

EDITORIAL

Michael Mustill: A Reminiscence

The arbitration world lost a giant when Michael Mustill departed in April of this year, just a few days short of his 84th birthday. A man of enormous intellect and wit, with a fine capacity for sincere friendship, this generous Yorkshireman enriched us through contributions as counsel, judge, scholar, and mentor.

Lord Mustill sat as judge successively in the High Court of London, the English Court of Appeal and the UK House of Lords, the last of which morphed into the Supreme Court of the United Kingdom. After retirement from the bench, his service as arbitrator touched a wide spectrum of disputes, implicating expertise in both private and public law. His treatise on commercial arbitration shines for a robust analysis of arbitration law,¹ as does the innovative and seriously brilliant exploration of what the ‘new *lex mercatoria*’ might (or might not) comprise.² He served his alma mater, Cambridge, as Arthur Goodhart Professor, Fellow of St. John’s College, and Honorary President of the Cambridge University Law Society.

Among his judicial pronouncements in the field of international arbitration, several will be ‘worth a detour’ as the Michelin Guide says of an exceptionally good gourmet restaurant. In this connection, we might stop to consider the House of Lords decision in the *Channel Tunnel* case,³ for which Lord Mustill delivered a majority speech addressing the vexing question of when and how courts in one country should play a part in overseas arbitrations.

The case finds its genesis in the body of water separating England and France, known as La Manche in the language of Molière and the English Channel for those partial to the language of Shakespeare. Connecting the Atlantic Ocean to the North Sea, these waters historically provided the British with enhanced protection against military invasion, albeit at a cost to efficient commerce with the Continent.

In 1988, after extensive debate, the governments of France and Britain agreed to construct a monumental tunnel of 31 miles (50 kilometres) joining the two countries. The parties to the construction contract designed an elaborately bespoke

- 1 Michael J Mustill and Steward C Boyd, *Commercial Arbitration* (2nd edn, 1989; updated Companion Volume 2001).
- 2 Michael Mustill, ‘The New *Lex Mercatoria*: The First Twenty-five Years’ (1988) 4 *Arbitration International* 86, adjusted with amendments from *Liber Amicorum for Lord Wilberforce* (OUP 1987).
- 3 *Channel Group v Balfour Beatty Ltd* [1993] AdjLR 01/21.

dispute resolution mechanism, calling for ICC arbitration in Belgium and designating not one, nor two, but three different legal systems to govern the relationship. The arbitrators were to apply ‘principles common to both English law and French law’. Absent such common principles, the agreement was to be construed according to ‘general principles of international trade law as have been applied by national and international tribunals’.⁴

As might be expected in a project of this scope, differences of opinion arose between the concessionaire and the construction companies. The contractors contended that changes in the nature of their tasks made the original price inadequate, and threatened to stop work if not properly paid.

The concessionaire sought judicial relief outside the arbitral process, asking English courts to restrain the contractors from suspending work pending resolution of the dispute. Ultimately the matter reached the House of Lords. Although admitting that an English court had power to grant an injunction, Mustill reasoned that such power should not be exercised under the circumstances of the case. Noting the heavily-negotiated arbitration and choice-of-law provisions, rather than a routine standard-form clause, he wrote as follows.⁵

The parties chose an indeterminate ‘law’ to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that process outside the territories of the participants. This conspicuously neutral ‘anational’ and extra-judicial structure may well have been the right choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made. The appellants now regret that choice. . . . Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration.⁶

One can only imagine the dilemma facing Lord Mustill. In the dynamics of construction projects, little causes more harm than work stoppage. The potential damage

4 Clauses 67 and 68, Construction Contract dated 13 August 1986, cited at paras 26–28 of Lord Mustill’s speech.

5 Para 100 of Lord Mustill’s speech. When the case was decided, the relevant issues were governed by the Arbitration Acts of 1950 and 1975. Later the 1996 Arbitration Act adopted s 2(4), providing that ‘[t]he court may exercise a power conferred by any provision of this Part . . . for the purpose of supporting the arbitral process where (a) no seat of the arbitration has been designated or determined, and (b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so’.

6 One notes the delicate and diplomatic ambiguity of the reference to the arbitral seat: ‘whether right or wrong, it is the choice the parties have made’. At the time, arbitration law in Belgium was controversial and misunderstood, due to an experiment with a form of delocalization that precluded annulment of procedurally defective awards if, as in the Channel Tunnel case, the parties came from outside Belgium. As in force between 1985 and 1998, Belgian Code Judiciaire art 1717(4) provided, ‘Les tribunaux belges ne peuvent connaître d’une demande en annulation que lorsqu’au moins une partie au différend tranché par la sentence arbitrale est soit une personne physique ayant la nationalité belge ou une résidence en Belgique, soit une personne morale constituée en Belgique ou y ayant une succursale ou un siège quelconque d’opération.’ Annulment, of course, presents a different issue from pre-award judicial support for the arbitral process.

to tunnel progress would have provided a strong argument for directing work to continue uninterrupted. A good judge, however, will carefully analyse the interaction between judicial power and the arbitration framework chosen by sophisticated parties with access to competent counsel.

Any reminiscence of such a great man should include a personal vignette. During one of Michael's visits to Boston we took in a baseball game together. The Red Sox, our local team, were playing their sworn rivals, the New York Yankees. Michael revealed that during his army service he sometimes narrated baseball games for American troops stationed in England. Then with frightening precision he imitated noises for a host of plays: the whoosh of an infield fly ball before being caught by the second baseman; the thud of a slow runner tagged while trying to slide into third; and the smack of a home run hit by a right-handed batter on its way to clearing the left-field wall at Fenway Park. Enough to cause envy in the best radio sound effects man.

Michael Mustill will be missed.

Rusty Park
Boston University
wwpark@bu.edu