The Relevance of Expertise in Commercial Arbitration [1]

"**Arbitration Procedures: Achieving Efficiency Without Sacrificing Due Process**"

Eur Ing Geoffrey M. Beresford Hartwell •

I - Introduction and Background

It is now rather more than seventy-five years since the ICC Court of Arbitration was formed. Rather more than 100 years since the creation of the London Court of Arbitration.[2] At the time, there was a thriving tradition of arbitration by merchants among themselves. It had existed for many years. When two merchants found themselves in dispute, about the quality of goods or about the terms of their agreement, they went to a colleague, often a doyen of their trade, and agreed to abide by his decision. Commerce was conducted rather more openly, perhaps, than it is now. A merchant's word was his bond. In many trades, there was no need for enforcement of awards at law. A man who failed to comply with an arbitral award faced commercial ruin when his peers were no longer prepared to give him credit or to deal in his goods. Chambers of Commerce[3] and trade associations played an active part in arbitration, while the courts had developed some degree of supervision as well as methods of enforcement where that became necessary.

It was natural, therefore, that the International Chamber of Commerce should create an International Arbitration facility, the ICC Court.[4] It was a child of its times. Businessmen, commercial lawyers and various specialists all were involved in arbitration world-wide in the nineteenth and early twentieth centuries. In some fields, notably commodity dealing and the maritime world, lawyers were involved as the exception, rather than the rule. Indeed, some trade associations specifically excluded lawyers, not merely from the arbitrator's chair but from representing clients in their arbitrations. In England, even under the new regime of the Arbitration Act 1996, it remains permissible for the agreement of the parties or a set of arbitration rules to exclude legal representation.[5] An example of such an arrangement is found in a case where the arbitration clause in a contract provided that "the arbitrators and umpire[6] shall be commercial men and not lawyers".[7] In

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2 Now the London Court of International Arbitration.

3 For an interesting and romantic illustration see the account of the Ouzel Galley Society of Dublin, a permanent arbitration body of merchants founded after the *Ouzel Galley* Arbitration of 1705, precursor of the Dublin Chamber of Commerce, quoted from *Princes and Pirates - the Dublin Chamber of Commerce 1783-1985* (L. M. Cullen, Dublin Chamber of Commerce) in an address by Nael G. Bunni CEng to the Annual Conference of the Chartered Institute of Arbitrators 1988, (1989) 1 *Arbitration* Vol 55, B12

4 It is perhaps unfortunate that the word "Court" has come to be used for many of these bodies, which are not, *strictu sensu*, Courts of Law at all, but private or quasi-public associations of one kind or another. It is also worth noting that the "Court" usually does not perform the function of tribunal, but performs an essentially administrative role, albeit with such supervising powers as the voluntary rules provide.

5 Section 36, Arbitration Act 1996 -- Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.
(The English Arbitration Act 1996 is structured with mandatory and non-mandatory provisions. Non-mandatory provisions, such as Section 36, may be superseded by direct agreement between the parties or by institutional rules to which they have agreed. In that sense, it is both an arbitration law and a set of statutory procedural norms to be applied in default of agreement.)

6 The term "umpire" has two meanings, usually in a common law context. Essentially, in both meanings, the umpire is a third arbitrator, brought into the reference when two party-appointed arbitrators have failed to agree. It became the practice to appoint umpires in anticipation of that disagreement and to provide for them to sit through the hearing, rather than decide between the two party-appointed arbitrators later.
The second, more restricted meaning refers to a practice whereby the party arbitrators, on disagreement, changed their role and acted as advocates before the umpire. In such a process, the decision making is almost at second hand. All the umpire hears is what the arbitrator-advocates have to say. The practice is archaic and, in the writer's submission, contrary to modern arbitral thought. It remains in some specialist trades and the concept of the partisan appointee still is seen in some jurisdictions, although anathema to the international practitioner.

a number of contract forms used internationally, where technical or scientific institutions have the task of appointment, there is at least a *prima facie* indication that the parties have agreed to the appointment of someone who is of the same general profession as that of the institution concerned.

Perhaps it should be borne in mind that many forms of contract are drafted either by businessmen or by other professionals in the relevant field of endeavour, albeit with the aid of their lawyers; the principals in such contracts, as well as the Institutions that initiate the drafting of standard forms and those that advise, have well in mind the problems created by modern developments which, by allowing the arbitral tribunal to become almost an esoteric legal laboratory, have come almost to defeat the purpose of commercial arbitration.

The freedom to select an arbitrator or arbitrators of one's choice is a necessary concomitant of the freedom of contract. That arbitral awards are enforceable at law is not because of the personality or personal status of the arbitrator, who is not some kind of second-class substitute for a judge; it is because it is the product of agreement between the parties. An obligation, freely entered.

For a number of reasons, perhaps the increased complexity of modern life, perhaps the increasingly litigious way in which modern commercial activity is conducted, the activity of non-lawyers in international arbitration has not kept pace with the development of arbitration itself. There may be other reasons. The technician or scientist may not be so enthusiastic to undertake the further study required of modern arbitral practice. It may even be that disputing parties have some race memory of a time when arbitrators who were unable to agree appointed an umpire and themselves became advocates for those who appointed them. That is not the case now in international practice, but some parties still expect "their" arbitrator to fight for them, something the inherently objective scientist or engineer is singularly ill-equipped to do. Such a party might think a lawyer better equipped to fight on behalf of his appointer; as conflict is the essence of what many lawyers are taught. Of course that is a wrong view, but memories die hard, and the benefits of being on the safe side are self-evident.

So, for whatever reasons, scientists and engineers, medical men, architects, business men and the rest, have tended to play a decreasing role in the arbitral scene. That is particularly true in the international field, as two anecdotes may help to show. At the prestigious Willem Vis Commercial Arbitration Moot competition in Vienna, there were some 130 arbitrators to judge the various heats of the competition. One was not a lawyer. In previous years there were no non-lawyers. Again, at an inaugural lunch of an International Arbitration Club in London, although there were some four or five non-lawyers of a total of about a dozen people, the chairman made the observation "Well, of course, there are no non-lawyers in international arbitration." What he said when taken to task was even more unfortunately revealing. He said that he had known those present for so long that it had not occurred to him that they were not lawyers. A curious compliment; he has long been forgiven.

Let me make it very clear: this is no complaint about the lawyer's role. Far from it; my argument is that non-lawyers are failing to play their proper part in the arbitral community and the purpose of this paper is first to set out what that part might be and then to make suggestions as to what should be done to encourage more non-lawyers, particularly those of scientific and practical disciplines, to become active and to contribute to the good of society by taking part in the development of arbitral philosophy and techniques.

In many modern commercial disputes there are important issues, particularly technical and scientific issues, but also specialist issues in medicine and accounting or finance, which are likely to be outside the experience of an ordinary legal tribunal, unless it has been created specially with such problems in mind. Somehow the tribunal has to be able to cope fairly with those issues; that requires the tribunal to have assistance to understand them and to appreciate the context in which they arise. The alternative is to create a tribunal specially for the purpose and to include one or more persons whose experience and formation is relevant to the subject matter and context of the dispute. If neither one nor the other of those services is available, then

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[7] ***Rahcassi Shipping Co SA -v- Blue Star Line Ltd*** [1967] 3 All ER 301, QBD. The dispute was about the construction of terms in the contract and the arbitrators appointed as umpire a well-known practising barrister. The judge (Roskill J.) said "Businessmen like using general phrases of the kind, because they leave open the possibility of arbitrators and umpires being chosen from a wide field of persons with commercial experience, so long as they are not practising lawyers." He found the appointment of the umpire to have been made without authority.

the parties are denied justice, in the sense that they are deprived of an appropriate and competent trial of their differences.

In this paper, I am concerned with the use of expertise in international commercial arbitration. Expertise also has a role, an important role, in civil litigation and in the criminal courts. That is not my concern here. In particular, as I write at the kind invitation of the Chairman and the organisers of the Congress, I will deal specifically with the relevance of expertise in arbitral procedures and the way in which expertise may be one means of achieving efficiency without sacrificing due process.

Before doing so, however, I will touch on another justification, the traditional justification, for expertise, particularly in the tribunal. It is that businessmen in specialist areas sometimes have greater comfort from the decision of a colleague, one of their peers, whom they know to have understood and appreciated their difficulties, than they have from a purely legal tribunal, simulating a court and operating with the remoteness that is necessary if respect for the legal process, and its different methods, is to be maintained. That is not a peripheral justification. I argue that it lies at the root of commercial arbitration itself. One of the reasons for domestic commercial arbitration is a wish to avoid the somewhat surprising results that occasionally can result from the application of strict law. One of the factors in international commercial arbitration is the development of a common mercantile practice[8] which may not coincide precisely with national laws.

Now is perhaps not the time to develop that proposition, but it does illustrate one of the fundamental topics which it is hoped that the new Council of Engineers and Scientists will be especially well placed to discuss with our lawyer friends.

In October 1993, the ICC Institute of Business Law and Practice held a colloquium in Paris on the subject of expertise in arbitration. It was well attended by both experts and lawyers and I recommend any student of the topic to look at the record of that colloquium. More particularly, I recommend reading the excellent report by Maître Isobel Hautot, who had conducted extensive research, world-wide, into the uses of expertise at the time. In a sense, that meeting sparked an interest in expertise and in 1996, at discussions during the International Conference of the Chartered Institute of Arbitrators in Boston, with its concept of a *Commercial Way to Justice*,[9] followed by the ICCA Conference in Seoul, *Towards an International Arbitration Culture*, the idea of establishing a forum for the discussion of the expert role and the development of appropriate arbitral procedures was translated into initial tentative action by the formation of a steering group.

A particular spur, from the ICCA Seoul meeting, was the discussion of the role of cultural "baggage" in international proceedings. The suggestion was made, in discussion, that the formation of some, such as engineers and scientists, was inherently objective, in the sense that a scientist's logical thinking does not depend upon the legal culture in which he is trained. It was further suggested that the freedom of a formation which was at once empirical, subject to strict logic and to natural law, could enable the scientist or other expert to approach both legal and practical problems without the "baggage" of national legal culture. What was striking at the time was not the argument, nor that, as an argument, it could be contested. What was

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8 The lack of involvement of businessmen and experts in the development of laws and practices that concern them is one criticism that might be made, albeit with the greatest respect, about the UNIDROIT Principles. Not that they are not excellently drafted and not that they are not the product of the highest degree of skill and erudition, clearly tempered with common sense and, if a non-lawyer may say so, a clear view of the natural law which forms obligations (to be distinguished from positive law, which arguably does not itself create obligations, but puts in place mechanisms for recognising them).

There is a potential criticism as to their provenance, and I submit that it should not be dismissed lightly. They are a essentially a product, neither of governments nor of the community they are intended to regulate and so meet with neither the positivist, nor the democratic nor the consensual criteria for laws. The author was recently advised that some members of the drafting committee did consult with their business communities, but to a limited extent and without much response.

The ironical result is a kind of *lex mercatoria* in which no merchants have had a hand. The small group of engineers and scientists who have sponsored the present paper would submit that to be a good example of the need for a forum within which such matters may be considered. We say, *simpliciter,* that law is too important to leave to lawyers alone.

9 See also *A Commercial Way to Justice*, edited by the author - Kluwer Law 1997 - which has the record of the Conference.

striking was that it was simply not understood.[10] It became clear then, perhaps as never before, that there was a cultural divide which required to be bridged. A small group of experts who had been at that meeting in Seoul agreed to come together to see how best to bridge that divide and a steering group was formed. The present group is small. It includes experts with experience of working within civil law, common law and arabic cultures and is in the process of widening its geographical connections.

It is important to emphasise that this group is not competitive. Its purpose is to bridge the cultural divide between lawyers and experts, not to widen it. That means exploring the theoretical practical links between natural law and positive law, not trying to create some alternative jurisprudence, detached from legal reality. Throughout the formation of the group, we have had active encouragement from ICCA and, in particular, from Fali Nariman Esq, ICCA's kindly and distinguished President, who has shown continuing interest in its development. That is much appreciated and I record the thanks of the steering group to the members of ICCA, both for their encouragement and for the opportunity to make this presentation.

Having explained the background to the role of expertise and the reasons for the formation of the steering group, I will turn to the practical aspects, to the contribution I believe the expert may make to the task of the Working Group on Arbitral Procedures. The use of expertise to achieve efficiency without sacrificing due process.

Due process is a term of art, a kind of shorthand. The key is in the word "due". I venture to suggest that, in international practice, it means no more and no less than is meant when the 1958 New York Convention speaks of a whole variety of things, such as incapacity of the parties, an absence of proper notice, a party unable to present his case, excess of jurisdiction, failure of the arbitral procedure to comply with the agreement and the like. In a layman's phrase, procedural fairness. Necessarily it will imply compliance with the mandatory rules of the place of the arbitration, because failure so to comply may jeopardise the intention of the parties to achieve a binding result. Nonetheless, procedural fairness does not involve mimicking without thought the detailed procedure of the Court and, indeed, it is conceivable that, in the international context, the formal procedure of the Court may itself bring a degree of procedural unfairness as, for example, in the provisions of the English Courts in respect of security for costs against foreign litigants. So I suggest that "due" in this context means "appropriate", having regard to the requirements of natural justice.[11] It does not mean "precisely according to the procedure of the Court". Nor could it, having regard to the variety of cultures and legal systems which may be represented in a typical international proceeding.

II - Review of Procedures Involving Expertise

The Expert may play a part in Arbitration and, indeed, in other forms of dispute resolution. Perhaps, pedantically, it is more true to say that arbitration, like litigation, exists as a means, not of resolution, but of determination, but that may be a distinction of semantic shade. In the paragraphs which follow, I indicate some of the areas in which expertise may be helpful. I apologise if there are more questions than answers -- my intention is to highlight areas which experts and lawyers usefully might discuss together.

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10 This incident led the author, who already describes himself, in the words of Rudyard Kipling's *Jungle Book*, as a *lesser breed without the Law*, to adopt as motto the line from Ovid: *Barbarus hic ego sum, qui non intellegor illis*, which opens *The Commercial Way to Justice*, (Kluwer Law) the account of the CIArb Boston Conference of 1996.
(Colleagues whose mother tongue is not the English of the island may wish to note the word "without", which has an older meaning of "outside" as well as the more usual one of "lacking". The distinction is more clear in Scots, which uses the Old English word "outwith". Kipling -- and the author -- would leave the reader to adopt his or her own gloss.)

11 It is suggested that *Natural*, or intuitive justice, which necessarily is difficult of precise and formulaic definition, falls to be distinguished from *Unnatural Justice*, that is to say the formal structure of man-made laws, although in practice the distinction may be narrow and of little import save in exceptional cases. There may also be distinguished *Procedural Natural Justice* and *Substantive Natural Justice*, the latter concept taking us towards ideas such as the general principles of law and even *lex mercatoria*, which could be seen as embodying the general principles of mercantile law as developed in practice by the custom of merchants. (But see also note 8 *apropos* the admirable UNIDROIT principles)

III - Non-Binding Arbitration

That leads me to mention, in passing, the helpful possibility of non-binding arbitration. That can be an efficient process, putting the parties in a position to assess the likely outcome of binding proceedings and allowing them an opportunity to negotiate a settlement. Essentially, the procedure has all the logical stages of an arbitration, indeed it is an arbitration in almost every sense, save that the parties have agreed that it shall not bind them. Non-binding arbitration may be very similar to a Mini-Trial, with the benefit of an opinion from the neutral participant or participants. Because the result is non-binding, the procedure may be easier, more relaxed, although for the final opinion to be useful, it should have authority, and that requires the principles of natural justice to be observed, at least in a general sense.

IV - The Expert in Alternative Dispute Resolution

In my brief note about non-binding arbitration, I likened that technique to the Mini-Trial. In fact, I suggest, there is much in modern ADR, in all its forms, about which it can be said, not merely that a scientific or practical approach is useful or appropriate, but that the techniques have been a part of scientific and technical life for many years.

I recall, some twenty-five or thirty years ago, being invited by two parties to investigate the causes of inadequate performance of some plant on site and to assist them to decide how to deal with it and how their responsibility should be divided. That combined the modern role of an investigative expert with that of a mediator, as I discussed with each the extent to which they were prepared to accommodate the other, eventually contriving to make the two offers meet. If I may say so, that illustrates an important point about ADR procedures generally; for success, they cannot always be confined to a readily specified task. A mediator may need to have some ability to ascertain facts and to ascertain them without having to rely entirely upon the parties, whose objectivity is likely to be coloured, or at least to seem so. A fact finder may need some powers of persuasion. Rigid categories and restrictions may well be an obstacle to a realistic settlement.

The freedom of parties to adopt whom they may please to mediate, or to perform other tasks of the like kind, may be under threat. I am aware, from recent Internet exchanges, of a move in the United States of America (I am tempted to say "Where else?") that mediation, or at least some aspects of mediation, should be regarded as the practice of law, and non-lawyers therefore barred from practising mediation.[12]

This paper is presented at a Congress whose business is arbitration. I will not therefore explore now the full variety of ways in which the Scientist or Technician may contribute to the resolution of disputes by informal or formal means of one kind or another; I merely note that the categories of such contribution seem to me to be limited only by the imagination.

V - The Dispute Review Board

There is one class of determination of disputes, probably of use restricted to major construction projects (although I can see a possible modified application in long term trade agreements) which almost defies categorisation in any strict jurisprudential sense, and to which the mind-set of the Engineer in particular appears to lend itself. That is the Dispute Review Board.[13]

Essentially, the Board comes into existence by agreement of the parties at the outset of the project. It may have, say, three members; it may be a substantial Board, having a range of specialities represented, from whom a panel of three, or even an individual, is selected for each dispute as it arises. During the progress of the works, whether or not there is a dispute, the Dispute Review Board meets with the Project Manager and the site representatives of all parties, Owner/Employer, Main Contractor(s), Sub-Contractors and, if appropriate, specialist suppliers. They are therefore continually up to date with the project and its

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[12] In a recent posting to the Internet discussion list *dispute-res@listserv.law.cornell.edu*, one correspondent wrote on 21 February 1998: "I have heard of at least two non-attorney mediators who have been brought before the U.P.L. [Unauthorised Practice of Law] Committee [of the State Bar of Texas], but I have not heard if either has been indicted or if their cases have yet been referred to the Grand Jury.".

[13] See, for example, *Le DRB/DAB, Un Véritable Complément à l'Arbitrage*, Ing-dipl. Pierre M Genton CEng FICE, [1997] 3 Bulletin ASA 416 - 431.
See also *Major Project Dispute Review Boards, their use and potential*, Dr Nael G. Bunni CEng FICE FIStructE FCIArb, In-House Counsel International, June/July 1997 13.

development and may even become aware of incipient disputes before they become serious. When notice of a dispute arises, the Board (or a panel) is able to convene, very quickly, to hear it and to determine it there and then.

The jurisprudential status of a Dispute Review Board is not entirely clear.[14] No doubt it is something of an entity *sui generis*, but its roots clearly lie, on one side, in the historical role of the Engineer or Architect appointed for the Contract, whose independence is, in the modern day, no longer to be taken for granted. I suggest that its roots also lie with the concept of arbitration itself and that only a comparatively modern perception of procedure separates a Dispute Review Board from an arbitral tribunal. Time forbids a more complete analysis. Any analysis of the Dispute Review Board, a creation of the contract between the parties, as to whether the Board itself, or a case-specific panel emanating from it, is or is not an arbitral tribunal,[15] may well involve a detailed consideration of the wording of the contract itself, or of the side agreement, if there is a side agreement, making the arrangements for the working of the Board and, of particular interest, for the way in which its decisions are to be regarded.

Insofar as the Dispute Resolution Board may be said to be an expanded form of continuing expertise, it may be appropriate for me to turn to that technique next.

VI - Expertise - the Quasi-Arbitral Expert

It is perfectly possible for disputing parties to agree to refer their differences for the determination of an expert, and for them to agree to be bound by the decision of that expert. The ICC Centre for Expertise facilitates such a service, as do many technical and other institutions.

The philosophical distinction between an expert determination by which the parties agree to be bound and an arbitration by such an expert is not obvious, but the practice is very much for the expert to make his or her own enquiry and inspection, rather than relying upon the parties to select and present evidence or argument. Notably, some modern contract conditions[16] include a provision for expertise, with a mechanism for appointing an expert in case of default, very like those used in arbitration. It should be noted that such an expertise, although binding, normally will be enforced as a contract, without the benefits of direct enforcement which many jurisdictions have available for arbitral awards. Moreover, even if care is taken to ensure that due process requirements are met, it is unlikely that the report of an expertise would rank as an arbitral award for the purposes of the New York Convention. It is more common for the report of such an expertise to be a finding of fact, with or without recommendations for future action, than it is for it to be a direction as to payment, although the latter option is used, for example, in cases where disruption and delay are alleged.

Arguments as to the distinction between an expert and an arbitrator abound,[17] particularly in those jurisdictions which hold the arbitrator immune from suit as a matter of public policy.

Recent legislation in the United Kingdom[18] has introduced a new character, the construction adjudicator, who combines some of the characteristics of the expert and some of the arbitrator. Neither fish nor fowl nor

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14 Although there is now a developing literature, see, for example, *Construction Dispute Review Board Manual* (1996) Matyas, Mathews, Smith, Sperry.

15 As might be necessary were a payment decision to require enforcement in a different jurisdiction. under the *New York Convention* 1958.

16 Such as the Red Book and Green Book standard forms of the Institution of Chemical Engineers in UK.

17 Possibly the landmark case in England is ***Sutcliffe -v- Thackrah and others*** [1974] AC 727; [1974] 2 WLR 295, HL. That did not concern an arbitration, it concerned an architect who claimed to be acting as quasi-arbitrator when certifying work for payment but was not successful in defending accusations of negligence.
In ***Arenson -v- Casson Beckman Rutley & Co*** [1977] AC 405, HL, which concerned accountants who were to act as experts in valuing some shares in dispute, Brightman J had said, in a reserved judgement at first instance "where a person (though not an arbitrator) is in the position of an arbitrator, with a duty to hold the scales evenly between two other parties for the purpose of resolving, by the exercise of his own judgement, a matter that is not agreed between them, it is not expedient that the law should entertain an action against the opinion given alleging an error, whether negligent or not." Although that was also the view of the Court of Appeal, the House of Lords thought otherwise and found the accountants accountable. Perhaps that is an example of how positive law and natural law might conflict.

18 *The Housing Grants, Construction and Regeneration Act* 1996.

good red herring. He is interesting to the arbitral community, however, for a particular reason: the adjudicator's decision binds the parties at the time and remains in force until the dispute is finally determined by arbitration or litigation. It is an interim decision against which the ultimate arbitral tribunal is the forum for review or appeal.

That is not as exceptional as it may appear. The rules of a number of trade associations, such as those of commodity markets, provide for a relatively swift arbitration at first instance, followed, if required, by an appeal board, but all within the context of arbitration by agreement. The Chartered Institute of Arbitrators has developed a scheme for review or appeal of awards in documents-only consumer arbitrations, to deal with the errors that occasionally arise from poorly presented dossiers.

VII - The Expert as Aide to the Tribunal

The classical use of the expert is as an adjunct to the tribunal. From jurisdiction to jurisdiction, the precise role may range from one of private advice to the tribunal, by way of the role of assessor, to that of the expert for enquiry and report. Private advice is unattractive as contrary to the principle of transparency which, I submit, should be paramount in arbitral proceedings. Historically, private advice was restricted to the legal advice which a lay arbitrator used to take as to the form of his award. Such advice is rarely now required, as modern lay arbitrators generally are trained and tested in the drafting of awards and orders; moreover, strict formality of structure is now of less importance for enforcement. Nevertheless, it could be said to remain, perhaps, as one jurisprudential justification for the scrutiny of awards by administering bodies such as the ICC.

The Assessor, by analogy with the role of an assessor in the Court, sits with the tribunal, hears what the parties and their witnesses have to say and reads the papers, so as to take part in the deliberations of the tribunal to give the benefit of his advice. Just as it would be wrong for an arbitrator to use his or her private knowledge as if it were evidence, without giving the parties an opportunity to see that knowledge and to deal with it, there are problems of transparency also with the Assessor. The recent English legislation tackles the problem directly. The Arbitration Act 1996 distinguishes but barely between the Assessor and an Expert and goes on to require that the parties be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.[19] That must be the correct way to let in the sunlight which Cardozo recommended as the best legal disinfectant.

The expert is a servant of the tribunal (and therefore of the parties themselves, or at least of their presumed joint intention to have the dispute determined properly). His role, typically, is to investigate the material provided to him or to the tribunal by the parties, to make such other enquiries as he sees fit and to report to the tribunal his findings. Those findings are not the findings of the tribunal, and the expert's instructions should make it clear where his task ends and that of the tribunal begins. *Delegatus non potest delegare*; the tribunal may not delegate its own task of decision. Nevertheless, where the dispute is essentially technical, a tribunal is unlikely to depart from the findings of the expert, although it is always possible that the arguments of one or other party, to the tribunal, may make a difference as to how those findings are applied in law.

An expert may save time, by investigating, by interviewing the parties on their own ground (the parties have the protection of seeing the report and questioning him, if they wish, before the arbitral tribunal makes its decision), by tests and in other practical ways. Even though he or she is not the tribunal, however, it is arguable that an expert appointed by the tribunal in this way should understand and appreciate the principles of natural justice and the procedural climate in which the tribunal has to operate.

The tribunal appointed expert has power almost without responsibility to influence the mind of the tribunal without sharing its duties of fairness and decision. Moreover, the expert's task is usually completed when his or her report is made and considered at a hearing. Again, practice may vary, but it is not usual (or, for that matter, desirable) for such an expert to take part in the private deliberations of the tribunal.

Before leaving the tribunal expert, I offer two anecdotes, touching tasks very like those of the expert appointed by the tribunal and illustrative of techniques which may be employed.

In recent conversation with a distinguished professor of law, the writer was told of an exceptional case, where the arbitral tribunal decided that an expert would be useful to examine papers and accounts in a

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19 Section 37(1)(b), Arbitration Act 1996 -- England and Wales.

somewhat specialised area. No expert could be found, who was not associated in some way with one or other of the parties. The tribunal decided to appoint, presumably as an agent of its inherent power of enquiry, a "fair-minded gentleman" to make enquiry and report as would an expert. Intuitively, that seems a perfectly proper choice, but one may conjecture as to the precise jurisprudential foundation of what was, in fact, a commonsense idea.

In the second example, some years ago, there was a major dispute between two parties over a construction project in the Middle East, and a commission of two was appointed to resolve the issues between the parties. Several hundred of those issues were in more or less specialised areas of engineering. The commission appointed an assessor (whose actual task turned out to be that of an expert appointed by the commission, in effect to determine facts in a sub-trial) to enquire into those issues. That was done in a hearing over a period of weeks, when the two parties presented their arguments and evidence as they would before an arbitrator. The hearing was punctuated; when an assertion was made that this or that piece of equipment did not work, the assessor and the parties walked out onto the site and tried it. When there was a dispute about the quality of lighting on emergency escape routes, the entire group, assessor, witnesses and representatives, waited until after dark and walked the route themselves. If a picture is worth a thousand words . . . . . .

VIII - The Expert Tribunal

Where the technical issues, or the custom and practice of an industry, or perhaps the usual interpretation of a particular contract or specification are at the heart of the dispute, or form a major part of it, then it may well be appropriate to adopt an expert or a businessman as sole arbitrator or as a member of the tribunal. As is mentioned in the introductory part of this paper, there is a long and respectable tradition of arbitrators of the kind, although their numbers, in international arbitration outside the maritime and commodity areas are not great. FIDIC, who keep a list of international practitioners who are engineers, lists some thirty or so world wide.

Rather more are to be found in domestic arbitration. Lay experts are quite usual in the Common-law countries, but there are other notable examples, such as the technical and business arbitrators who deal with many construction disputes in the Netherlands.

It may be helpful to consider the differences one might expect from having non-lawyers as sole arbitrators or as a members of a tribunal. I am tempted to say that the first surprise is that they do not have two heads, but that may be too informal a comment for the august body to which this presentation is made. Two criticisms are often suggested. One is that, without extensive experience of formal procedure, a non-lawyer may find himself in difficulty when faced with advocates whose approach is not cooperative, or who raise difficult procedural issues. There are two answers to that, one theoretical, the other practical. Firstly, a large part of procedural natural justice is, in my submission, intuitive. That is true by definition, if natural justice is in fact intuitive justice. Next, in most modern jurisdictions, the extent of mandatory positive procedural law applicable to arbitration, and particularly to international arbitration, is not great. It is certainly far from coincident or coterminous with the procedural law or practice of the national Courts. Moreover, extensive academic attention has been given to arbitration as a jurisprudential or even metajurisprudential concept, not least under the auspices of ICCA at Congresses around the world, such as the Congress to which this paper is presented, with the consequence that procedure in international arbitration is well researched and the principles accessible to the student, whether he be lawyer, scientist or amateur philosopher.

The practical answer is also more mundane. Among the engineers and scientists who practise as international arbitrators, some have degrees in law, some have made a study of relevant aspects of law and all have considerable experience as experts and technical advisers in litigation and arbitration as well as of arbitration both domestic and international. Put simply, they are used to it.

Moreover, there is a groundswell of education and training in International Arbitration: Since the 1970's, the Chartered Institute of Arbitrators has mounted training courses in both international and municipal arbitration, and the first such course outside the UK was in Hong Kong, followed by another in Belgium in 1991. Nowadays there are courses for new practitioners and advanced assessment courses for experienced professionals throughout the world and a course for the Institute's Diploma in International Commercial Arbitration, which may be a residential summer school or a series of evening sessions. The most recent, at which I had the privilege of teaching, was in Keble College, Oxford. Consideration is, I believe, being given to courses in other parts of the world. In passing I would say that the courses are attended by both lawyers

and non-lawyers and that the twin tasks of the training are to develop the layman's understanding of the law as it is relevant to arbitration and to develop the lawyer's understanding of the implications of freedom of procedure outside the Court. Tasks of comparable importance.

It may also be relevant to say that the base teaching of the Chartered Institute of Arbitrators is in the context of the UNCITRAL Model Law (Dr Gerold Herrmann is one of the Course Directors), adapted as necessary to the home jurisdiction of the place where the course is held. The Institute's examination structure includes examinations on substantive law (practising lawyers have exemptions) and on the law and procedure of arbitration. The final examination of the Institute, which every candidate for senior Membership must take,[20] is a written award on an hypothetical reference. To pass requires the candidate to produce a fully reasoned award, capable of enforcement a) in the relevant jurisdiction and b) within the 1958 New York Convention. Continuing development is encouraged through a series of advanced international workshops, which the writer had the privilege of initiating in London last year (1997).

The Chartered Institute is by no means alone. Its courses in the United States of America have been hosted jointly with the American Arbitration Association; CIArb has collaborated recently with the Swiss Arbitration Association and with UNCITRAL in the first of what is hoped to be a series of practical and academic workshops and it is involved with arbitration centres and institutions around the world in more or less formal cooperation. The LCIA has, for many years, encouraged the so-called "Selsdon" round table colloquia (there is to be another in Tylney Hall this weekend); the ICC Institute of Business Law and practice has its arbitrator's colloquium. The ICC itself has commenced a training programme, as have others. Perhaps more than a groundswell.

Of course some non-lawyers take part in all these academic gatherings, but they are few in number and it is one aim of the new group to raise the profile of academic debate among non-lawyers in arbitration, and to encourage more of them to take part. In the process, I believe that much will be done indirectly to raise the profile of arbitration as a process and to improve confidence in the fairness and efficiency of arbitration among ordinary businessmen and users generally.

That was something of a digression from the main theme of the present paper. It purpose was in part to illustrate the scene and to rebut the view, which seems commonly to be held in some circles, that those outside the cloistered world of the lawyer somehow cannot deal with the day-to-day incidents of arbitration practice. They are doing precisely that and on a daily basis. In passing, however, I have to admit that even Engineers are not always right. I have been corrected on an appeal to the High Court in London,[21] but then so have some of the most experienced of my lawyer friends. It is a privilege to err in honoured company.

There are few jurisdictions which restrict the composition of an arbitral tribunal by law. Any one chosen by the parties may be an arbitrator[22]. One anomaly that arises, or used to arise in some jurisdictions, of which Singapore was an example until comparatively recently, is that it is possible for the local law to regulate who may appear on behalf of a party, excluding a foreign lawyer, for example, and confining the task to a lawyer locally admitted to appear before the Court, even though there is no such limitation on the parties' choice of arbitrator. That is sometimes no more than a result of local politics, but it reveals a lack of understanding of what is essentially a private consensual process and not an emanation of the legal system.[23] Just as the right of audience in the Court is ultimately a matter for the Court then I suggest that, subject to mandatory provisions of National Law, the parties have the legal right, corresponding to their undoubted right at natural law, to choose how they are represented in their own tribunal, and to be regulated by the tribunal itself where

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20 Subject to very limited exceptions.

21 ***Metro-Cammell (Hong Kong) Ltd -v- FKI International plc*** [1996] ADRLN 19, on an award as to costs and whether or not a conditional payment on account was to be equated with a payment into Court when disposing of costs as between the parties. The arbitrator had thought not, because there was no offer to settle the proceedings and the payment was specifically subject to the outcome of the arbitration. The Court determined that the payment on account was to be treated as equivalent to a payment into Court.

22 To be more exact, anyone chosen by the parties or by a method they have agreed (Institutional appointments etc). There may be a presumption that an arbitrator requires to have personal capacity to make a deed or its equivalent, i.e. to be of age and not insane Or (less certain this) bankrupt. The draft Scots Arbitration Law seen by the author has a provision that an arbitrator must be a natural person but arguably *cela va sans dire*, as a body corporate necessarily acts through its agents and an arbitrator may not delegate his decision making function.

23 But see also note 25 for some problems in USA.

they do not agree. As it happens, I also believe that National Law is wrong if it imposes limitations, but that is a purely academic issue. Law is law, both *jus* and *imperium* and one must obey.

Having, I hope, laid the ground for a tribunal unfettered as to its composition, I would like now to explore some of the possibilities that opens, and to do so in the context of procedures that achieve efficiency without sacrificing due process.

One of the first possibilities is that of a deliberately mixed tribunal. Consider for a moment a major investment project, an international project, for the construction, operation and management of a facility for manufacturing pharmaceuticals or perhaps generating electricity. A long term contract with provisions, *inter alia*, for fixing prices of the product for the local market. Something goes wrong, let us say not during construction but in the operation and management phase. Let it be that circumstances make it necessary completely to change the feedstock or the fuel, with possible impact on the plant itself, on the pricing of the goods and on the investor's return on capital. Alternatively, let environmental rulings make disposal of the ash or the waste more difficult or limit smoke emissions. All this is hypothetical, I have no specific case in mind.

Now consider a tribunal comprising a businessman, perhaps a practical industrial financier or Chairman of a management consultancy, an engineer, perhaps with a speciality in chemistry, perhaps not, but with experience of leading projects, and a lawyer with some experience of problems with long term contracts and an understanding of *rebus sic stantibus* in the appropriate jurisdictions. Other combinations could be considered.

I make two points about the suggestions I have made. First, for the determination of a dispute such as I have postulated, that could be the Dream Team, creating confidence for the parties in the fair resolution of their problems. That is because every corner is covered. No one can say with any credibility, after the award, "They didn't understand the technology.", "They didn't have a proper grasp of the law." or "They didn't understand the financial implications.".

The second point is this: in the Dream Team I postulate, it does not matter who takes the chair, who presides over the tribunal. I have discussed the question of procedural skills of non-lawyer arbitrators, but in this case, it may be that any of the people I have suggested could have little or no previous experience as an arbitrator. Two options are open. One is to choose the member with arbitral experience (he may be the lawyer, he may not) as Chairman. Another would be for the Chairman to let it be known that the more experienced arbitrator will lead in procedural issues. That is quite a common state of affairs in other tribunals; for example, in Courts-Martial the lawyer of the tribunal takes the lead in procedural issues, although the Court itself takes the decision.

It is not easy to design an optimised tribunal of this kind, particularly in systems which provide for each party to appoint his or her own arbitrator. Nevertheless the benefits in fairness alone are such that an attempt should, in my view, be made. If that is to happen, it usually will be something for the parties' own lawyers to do. It may also be for the appointed arbitrators, if they have an opportunity to concur in the appointment of the third. Two lawyers might suggest someone of a different formation, two engineers or business men might suggest a lawyer.

I emphasised the question of fairness. It is also clear, I would suggest, that a mixed tribunal will of necessity be more efficient than a tribunal that is not mixed. Extensive expert evidence or expertise ceases to be necessary; lengthy argument, that a lay tribunal might prefer to help them with the law, is not necessary. Decisions, procedural or substantive, upon which a mixed tribunal is entirely agreed will have a firm base.

Moreover, a mixed tribunal is well placed to take the initiative in questioning the parties, if that is what is required.

An alternative which has been reported, at least anecdotally, is a tribunal of two: one lawyer, one not. Such a tribunal has the theoretical disadvantage that there is no means for a majority decision if the arbitrators disagree in their deliberation, although a mechanism could, no doubt, be devised. In one example reported to me, the two arbitrators divided responsibility into, effectively, law and fact. Starting within their deliberations, each with professional deference to the speciality of the other, they sought to reach consensus by persuasion and argument and succeeded in doing so. In that way they justified the confidence of the parties in the tribunal they had created.

Among the procedures available to a tribunal having the appropriate expertise are two developed by the Institution cf Civil Engineers, in London. The first is known as the Short Procedure and comprises an exchange of dossiers followed by a brief informal hearing at the arbitrator's discretion. It is suitable for small sums, but then disputes as to small sums are extremely important in the scheme of things for most commercial concerns, because of the costs of litigation and even some arbitration. The second is the Special Procedure for Experts, in which an exchange of reports by experts is followed by a meeting between the tribunal and experts appointed by the parties (they may be "independent" experts or the parties' own personnel) at which the issues are discussed, in a round table forum chaired by the a sole arbitrator or, if appropriate, by the Chairman of the tribunal. It is not a negotiation, it is a fact-finding session, without the procedural complications of the trial process. In the strict form of the procedure, as recommended by the ICE, lawyers are excluded, but the technique may well be used for fact finding in a more complex reference. In such a case, the lawyers would be present and might take part, the important relevance of their involvement being their understanding of what was done, so as to take it into account in later argument.

To take the use of the technically aware tribunal to the extreme, it is perfectly possible for the tribunal itself to be present at a test, or at the dissection and examination of a piece of faulty plant, perhaps with technical and legal representatives of the parties and even to observe directly measurements taken and results obtained. If a picture is worth a thousand words, the value of such a process is almost beyond estimation.

I can recall a reference some years ago, where the performance of a power station was in issue. There were disputes about many issues, not least the effects of weather, humidity, temperature and barometric pressure. Proposals were made by both parties for tests on the power station. The sole arbitrator took the requests of both parties and embodied them in an Order in the reference, setting out the test requirements in detail. The arbitrator attended the tests and every measurement was agreed between the experts for the two parties in the presence of the arbitrator and noted as evidence in the record. A week of evidence from witnesses was crystallised into a day -- a long day but a day. That was a multi-million dollar dispute which settled on the finding of facts, although the initial statements of the parties raised many points of law.

Another reference, a smaller matter of some thousands of pounds only, concerned the rebuilding of a large electrical machine driving plant in a paper mill. When the rebuilt machine was re-installed, it burned out, causing extensive damage. The re-builder and the owner could not agree as to the cause or the liability. They did, however, agree to appoint an arbitrator, who was contacted by telephone and advised a formal written submission to arbitration which was faxed that same day. He saw the machine the following forenoon, heard representatives of both parties in the afternoon, gave an oral award as to liability before leaving, enabling the machine to be taken away for repair, and prepared and published the written award, including quantum, on the following day, a weekend day, without deviating from the mandatory rules of the jurisdiction.

Those examples are of matters where the technology dominated the reference. Of course they are exceptional, but they do indicate ways in which technical knowledge may turn out to be useful. There are many such cases in, for example, the maritime field or in major technology transfer contracts.

In addition to the self-evident benefits of having technical knowledge in the tribunal itself, there is a second factor, a cultural factor, which may play a part in creating fairness, substantive natural justice, in the reference. For an arbitral tribunal to work well, the arbitrators should develop a close personal relationship. It is an important task of the Chairman of a tribunal to encourage the integration of the arbitrators into a team. Not only necessary for efficient working but also, if one or other party appointed arbitrator is not to feel isolated, a circumstance which might militate against the fully independent role required in modern international arbitration. It is at least arguable that, when a good working relationship exists, between arbitrators whose history and formation are as different, culturally, as are those of the scientist and lawyer, the result is a rounded tribunal which is able to look at each aspect of the reference from different, but relevant, points of view. A rounded and complete discussion and a rounded and fair result.

At a recent luncheon of the International Arbitration Club[24] in London, Sir Michael Kerr observed that there were times when arbitrators, and particularly international arbitrators, were able to do justice between the parties in circumstances where a Court, applying the law strictly and having regard to the influence one case may have on others, might be more constrained. It is at least arguable that the influence of one or more

[24] An informal luncheon club of lawyers and others engaged in international arbitration.

members of a tribunal who may not be wedded closely to the procedures and thinking of their National Court system may encourage that tendency to justice. That, however, is a topic for another day.

IX - Party Appointed Experts

The new group has adopted the name of a Council of Engineers and Scientists *in* Commercial Arbitration. It is a deliberate choice. Just as there are far more lawyers in arbitration than there are arbitrators, there are also many engineers and scientists acting as expert investigators and witnesses. I have already discussed the various neutral roles of the technical expert. The role of the expert appointed by the parties also deserves some examination.

There is an important distinction to be explored, between the expert as witness and the expert as advocate. Some systems of law allow evidence of opinion by experts appointed by the parties, the party-appointed expert witness. More usual in common law jurisdiction than in Civil jurisdictions, the expert witnesses, provided by the parties, are important contributors, often necessary contributors, to the evidence in many international arbitrations.

Furthermore, some jurisdictions, and the modern English arbitral regime is, as I have noted earlier, an example of one such, allow (or perhaps it would be more correct to say do not prohibit) representation by persons who are not lawyers.[25] As a consequence, there is scope for non-lawyers to act as representatives in arbitration.[26]

I do not say that they should, only that they can. At the risk of appearing politically incorrect, I suppose the sight of a non-lawyer representing a party in international arbitration might be thought to invite the comment of Dr Johnson on a lady preaching.[27] Nevertheless, some trades have a history of such representation and it is still a developing area, likely to create problems with which we shall have to deal.

Be that as it may, there is clearly an uncertain line between opinion as evidence and argument. There have been occasions when the one person has performed both roles in an appropriate arbitral proceeding, but there are some jurisdictions where such a process would be unthinkable. The role of a witness is an invidious one. Certainly, it is the duty of a Scientist or Engineer to be objective, not only because that is what a Court or Tribunal is entitled to expect as a matter of law, but because such objectivity is the key to his or her professional authority. Nevertheless there are difficulties. In an article in *The Times* of 12 July 1990, it was suggested that "even if the expert manages to achieve Olympian detachment, his neutrality is likely to be undermined by the workings of the adversarial system".[28] The leading English case on the role of the expert witness is, no doubt, still ***Whitehouse -v- Jordan***,[29] in which it was said that expert evidence presented to the

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25 See also note 5.

26 But note, for example, an Advisory Opinion of the Florida Supreme Court, (7/3/97).
"The Florida Supreme Court has decided that a non-lawyer who represents the public in a stock exchange arbitration for compensation is engaged in the unauthorized practice of law, and will be prohibited. The ruling applies to all three stages of an arbitration: before, during, or after. The decision does not affect the right of individuals to represent themselves; it applies only to representing others. The court recognized that the Federal Securities and Exchange Commission could override state law on this question, but it has not done so."
This is a sensitive topic. In another case, of which the author has no particulars, it is said that a Californian Court denied a New York attorney his agreed fees for representing a party in an arbitration held in California on the basis that he was engaging in the unauthorized practice of law in that state. It is possible that may have been the case of ***Birbrower, et al v. Superior Court of Santa Clara*** (1/5/98) 70 Cal.Reptr.2d 304:
A California client sued a New York law firm for malpractice; the firm countersued for fees. The California Supreme Court ruled that the firm had violated the statute prohibiting the practice of law in California by persons not members of the state bar when the firm represented the client by making preliminary arbitration arrangements and negotiating a settlement. As such, the firm could not recover fees for services performed in state.

27 Dr Samuel Johnson (1709 - 1784), the English lexicographer and eccentric (*sed quaere* if the phrase "English eccentric" is not in fact tautologous) -- "Sir, a woman's preaching is like a dog's walking on its hinder legs. It is not done well; but you are surprised to find it done at all." (c.1763)

28 *Mischief and the Expert Witness*, Spencer, J R, The Times, 12 July 1990, quoted in *The Role of the Expert Witness in Construction-related disputes: Problems and Pitfalls*, Robert Greenstreet, *The Commercial Way to Justice* (edited by the present author) 1997, Kluwer Law International 243 - 248 at 244.

29 ***Whitehouse -v- Jordan*** [1981] 1 WLR 246 HL, a medical case concerning the use of forceps for delivery in difficult circumstances.

court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. The same honesty, I suggest, is required of witnesses in international arbitration, but there is no clear code.

What is clear is that, as the expectations, both of party appointed experts as witnesses and of non-lawyers as advocates, vary from jurisdiction to jurisdiction, more study of these roles is required. Moreover, when one turns to advocacy, matters become complicated. Although in any single jurisdiction the ethics of the Bar are well known, they also vary from one jurisdiction to another. One only has to consider the question of consultation with or preparation of witnesses, as one example, or the rules for protection of documents, an aspect of the attorney-client privilege, to see how fundamentally such rules vary from place to place.

There is no clear written or agreed ethical basis of operation for the non-lawyer. Unless he or she is constrained by a sense of public or private morals, there is perhaps too much scope for uncertainty on many of these issues. I submit that there is a requirement for more development of ideas and principles towards some common understanding of how the participants in arbitral proceedings should behave to the tribunal and to one another and that this is another area where dialogue between lay practitioners in arbitration and between lay practitioners and our lawyer friends is of enormous importance in developing public confidence in arbitration as an ethical, as well as a practical way of determining issues in dispute.

X - Conclusion

I hope that I have set out an adequate overview of the roles that engineers, scientists and other non-lawyers, such as business men and women, medical experts, accountants and other professionals may play in the arbitral process. Necessarily it is an overview. Books can and have been written on the subject. What I have written here is by no means exhaustive and, if there is a single lesson I hope to offer, it is that the procedural freedom allowed to arbitration throughout the world demands an imaginative response to each new task and to each new problem that arises. We share with you (and I address an audience which is principally of lawyers) problem solving as our *raison d'être*. Perhaps that is why we are able to work together so well, in spite of our difference of culture.

One of the features of procedural processes, such as the processes of law, is that there comes a time when the procedures are copied from previous procedures by one generation after another, without any clear view as to the historical reasons for them. Perhaps the curious and analytical eyes of the engineers and scientists may help our lawyer friends to question those reasons and to develop new techniques for the modern world. Then, at last, it will no longer be true to say, as was said in 1916 but could still be said in many jurisdictions today, "The forms of action are dead but they still rule us from our graves".[30] If I and my colleagues may help that development, as it applies to arbitration and to voluntary dispute resolution, we shall be content. It is, as Hamlet might have said, ". . a consummation devoutly to be wished".

It has been the purpose of this paper to introduce some of the ideas behind the new International Council of Engineers and Scientists in Commercial Arbitration and to invite the interest of our lawyer friends as well as of our own colleagues. The encouragement of ICCA has been crucial and this opportunity greatly appreciated. I am confident that I speak for my colleagues in saying that we value that association, informal though it may be, and will endeavour to make sure that we are of value to the legal arbitral community in both academic and practical deliberation.

With no final international Court and generally no general means of appeal or regulation, arbitration depends ultimately upon personal competence and integrity like no other legal or quasi-legal process. That integrity is required, not merely of arbitrators but of practitioners and institutions, both legal and non-legal. It is only in the personal relations that exist within the world arbitral community that the integrity of the process can have its protection. In a way, that is more important than all our debate as to procedural detail. As a new society, the steering group of the International Council of Engineers and Scientists in International Arbitration has no hesitation in pledging its allegiance to ICCA and to our friends and colleagues in the international community of arbitration.

Geoffrey M. Beresford Hartwell © 1998

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[30] Maitland, *Equity* (1916 Edition) p.296. He referred to an English problem, but friends and colleagues from many jurisdictions and cultures will be able to point to examples where excessively strict or mis-construed application of procedural rules may have militated against the achievement of Justice.

"**Arbitration Procedures: Achieving Efficiency Without Sacrificing Due Process"**

Initial members of the Steering Group of the proposed International Council of Engineers and Scientists in Commercial Arbitration -- May 1998

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