International Arbitration in London: A View from Outside

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Reprinted from

(2011) 77 *Arbitration* 428-434
Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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Lectures and Addresses

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Annual Keynote Address delivered on May 5, 2011 to the Chartered Institute of Arbitrators London Branch

Good Evening Ladies and Gentlemen.

It is indeed an honour and a pleasure for me to be here tonight and to share with you some thoughts of mine on arbitration in London. As you have heard, I have been asked to challenge the perception that London is best for international arbitration; so lock the doors and fasten your seatbelts!

When I started out in international arbitration at the beginning of the 1980s, in fact in 1982, international arbitration was very much an exotic thing. There was perhaps a handful of, maybe a dozen, international practitioners doing international arbitration in those days. Now, of course, things have changed dramatically: international arbitration is big business. If arbitration was exotic in the 1980s, arbitration in London was even more exotic. Here of course things have changed also quite dramatically, very much thanks to the 1996 Arbitration Act. We have certainly moved beyond the point illustrated by the well-known London Times headline, "Fog over the Channel—The Continent Isolated". London is, of course, a very important international hub today, for so many things, including international arbitration. If Paris used to be the capital of international arbitration, I would say that London is at least at the same level as Paris nowadays.

I am addressing you today, not so much as a civil law-trained lawyer, but perhaps more as an international arbitrator, or international arbitration practitioner. I do think, however, that there are still differences between civil law and common law when it comes to the approaches to international arbitration. One should not over-dramatise those differences, but there are still differences, even though we are moving, I think, towards an emerging international arbitration culture.

Even if I am addressing you today primarily as an international arbitration lawyer, I will try to wear my civil law lawyer hat more than usual, simply in order to try to bring out a little more the differences between the two different approaches, and perhaps primarily the expectations of parties and counsel involved in international arbitration. Having said that, I would like to point out that in my own country, Sweden, which is definitely a civil law jurisdiction, as far as procedural issues are concerned, we are much more in the common law camp than most continental European countries.

This means that even when you go to court in Sweden you will find a very adversarial approach taken by judges. You will find that party autonomy reigns supreme, also in commercial disputes in courts. That is certainly the case when it comes to international arbitration in Sweden.

Today I will address four aspects of arbitration in London that I think cause concern among non-English lawyers. Those four aspects are: (i) "case management", (ii) "discovery", (iii) "cross-examination" and (iv) "appeal on questions of law". I will come back to those issues shortly. I should also say that what I am going to say is not necessarily a reflection of my personal experiences: some of it is, but not everything, but rather a combination of views and comments that I have been gathering from colleagues and clients. Before I address

these four aspects of arbitration in London, let me give you some general background from a civil law perspective when it comes to procedural matters, including international arbitration.

First of all, I think one rather important difference is the fact that when civil law lawyers start out with a dispute we tend to focus on the legal aspects. We focus on the law, not so much on the facts. Needless to say, the facts are important, but we start out by thinking about the legal issues involved in the case, even before we necessarily have a clear picture of all the facts. I think that this is one rather important difference as far as the starting points are concerned.

The second important point to remember is that, before you go to court, certainly in my country, as in most continental European countries, and also before you go to arbitration, you are expected to have done your homework, in the sense that you are expected to have thought about the legal issues; you are expected to have taken a look at the facts, what documents are available and so on and so forth. You are not expected simply to go to court, file complaints and then wait for discovery.

This leads me to the third important difference, namely, discovery. The word "discovery" does not even exist in most continental European systems. What we talk about is production of documents. Again production of documents is something you can ask the court for on the assumption that you can convince the court that the documents in question are relevant as evidence in the case. There are no such things as fishing expeditions, or asking for documents that you think might be helpful in building your case. The courts typically take a very restrictive approach to the issue of production of documents.

The fourth important general difference, by way of background, is the fact that in continental European systems, and in Sweden, we focus very much on the actual prayers for relief. When you go to court, the first thing that the judge will ask is, "What are you asking for?" "What exactly do you want me to do?" So in the summons, or the statement of claim, i.e. the first substantive brief that you submit to the court, you are expected to outline very much in detail exactly what you want the court to do, basically the contents of the order that you are asking for. Without this, you will not get very far in a court proceeding in a continental European country, and by the same token, in an arbitration taking place in one of those countries. The typical statement of claim in a continental European country, be it in court or in an arbitration, is really a three-stage rocket. First of all, the prayers for relief. Secondly what we call the legal grounds, i.e. the particular legal principle or rule you say led to what you are asking for. This might be a particular provision in the contract, a particular provision in a statute or a legal principle, but you need to identify the legal basis, the legal ground for your prayers for relief. The third stage is to describe the facts. These three elements are something that the judge would be looking for. What I see sometimes in arbitrations is that parties are asking for "any other relief that the tribunal deems appropriate". That is a non-starter in our systems, because you cannot go to the court and not know what you want the court to do. That is a very important difference between the general approach taken by lawyers in common law countries and in civil law countries. From our perspective, this focus on the prayers for relief is important from a very legal-technical point of view. It draws up the framework for the mandate of the judge or of the tribunal, i.e. he cannot, or they cannot, go beyond what you are asking for. If they do, they go *ultra petitia*. That may be a ground for setting aside the award, or for appealing the judgment.

Let me now turn to the four aspects that I mentioned previously. Before doing that, however, let me raise two complaints, if I may use that word, that we often hear about arbitration in England. I will not dwell on these in detail, but I think I should mention them. One complaint is that arbitration in England, or at least in London, is expensive. One reason why it is said to be expensive is that you usually have a solicitors firm as well as barristers involved, which in the eyes of some of my colleagues, and particularly perhaps in the eyes of clients, does not make sense. They do not understand why this is necessary. I do not

personally have that much of a problem with that, but the perception is that it becomes unnecessarily expensive by this duplication of efforts. If in fact there is duplication is, of course, a matter of discussion, but that is the perception.

The other general criticism you hear from time to time relates to the system of barristers practising in chambers and the conflict of interest issues that may arise in relation thereto. This has been discussed, as many of you know, for many years. Nowadays it is a problem of which many of you are aware. It is, however, sometimes quite difficult to explain to parties, the users of arbitration, who are perhaps not that experienced in international arbitration, how it can be that persons sitting in the same chambers act in all sorts of capacities in the same arbitration. The English Bar has done a good job of trying to explain the system to outsiders, but I think more explanation is probably needed.

Let me then move on to the four aspects. Let me preface my comments by the following. When I mentioned, and emphasised, the differences between civil law lawyers and common law lawyers, these should not be over-dramatised, because in my experience, it is more a question of the degree, the extent to which the persons involved—parties, counsel and arbitrators—have experience of international arbitration. The more experience you have, the fewer problems the parties will have in relation to arbitration in London. It is more a question of experience than anything else. But perhaps also, to a certain degree, a question of, let us say, personalities. I do not mean that in any psychoanalytic way, but personalities as lawyers. Of course we make a full circle here, since the personalities of lawyers are dependent on legal education, legal background and legal traditions. In a way we are back to square one. It is still a difference between civil law and common law lawyers, but it is more a difference of expectations rather than anything else. When there are arbitrations in London involving mostly civil law lawyers, it is a good rule of thumb to try to explain at a very early stage the "rules of the game" so as to make everyone aware of what is going to happen.

Let me move on to the *first* aspect I want to address, namely, *case management/conduct of arbitration*. I start out with a very basic question: what role should the members of the tribunal really play in this respect, or as someone has said "Whose arbitration is it anyway?" From my perspective it is quite simple: it is the parties' arbitration. They agreed on arbitration. As we all know, party autonomy, the will of the parties, is an extremely important cornerstone of international arbitration, indeed for any kind of arbitration. Without an arbitration agreement, the arbitrators would not sit there. The parties have appointed the arbitrators, the parties have paid the arbitrators. It must be for the parties to decide the scope and complexity of the arbitration. All this should come as quite natural to lawyers from a common law system, based as it is on the adversarial system where the parties are primarily responsible for running the show. But I have experienced in arbitrations in London that some arbitrators, and perhaps primarily the chairperson, occasionally finds it very difficult to resist getting involved in the actual management of the arbitration without being asked by the parties to do so. Perhaps imposing their own ideas on how the arbitration should be run, perhaps imposing ideas based on their own preferences which do not necessarily coincide with those of the parties. In some cases this might lead to confusion and unnecessary delay, e.g. to a more cumbersome and costly procedure than would have otherwise been necessary, and above all, and most importantly, to a procedure which is not in accordance with the wishes of the parties, nor with the agreement of the parties.

When you act as counsel, it is not always easy to take on a fight with the chairperson on issues like those. It can, rightly or wrongly, have all sorts of consequences in your relationship with the tribunal for the future arbitration. Most counsel are quite reluctant to take on this fight. Sometimes of course, you have to do it. Restraint from the side of the tribunal is called for, as is the willingness to listen to the parties and find out what they want to do, rather than imposing your own ideas and perhaps preferences as to how the arbitration should be run.

The other side of this coin is the actual conduct of the hearing: what role should the arbitrators, and the chairperson in particular, play at the hearing? This raises the rather fundamental question—what is really the duty of the tribunal? Is it to find out the truth, or is it simply to decide the case on the basis of the arguments, facts and evidence presented to them by the parties? In my view the answer is simple, and it ought to be simple for common law lawyers too, i.e. it is the latter approach which has to prevail. You can only decide the case based on what you have been told and on what has been presented by the parties, otherwise you start a journey the end result of which you will not be able to predict. If you take the view that the duty of the tribunal is to find out the truth, well, where does it stop?

I have experienced several times, more so in continental Europe than here in London, but still here in London, that you have chairpersons who simply cannot resist the temptation of trying to find out everything that happened. Even though it may have, as it may turn out, nothing to do with the issues that must be decided in the case. They ask these questions because they think it is so interesting; they simply want to find out what really happened. I think this is a dangerous approach to take. If you allow yourself to put questions of this kind, you never know where it will end up. As an arbitrator you actually know only the tip of the iceberg. If you start asking questions to find out what is below the surface, under the tip of the iceberg, you may end up with an enormous iceberg at the end of the day; an iceberg of such size and character that the parties have no interest in having you look at it. One very serious risk you run by asking these kinds of questions is that the dispute will be blown out of all proportion. You have most certainly destroyed, or at least undermined, the plans of the parties. This has all sorts of implications, not least cost implications. I have been in arbitrations where arbitrators even suggest to the parties, or at least to one of the parties, that it would be a good idea for them to submit documents covering this or that issue, and "is this not a legal principle you should be thinking about?" Well, if you do that the parties lose control of the arbitration. This may have all sorts of consequences. In addition to threatening to blow the whole arbitration out of proportion, it raises, of course, very serious questions with respect to the impartiality of the arbitrators. As we know, impartiality is above all a question of perception. Even though you think that you are 100 per cent impartial and neutral as an arbitrator, that is not always the way you will come across in the eyes of the parties.

Because if you ask certain questions of one party, the other party may say, "Why is he helping this party, why is he asking these questions?" Then you think you should balance it by asking questions of the other party and the first party will think the same way. It is a very slippery slope if arbitrators start asking these kinds of questions.

Now, as I said, in continental Europe this happens more often. Arbitration lawyers who have sufficient experience of international arbitration would not accept these kinds of activities from arbitrators. Continental European lawyers who have less experience would probably do so, because this is typically the way that court proceedings are conducted in many continental European countries. To sum up on this point: case management and conduct of the hearing call for restraint from the arbitrators. One should really try to remember at the beginning of every hearing day what the role of an arbitrator is. In my view it follows from the very fundamental principle of arbitration, which is based on party autonomy, that the parties must have the right to decide what to do with their own dispute. They have appointed the arbitrators, they pay them and they should be entitled to decide themselves the scope and complexity of their dispute.

I will now move on to the *second* aspect I wanted to mention, namely, *discovery*. As I said at the outset, in civil law systems, discovery, or production of documents, is typically quite limited. In order to convince a court to order the other party to produce documents you must explain to the court why this particular document, which you then have to identify, is important as evidence in the case. You must also explain to the court that you cannot prove this particular point in any other way, so it is very restrictive. US-style discovery is

unheard of. No fishing expeditions! Asking for documents simply because you think they might be helpful for your case is a non-starter, certainly in court proceedings. Even though the UK discovery procedures, as far as I understand, are not as draconian and far-reaching as the US procedures, I think that many civil law lawyers who are not experienced in the UK system would still be shocked if, in an arbitration in the UK, court discovery procedures were to be applied. If you have a very wide-ranging approach to discovery, it has all sorts of consequences, not least cost consequences, because the case will almost certainly grow. Now, in international arbitration, as many of you know, the International Bar Association adopted several years ago its "Rules for the Taking of Evidence in International Arbitration", which try to merge the two systems and to find a compromise between the two systems. Some lawyers have characterised this as the complete capitulation of civil law in favour of common law approaches to discovery. I personally do not agree. I think that the IBA Rules are quite balanced and, if properly applied in international arbitration, they are quite sensible. The emphasis is on proper application. In international arbitration in London, I would recommend you to try to encourage parties, or your clients, to use the IBA Rules because they do constitute a sensible and reasonable compromise between the two systems.

In practice in international arbitration the "Redfern Schedule" is a very helpful and practical document to work with in order for both the parties, and the tribunal, to find out what documents are relevant and what documents should be allowed to be produced or ordered to be produced by the other side. As a final comment on discovery, I would like to say that even though the IBA Rules constitute a good compromise, there is still quite a significant gap between the expectations of the typical civil law lawyer and the typical common law lawyer when it comes to discovery. As far as the handling by the tribunal of these issues is concerned, the best advice is to raise those issues at the very first stage of the proceedings when you issue the first procedural order, or when you have the first procedural meeting and to try to explain to the parties, or I should say agree with the parties, the rules of the game, so that everyone knows what is going to happen. That is also a very important aspect of case management.

The *third* aspect that I wanted to discuss today is *cross-examination*, something which common law lawyers, at least say they, do very often and civil law lawyers do very seldom. In fact in some countries on the Continent there are no witnesses at all, not even in commercial cases. The complaint you hear from time to time from civil law lawyers, with respect to cross-examination in arbitrations in England, is that cross-examination is too long and too cumbersome and leads to long proceedings which, again, has cost implications. Well, why does cross-examination last so long? Is it correct that it is too long, too costly and too cumbersome? I think the generally held view is that, yes, it is: "it is surprisingly long", would be the comment from many. Well, why is that the case? From my perspective the problem is that a lot of cross-examination you see in arbitrations in London is done as if the parties and counsel were in court. The focus is very much on reviewing documents. Speaking for myself, and I think for many of my colleagues, in international arbitration, there is simply no need for that. Most arbitrators can read. They will have read, reviewed and analysed the file. There is no need to repeat what the documents say during the hearing. This reminds me of the joke about the barrister who, during cross-examination, or maybe during opening, started to review all the documents in the file. After a while the judge said: "Mr X, there is no need for this, I have read all the documents". The counsel responded: "Ah yes, Sir, you have, but I haven't". The perception that many of my colleagues have is that it is a rather unnecessary exercise to go through document after document that is already in the file.

In international arbitration, in order to challenge the testimony of a witness, it is not necessary to challenge every word that he or she has said or written. It is not necessary to challenge every document that has been signed by the witness. It is certainly not necessary to challenge it through cross-examination, because challenges can be done in the written submissions, and it can be done in closing. There is no need to spend time during

cross-examination to do that. Furthermore, if you do not challenge a witness statement that has been submitted by a witness, or certain parts of it, that does not mean that you have accepted that part of the statement. In international arbitration the very basic rule of evidence is that the arbitrators have the right, and the duty, freely to evaluate evidence. No national rules of evidence apply. It is just a matter for you as counsel to convince the court in whatever way you think is the most efficient way of doing that. To take the witness through document after document is not something that is really very efficient. Again it takes a very long time.

If these fundamental aspects are kept in mind, it would in my view be quite easy to have a much more focused form of cross-examination. In fact, the approach one should be taking is that of a stiletto approach, rather than a sledge-hammer approach: it has to be very focused. In order to have a focused cross-examination, you need a well-prepared, well-thought-through plan for your cross-examination. What do you really want to get out of this witness? What can this witness really tell you? These are really simple, but fundamental questions to keep in mind.

As some of you may know, I received my first training as a cross-examiner in the Swedish Army. I was trained to interrogate Russian prisoners-of-war, the idea being, or the hope, or rather the fear, that we would ever get any. That was my training anyway. In the Army you learnt a lot about many things. One thing that you learnt very quickly with respect to cross-examination, or interrogation, is that it is absolutely useless to ask the cook in the platoon about the plans of the regiment. In other words, you must put the right kind of question to the right person. Otherwise it is just a waste of time. A lot of that does in fact happen. You end up in almost surrealistic discussions between counsel and witness when it really has turned out very quickly that the witness just does not know. You should then stop the cross-examination and move on to a new witness.

A couple of other basic rules of cross-examination should also be kept in mind. For example, never try to have the witness agree with you with respect to certain conclusions. In 99 cases out of 100, the answer is "no". If you ask the question, "Well, Mr X, would you agree with me that …", the answer is almost always "no". What is your next question then? To try to win over the witness to your view of things is almost always, I would say, hopeless. Likewise, never argue with the witness. I have been in many arbitrations where counsel and the witness simply start arguing. That it is not very helpful for the tribunal.

Another peculiarity that I have found very often in cross-examination here in London is that counsel are "putting" things to the witness, again in the hope of getting a positive answer. In my experience that is just as hopeless as having a witness agree with you, because the answer is always "no". There is no need to suggest things and put things to the witness in order to challenge the witness, as that can be done in many other ways. What I have just said is really basic stuff in my view when it comes to cross-examination, but it seems to be forgotten quite often. Another basic rule regarding examination of witnesses, when you act as counsel, is that you are supposed to convince the *tribunal*, not the witness, not the other party, not your client, well maybe sometimes your client, but certainly not the witness. If you try to have that very basic rule in mind when you conduct your cross-examination, I am sure it will be much more focused.

When I chair arbitrations myself and diplomatically complain about cross-examination, usually that it takes too long, the comment I typically get from counsel is: "Well, Sir, I put the questions but I cannot really control the answers". My response then is that the answer very much depends on the question. If you ask an open-ended question—what, why, how?—questions like that, you will of course get an open-ended answer. That takes time. It is then difficult for counsel to try to interrupt in the middle of that too-long answer, because after a while the arbitrator will let the witness finish his sentence, or gets a bit irritated, if counsel tries to interrupt. Precise, short questions. That is the way to do it.

I have spent some time on this, because when I thought about the different aspects I wanted to raise tonight, I came to the conclusion that, as far as the conduct of arbitration is concerned, the length of cross-examination is probably what distinguishes arbitration in

London the most from other arbitrations I have been involved in. If one tries to keep these rather basic principles of cross-examination in mind, that would certainly shorten cross-examinations.

May I then move on to the *fourth* and final aspect that I wanted to address, namely, *appeals on questions of law*. This is really the only strictly legal, or statutory, comment I have with respect to arbitration in London. Even though it is probably not such a big problem in practice, s.69 of the 1996 Act does stand out because it is different. You will not find such a provision in very many other modern arbitration Acts. Your country did not adopt the UNCITRAL Model Law, nor did my country. The 1996 Act, however, is certainly very much Model Law compatible in all respects, save for this provision which stands out.

A basic principle of international arbitration is that there should be no retrial of the merits of the case. You have one bite at the apple only. It is a fundamental principle of arbitration. Indeed most parties find it a very important advantage of arbitration compared to going to court. Against that background, I think many users of arbitration are a bit surprised to find this particular provision in the 1996 Act. As far as I understand, in practice this provision does not cause very many problems. I have not had a chance to look at any statistics, but I have talked to some colleagues. If I understand correctly, in practice it does not really cause problems, but when you look at the Act it stands out. I think it may cause concern from time to time with parties and those not so experienced in international arbitrations and with those who do not have any previous experience of arbitration in London.

One can wonder why it was included in the 1996 Act. As far as I understand, the parties can basically contract out of this provision without any problems. I suppose that one reason could have been that the courts want to have the possibility to develop the law, i.e. to rule on interesting and important issues of commercial law, so as to be able to create precedents. Nowadays, many arbitral awards in the commercial field are in fact published. If you look at this particular aspect from a user's perspective, many practitioners today would probably say that they could get enough information about how commercial law or English law is being developed in arbitration without the need to go to court. Another possible reason could have been that it was felt that there was a need to have the possibility to go to court as a last resort, if the result were to be completely unacceptable, which I think, luckily, happens very seldom, certainly in this country and many other countries too. On the other hand, you could say that the idea behind arbitration is that you should select your arbitrators, select the right persons as arbitrators and that if you do that, the risk of this happening, i.e. getting completely unacceptable results, is very much reduced. Anyway, it is there. It stands out as a peculiarity of English arbitration law, but it does not really create many problems in practice.

Well, ladies and gentlemen, Voltaire, the well-known philosopher, once said: "the art of boring is to tell it all", so I will stop there. Thank you.