then following it. Nothing else will do. The laws that we follow are those of Physics, Chemistry and perhaps above all, Mathematics and Logic. Man does not rule Natural Law.

It is important to bear that in mind when we discuss the nature of work in disputes, whether we consider determination as by arbitral tribunals, by experts with binding authority and Courts on the one hand or resolution by negotiation, conciliation or mediation on the other. We often say that a tribunal decides fact. That is one thing it cannot do. All a tribunal can ever do is decide what, in the circumstances, appears to be the most likely fact. It is all about appearances. The truth is still out there.

In some jurisdictions the tribunal seeks the most probable fact more or less for itself. In others, notably the common law jurisdictions, the tribunal seems to decide from a menu of choices provided by the parties. In practice that is not a distinction that often leads to a difference. The essence remains, the tribunal is dealing with representations, with appearances of truth, rather than truth itself (which often cannot be ascertained).

Let me remind you of a notable example. I imagine you know it. It is the case of the Church against Galileo Galilei, the philosopher and astronomer. In 1616, he was arraigned at a hearing convened by the Holy
Office which ruled, by consent as it happens, that the Sun did, in fact, revolve around the earth, which was fixed in the heavens. In doing so the court affirmed a long-standing rule. Galileo, of course, is said to have muttered as he left the court, "E pur si muove,"-and yet it moves-no doubt an act of contempt of court. As it happens he was imprisoned later for other writings, but the point I wish to make is that a properly constituted tribunal may arrive at a decision of fact, and that decision may be binding to the parties to an arbitration, or at large if the tribunal is a court of competent jurisdiction, but that is only a decision about appearances. One day the Tower of Pisa may fall. The Italian courts may decree that every human endeavor be deployed to prevent it, but they cannot decree that it will not fall.

That incidentally was the message that England's King Knut sought to give his courtiers. He took his throne, they say, to the edge of the sea and decreed that the tide come no further. A dramatic demonstration of the difference between law and fact. Wet feet.

It is with law's limitations in mind that I suggest a social theory of contract. Strictly it is, I suppose, a hypothesis. I have not yet devised a scientific test for its proof. I suggest that it is a necessary part of social interrelation that persons have the right - a natural right - to agree with one another and that the agreement brings with it a set of natural rights and obligations, a set of natural expectations, in the terms of the promise. I go further. Elsewhere I have suggested that the principle, *pacta sunt servanda*, is not a principle created by law, but something more fundamental. I say it is simply a definition, a truism. In mathematical terms *pacta* = *servanda*. I don't say pacts ought to be served. I say more simply that if something is not to be served, it simply is not a pact. As I say, it is a definition. Not a property of Law but a property of language and the ability to communicate. Part of the human condition.

If that is right, then contract law itself is not a creation of law, it is a recognition by law of a more fundamental principle. Of course, jurisdictions have a right to say what they will and what they will not enforce. They also have rights, collective rights to fetter the more fundamental right in the public interest - anti-trust laws are an example. But my point is that the law comes after the principle of the promise. Law is the servant of man, not man the servant of law. Lawyers are the servants of law, lay arbitrators are friends of law, but that is the professional arrangement they have chosen.

Incidentally, I think it is widely recognized that, here in the United States, you have the best system of justice in the world. I am happy to accept that, of course, I am your guest.

But we have it too. We think British justice is the best in the world. The French believe the Code Napoleon to be the best justice in the world. Then there is India of course, and the Islamic states, Germany, Hong Kong, and the Eastern cultures. And looking at the best justice in the world, if it is in the United States, is it here on the east coast or is it in
Louisiana? Perhaps I was right all the time and it is the British - but is that Scotland or England - or perhaps the Isle of Man where even I can be a kind of temporary judge?

Well I am no jurist, and engineering is not philosophy, but I am a logician of a kind. And I can see that a principle that is shared by all those systems of law must be pretty fundamental and I can say that the principle I have advanced - one might call it the meta-jurisprudential principle of respect for the promise - underlies the commercial law of all those systems. It is a universal *grundnorm*. Not the product of any of those excellent systems of law, rather a precursor; not even a foundation but the very rock upon which the foundations of commercial and contract law themselves stand.

Now you have to grasp that concept, the fundamental social nature of the promise, to take the next step and look at the possibility that the promisor may agree to a number of steps, one of which is that they may make a promise about what exactly they will do if they find themselves in disagreement. They may not make any such promise. If they disagree and it is important, then they will fight or one or both will dishonor whatever deal they made and then a court will be asked, by one or the other or both, to enforce their agreement. The principal purpose of the court, in this context, is to enforce agreements. It interprets them in the process, but its purpose is enforcement.

Let me be clear about what I have just said. No promise about what to do when the parties fall out, then the dispute is determined in court. Not because there is any deemed agreement to go to court - although such an agreement may be made - but because the court is available to enforce the deal.

While no one will ask me to address the Supreme Court, it has already taken me about 1400 words to come to my point. It is this. One of the agreements parties may make is that they will take disagreements to someone else - a friend, a priest, a leader in their community or their trade, or even if they think it is a good idea, to a lawyer or even an engineer. Anybody. That may be to talk it through - mediation or conciliation - but it may be to ask him or her to make the decision upon which they cannot agree and it may be that they also promise one another to abide by that decision. Now there you have it. Arbitration. In the words of the Shorter Oxford English Dictionary:

**ARBITRATION** 1. Uncontrolled decision. 2. The settlement of a matter at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision.

As I am speaking here, perhaps I should also look at Webster. I have the collegiate edition, which I suppose is the shorter version. He calls an arbitrator “a person or one or two or more persons, chosen by parties who have a controversy, to determine their differences.” His definition also describes arbitrators as “having the power of deciding or prescribing without control.”
But that was the edition of 1911, given to my father as a science prize, long before the new English Arbitration Act of 1996.¹

You will see that the words, "according to law," form no part of either of those definitions. There is good reason for that. First, the promise is more fundamental than law. Second, there may be times, rare times, when justice \textit{inter partes} does not line up with the strict interpretation of laws intended for general use. I don't want to overplay this card but there may be a common and reasonable expectation between the parties which does not sit comfortably, perhaps with a new law, perhaps with a stretched interpretation of a law which neither contemplated when they made their bargain. In an international trade agreement, they may have even agreed to some general principles of law rather than adopt the laws of one or the other. Interestingly, most developed arbitration laws recognize this possibility and respect it, I suggest, because of the fundamental nature of the promise.

There is no great mystery about the making of an arbitral decision on this basis. The arbitrator does not decide on the basis of some vagaries of personal conscience. All that is meant is that the decision will be made on the merits of the immediate case and not by reference to extraneous considerations.

There is a caveat to this matter of arbitral freedom. It stems from two legal consequences. If the promise to abide by the arbitrator's decision is not honored, then that becomes a broken promise, like any other, for the court to put right, to enforce. Then the court has the power to intervene on behalf of someone who is not being treated properly, say by an unfair arbitrator. There is much talk of natural justice, but that becomes the subject of legal sophistry. I would prefer to say that there are inescapable logical inferences from an arbitration agreement that the arbitrator will deal fairly with the parties, hear each of them sufficiently, and not allow himself to be biased by his own prejudices and particularly not by his own self interest. If he or she does not adopt such an approach, one party at least will be very disinclined to obey his decision and a court would be reluctant, even unlikely, to enforce it.

It also needs to be said that, if a court is to be satisfied that an arbitral decision is right, then it is likely that the arbitral decision will have to be generally consistent with the law that court recognizes. The New York Convention of 1958 on the Recognition of Foreign Arbitral Awards separates the ordinary law of the place of enforcement from the law adopted in the award with an important saving that recognizes that no court ought in conscience to be asked to enforce a decision contrary to its own public policy.² I have written elsewhere a discussion on the Convention which

\footnotesize

¹ Arbitration Act, 1996 (Eng).
suggests that it is based upon a philosophical hypothesis of the promise that I outlined earlier.  

In conclusion, I believe that I have explained why I believe that arbitration, and processes like it, are not a part of the legal system. That does not mean that there are no links and it does not mean that the approach of the arbitrator should not follow closely the approach of the jurist. What it does mean, in my view, is that the arbitrator is free to go about his or her job, free from the detailed complexities of day to day court procedure, and in the best practical way to achieve the decision that parties have engaged the arbitrator to find.