GENERAL REPORT ON ARBITRATION

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This part of the General Report is confined to a consideration of Arbitration in the common law countries and should be read together with the General Report submitted by Professor C. Punzi.

Arbitration is a very suitable topic for a Congress which is devoted to the theme of procedural law and legal cultures because few subjects more clearly illustrate various themes of legal culture than arbitration. The differences between legal cultures in relation to arbitration are not confined, however, to a simple distinction between the civil law and common law legal "families", since it will become apparent that there are substantial differences of approach between the common law countries themselves on fundamental issues relating to arbitration. Some of these differences are becoming less pronounced because of the influence of international norms, and in particular the Uncitral convention.

All common law countries take as their starting point the idea that arbitration is a consensual arrangement which derives its force from a contract between the parties to the dispute in question, whether entered into as part of the transaction which is the subject-matter of the dispute or as a result of some later agreement. This theory leaves the courts of the state in which the arbitration takes place with a relatively minor role confined to dealing with problems about the appointment of the arbitrator and basic issues about the arbitral procedure. Most common law jurisdictions have pursued a policy (not always successfully) of reducing the courts' role still further so far as possible. However, there is a growing recognition that fundamental rights, such as those conferred by the European Convention on Human Rights and Freedoms, have to be safeguarded within the arbitration process, and that some legal principles (such as rules of competition law) may

have to be recognised and given effect even if not directly relevant to the dispute before the arbitral tribunal.

Although the methods of appointing arbitrators vary from one jurisdiction to another, all common law jurisdictions accord primacy to the choice of the parties or whatever default mechanism the parties may have chosen where they are unable to agree upon a choice of arbitrator. There seems, however, to be a growing tendency to challenge the appointment of arbitrators. This in turn seems to be part of a growing tendency to engage in "satellite" litigation in the courts in order to gain advantages within the arbitration process (or perhaps to frustrate it completely).

It is also generally the case that the courts will uphold the right of the arbitrator to decide upon a procedure for the arbitration and will not interfere with his decision unless fundamental procedural values are being infringed. There is no need to follow closely the procedures of the courts of the state, but again there may be differences as what degree of deviation from court procedures is regarded as infringing fundamental procedural values. Many commercial arbitrations in the common law world are little different in their procedure (and cost) from those of similar disputes heard in the ordinary courts.

Although the common law systems have always gone to great lengths to support the right of an arbitrator to be the final judge of questions of fact, they have had much more difficulty in accepting that an arbitrator can be the final judge of a question of law. For this reason various techniques have been developed for resort to the ordinary courts by way of "review" or "appeal" against arbitrators' decisions on legal questions. It is important also to note at this stage that in the common law tradition the interpretation (construction) of the words of a contract —perhaps the most common question of law to arise in commercial arbitrations— is treated as a question of law for this purpose. Once the possibility of appeal against an arbitrator's decision is accepted, various different techniques may be employed whereby reference to the courts can be made, such as review for an error of law on the face of the record, a "special case" procedure and a true appeal. The trend seems to be in favour of adopting a true "appeal" procedure, but restricting such appeals to defined categories of case where questions of law of some general importance are involved. Many systems now also recognise the possibility of the parties agreeing to waive any right of review or appeal at the outset of the arbitration.

Although arbitration in the common law world is largely a device for the resolution of commercial disputes —and not surprisingly most of the cases reaching the courts fall into this category— arbitration as a technique of dispute resolution is widely used in common law jurisdictions for other purposes, such as fixing compensation for compulsory purchase of land and other "public law" disputes. There is also a growing tendency to use what might be called "sub-arbitral" devices for the resolution of small disputes (such as small claims), and to provide a temporary solution to disputes where there is a continuing commercial relationship between the parties which needs to be maintained until a permanent resolution of the dispute can be achieved. An example is the use of "adjudication" —a sort of short—term, informal, decision of an expert in building and engineering disputes which is designed to keep the project on which the parties are engaged going, leaving a permanent solution to be arrived at through arbitration in the strict sense when the building, etc. is completed. In England any party to a construction (building or civil engineering) contract has a statutory right to invoke this technique.

We may also note that the idea of arbitration as a purely consensual arrangement between parties having a common interest in the dispassionate resolution of the dispute can itself no longer be taken for granted. Arbitration has become an "industry" with all that implies for the intervention of the national courts and legislature. Attempts to keep the general law at arms' length from arbitration seem doomed to failure.