CHAPTER 7

From Supreme Court to Arbitrator: A Challenging but Enjoyable Journey

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§7.01 INTRODUCTION

I spent twenty-four years of my professional life sitting as a judge before my retirement from that role in 2013. I then turned to sitting as an international arbitrator as a means of occupying some of my spare time during my retirement.

It was never my intention to become a full-time arbitrator, even if I could attract enough business to make that a possibility. I had various other interesting things to do for which I wanted to remain available. Arbitration was to be, for me, very much a part-time occupation, and so it has remained. But, I have been fortunate enough to receive several appointments over the years since that retirement. So, I have, at least to some extent, been able to adapt to this new role. I was soon to find that, although these two methods of applying one's mind to resolving disputes may appear to be very similar, there are some significant differences. I found that the path from one role to the other was not quite as easy as it might seem to be.

I should start by saying a bit more about my role as a judge. It was an unusual career, even for someone who has practised law throughout his career in the United Kingdom. I did not seek or apply to be a judge. Until quite recently, the responsibility for making appointments to the senior judiciary was vested in the Prime Minister on the recommendation of the principal government law officers – the Lord Chancellor for England and Wales and the Lord Advocate for Scotland. Applications were not invited or expected. If, like me, you were among those who were qualified for appointment, you just had to wait for this to happen. In my case, when the invitation came, it was wholly unexpected. I was invited by Mrs Thatcher, then the Prime Minister, to accept appointment direct from the Bar in Scotland, where I had been practising as a

self-employed advocate for the previous twenty-four years, to be the President of the Court of Session, Scotland's highest court.

I was very fortunate. I do not believe that this promotion would have been extended to me under the current system, by which appointments are made on the recommendation of a judicial appointments committee following a process of application and interviews. It would never have occurred to me, as someone who had never sat as a judge of any kind, to apply to be appointed directly to the position of the Court of Session's President. As it happened in my case, the Lord Advocate provided the Prime Minister with a list of three names, to which he attached his own assessment of each candidate's suitability for the appointment. It was based on that assessment that Mrs Thatcher chose me. It was then up to me to prove that I was capable of performing the duties of that office.

My function as the Court's President was to sit as an appellate judge, sitting with two and sometimes four other colleagues. There were many interesting issues that I had to deal with in that capacity, but they were always issues of law. It was not our function, as appellate judges, to take evidence from witnesses. And I never sat on my own as a trial judge. So I did not have at any time during my judicial career to assess a witness's credibility. But, the judgments which I delivered always had to be based on an assessment and understanding of the facts with which we were presented. I had the advantage of many years of practice as a trial lawyer behind me when I was performing that exercise.

Then, after sitting for seven years as President of that Court in Edinburgh, I moved to London. I was appointed to sit as a Lord of Appeal in the House of Lords at Westminster. One of its functions at that time was to act as the court of final appeal for the whole of the United Kingdom. So here I was, sitting again as an appellate judge, this time as one of a panel of five and sometimes seven members of the House of Lords' Appellate Committee. Then, in 2009, after thirteen years in that role, I moved again when the appellate role of the House of Lords was transferred to a newly created UK Supreme Court. I remained as an appellate judge in London, but I was now sitting as the Deputy President of that court. It was from that position that I retired after a further four years as an appellate judge.

At no time during my twenty-four years as a judge was it open to me to accept an appointment as an arbitrator. The work I was doing was too demanding for that. In any case, I was required by the nature of my employment to devote my full time to the job for which I was being paid. I had done some arbitration work in Scotland before I was appointed to be a judge. But that was a long time ago. In turning to international arbitration after my retirement, I was, in effect, venturing into new and uncertain territory.

§7.02 MY CV

My first move was to apply to join a set of chambers in London as a door tenant. Unlike some of my English judicial colleagues who turned to international arbitration on their retirement and were able to return to the chambers from which they had practised as

barristers before becoming a judge, I had to start anew. My place of work before becoming a judge had been in Edinburgh. But there is not yet much of a market for international arbitration in Scotland, so I decided to place myself in London. I was greatly helped by the fact that Brick Court Chambers accepted my application. I did not have much to offer them other than the fact that I had been a judge at the highest level for so many years. I suppose it was my reputation as a judge that persuaded them to accept me. I had no background as an arbitrator to offer them. But they were kind enough to overlook that fact. I was introduced to the clerk who managed their arbitration business. She gave me a warm welcome. The reality of the task that lay before me was made plain, however, when she asked me to prepare a CV for publication on their website.

This was a bit of a challenge. It was never our practice as judges to prepare CVs. We did not need to advertise ourselves. Indeed, during my time as an advocate, before I became a judge, any form of self-advertisement was forbidden by our professional conduct rules. So I was not practised in the art. I was a beginner. Furthermore, I did not have much to say about myself beyond a listing of the various positions I had held as a judge and a brief reference to aspects of my practice before I became a judge. I did not think that it was relevant to attempt to list the various judgments about arbitration in which I had participated, which included the well-known cases of *Fiona Trust* and *Dallah*.[1] What was being looked for was my experience as an arbitrator. It was, of course, not thinkable that I would just invent one or two entries to try to exaggerate what little I had to say about myself. I looked at some of the CVs that were available under the names of other members of my chambers who were in active practice as international arbitrators. That was enough to show that I would be at a serious disadvantage in the open market until I had at least a few appointments to list under my name.

Now, several years later, I have a list which I can publish, thanks to a number of appointments which have come my way as a result of personal contacts. The list is still very short, but at least it is a start. Furthermore, I can now claim to have had enough experience to venture a few observations about how, in practice, sitting and working as an arbitrator differs from sitting and working as a judge.

The lesson I take from this is that one's CV matters in a way that was entirely alien to me and was indeed entirely contrary to my instincts when I was a judge. But it is an essential aspect of life as a professional arbitrator for reasons that I fully understand. It is, after all, up to those who are advising the parties to an agreement to refer their disputes to arbitration to justify their suggestions as to whom they should seek to appoint as their arbitrators by reference to their qualifications and experience. Especially in the international field, this cannot be done by word of mouth alone. It requires a demonstration of what candidates for appointment have to offer by reference to what they have said about themselves in their CVs.

1. *Fiona Trust & Holding Corporation v. Privalov and Others* [2007] UKHL 40; *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

§7.03 THE PANEL

Throughout my time as a judge, I sat with other judges with whom I worked day after day and whose experience and character I knew very well. It was my responsibility to decide who was to sit with me when I was President of the Court of Session in Scotland, and I shared that responsibility with the President of the UK Supreme Court when I was its Deputy President. Almost all the judges with whom I worked in these courts were permanent members of the court in which I was sitting. So, my relationship with them was a continuous one. We met frequently, and there was never any difficulty in maintaining contact with them when this was needed. Moreover, as the numbers at my level in each court were not large, it was a closed community. There were normally only seven other judges at the appellate level with whom I could work in the court in Scotland, and there are only twelve Justices on the UK Supreme Court.

One of the pleasures of moving to the field of international arbitration is the opportunity that it gives to meet and work with a much wider circle of experienced practitioners. This presented me with new challenges. The majority of those with whom I have worked as arbitrators have been English, but I have worked with two from Canada, one from Sudan, one from St Lucia and one from Trinidad and Tobago. In each case, however, it was for one arbitration only. We were starting from scratch in each case, and there was no continuity. Much of our contact before we met to conduct the hearing was by email or, when these systems became readily available, by Teams or Zoom.

Remote working of that kind is easy if the person with whom the contact is made is someone you already know well. One has to be so much more careful when dealing in that way with people whom you do not know. Of course, things improve when you meet and discuss things face to face. But even then, I sometimes found that time pressures left little time to get to know my colleagues well enough to be at ease with them. Such lack of ease affected the quality of our decision-making, which left me with the feeling that I had not given my best to the process.

I was fortunate in the case, which I shared over a prolonged period with colleagues from St Lucia and Trinidad. We decided at an early stage to meet over a period of four days in Port of Spain for a two-day preliminary hearing and a site visit. The site visit took us far from civilisation into what was rightly described to me as ‘the jungle’. After a long and rather bumpy drive, we inspected a variety of installations located in a dense forest beneath which was in an extensive oilfield. This was a valuable bonding process.

Shortly afterwards, COVID-19 reduced us, like everyone else, to remote working as we took the parties to the arbitration through the preliminary stages prior to taking evidence. We had then to conduct a fourteen-day hearing by Zoom with counsel working in Trinidad and London and witnesses speaking to us from various places in the UK and North America. I do not think that we would have been as relaxed as we were throughout that process had we not met and got to know each other beforehand. It was not an easy case, but we were able to reach a unanimous decision in a reasonable time without too much difficulty.

The lesson I take from this is that it is worth spending time to get to know one's colleagues and to feel at ease with them, before getting into the hearing and its aftermath. That was new to me, as I never had that problem when I was sitting in my courts as a judge. Much of the preliminary business has to be conducted online. That saves time and costs. But that is no substitute for the benefits that are to be derived from personal contact, especially with people you have never met.

§7.04 THE INSTITUTIONS

Two of my arbitrations, including the first, were what are best described as ad hoc. With the agreement of the parties, we applied the UNCITRAL arbitration rules. But all the other aspects of the procedure were for us to work out among ourselves. We did not see this as a problem, as we had the advantage in each case, as we had all been judges with many years of judicial experience in common law courts behind us. We stuck to what we knew in those cases, and we did not feel that we needed guidance from anyone else. But, I have had to understand and work with institutional rules in each of my other cases. For me, as a former judge, that was a new and not always comfortable experience.

I am not in the least adverse to the need for rules. On the contrary, much of my time on the courts on which I have served was taken up with keeping our rules of court up-to-date. In the case of the UK Supreme Court, I was closely involved in the formulation of its court's rules and practice directions when that new court was being set up before it opened in 2009. I had the same responsibility when I was appointed Chief Justice of the newly created Abu Dhabi Global Market Courts eight years ago. What was new to me was the people to whom these rules were addressed. In my judicial capacity, I was making, revising or creating rules that were to be observed by someone else. These were the litigants and counsel who were appearing before us in our courts. In the case of the institutions, however, the rules were addressed, in part, to me. It was my responsibility as an arbitrator to read, understand and observe what they were telling me to do.

The first institution whose rules I had to work with was the International Court of Arbitration (ICC). For the most part, its Rules caused me no difficulty. They provide a well-designed template of rules, whose object and effect is to set and maintain a sound system of working for all who make use of them. They are particularly helpful for those who need that kind of guidance, and they do not present any obstacles to those whose background is that of litigation in the courts. But I was surprised by the extent to which the proceedings were subject to the supervision of the Court itself. The most surprising was the provision in what is now Article 34 of the Rules that, before signing any award, the arbitrators must submit it in draft form to the Court. The draft is then open to the making by the Court of modifications as to its form and, without affecting the substance of the arbitrators' liberty of decision, to the drawing of attention by it to points of substance too. Then there is the direction that no award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

I have to confess that this provision did not sit easily with my many years of working as a judge in my own courts. It is true that our practice in the UK Supreme Court was to show our judgments in draft to our court reporter before they were made public. But this was so that they could be checked over for any possible misprints, incorrect references or other mistakes of that kind. We did not expect the reporter to raise any points of substance with us. We had already raised them with the other members of the court before finalising our judgment. The provisions in Article 34 took me into new and uncertain territory.

I was also surprised by what happened when we submitted our award in that case to the Court for scrutiny. Perhaps we were unlucky, but the process took a remarkably long time, given the quality of the modifications that came out of it. Almost nothing of any consequence was raised with us by the official who scrutinised our draft award. That this was so was due very largely to the meticulous care that our chairman took when he was preparing the draft. He recorded each stage in the procedure from start to finish in scrupulous detail. It was obvious to me that had he not done this, our draft would have been regarded as defective and open to many more modifications for us to consider than was in fact the case. His careful attention to all those details, as he built up his draft step by step throughout the proceedings, saved us a lot of bother in the end. But this was a very different process from that which I was used to following as a judge. I felt that I was having to devote more attention to the procedure than to the reasoning behind the substance of our decision.

I was to find out later that the ICC's approach to supervision of the award is not universally followed. The rules of the International Centre for Settlement of Investment Disputes (the ICSID), with which I am working at present, do not require the draft award to be submitted to the Centre for scrutiny. Nor do the London Court of International Arbitration Rules (the LCIA). It is no doubt true that scrutiny of the award by the ICC ensures a high standard of the writing of awards. But I wondered whether too much emphasis was demonstrated in my case on a detailed narrative of the procedure, as compared with the attention that seemed to have been paid to the reasoning that led us to our decision.

§7.05 THE PROCEEDINGS

With very rare exceptions, all the proceedings in which I participated as a judge were held in public. Article 6 of the ECHR requires this to be so, but the tradition in the UK of holding our court proceedings in public was established long before it became a party to the European Convention. This applies throughout the proceedings from the earliest stages in the taking of decisions as to points of procedure to the delivery of judgments in open court and their publication. Only in very rare cases, usually for reasons of national security, is it open to the court to go into what are described as closed proceedings. An important aspect of that way of working is that the judge or judges are normally given a position of pre-eminence in the courtroom. And they are usually dressed in some kind of uniform that distinguishes them from those who appear before them to argue the case as advocates on behalf of the litigants.

The fact that the process of arbitration is, from start to finish, confidential is perhaps the feature that distinguishes it most from my previous existence as a judge. As to procedure, in my own case, the contrast with the way we conducted our proceedings in court in the House of Lords and the UK Supreme Court is not that great. In the House of Lords, we, as the Law, Lords sat as members of a committee, its Appellate Committee. We did not wear any uniform. We were dressed in business clothes, just like the members of any other committee of the House. Furthermore, the room in which we sat was not like a courtroom at all. It was a committee room. We sat at a table which was at the same level as the tables occupied by the counsel who were appearing before us. When our appellate jurisdiction was transferred to the newly established Supreme Court, we decided to adopt the same arrangement. The justices in its courtrooms sit at the same level as counsel and they are dressed in business attire, as too are counsel. So, to the casual observer – if one can imagine such a person as being present in an arbitration – there is a very close affinity between what I was used to as a judge and what I now find myself engaged in when sitting as an arbitrator.

There are, however, some very important differences. The first is that we, as arbitrators, do not have the authority of a court behind us. This means that there is an edge, a tension, that is present in all aspects of court proceedings that is missing in an arbitration. Of course, everyone who appears before a court or a panel of arbitrators must be given a fair hearing. But courts exist to serve the public, and they are subject to many demands on their time. Timetables when set must be adhered to. The convenience of the parties must give way to what the court considers to be the best use of its time. The opportunities that exist for challenging an award or refusing its recognition or enforcement under Article V of the New York Convention[2] are different from those in the case of judgments issued by a court. Arbitrators have to be very much more careful as to the way they conduct the proceedings and the way they treat the parties that appear before them than a judge has to be when sitting in his own court.

Then there is the relationship with the advocates and what, as an arbitrator, one expects of them. In the case of a judge, it is very much at arm's length. The judge and the advocate enter and leave by separate doors. There is no opportunity for a casual conversation between them. Indeed, if any of the advocates happen to meet the judge while the hearing is in progress, any contact between them is kept to a minimum. Keeping one's distance is regarded as necessary to preserve the judge's impartiality.

I soon found that a more relaxed approach was possible when sitting as an arbitrator. This is partly because of the physical layout in the hearing room, which tends to bring the arbitrator closer to the parties than is the case in a courtroom. One can have a conversation with them in a way that a judge cannot do. But it is also due to the nature of arbitration itself. An arbitrator has been described in one of the textbooks with which I was familiar when practising in Scotland as 'an equitable judge … presiding over an amicable tribunal, in the exercise of a private and voluntary jurisdiction'.[3] It seems to me that the word 'amicable', although written well over 150

2. The New York Convention on the Recognition and Enforcement of Foreign Awards, New York, 19 Jun. 1958.
3. JM Bell, *Law of Arbitration in Scotland,* 2nd ed. (1877), p. 15.

years ago, captures the essence of the difference between a judge and an arbitrator. Arbitration is an amicable process of resolving disputes. Court proceedings, on the other hand, are never amicable.

That is not to say that the process is entirely without formality. Of course, formality, to some degree, is a necessary part of preserving a proper balance between the parties in the conduct of the process. Institutional rules have their part in this process. So too are steps that an arbitrator can take to encourage economy on the part of the advocates in their presentation of their arguments, both written and oral. It is normal practice in the UK Supreme Court to set limits on the number of pages and on the time each side has for the presentation of its oral argument. This is done by directions issued by the court, with which the parties must comply.

The taking of such steps in an arbitration cannot be compelled in the same way. They should normally be done with the agreement of the parties. But that should not be too difficult to achieve. The art of advocacy, after all, is adapting one's presentation to what will best appeal to and hold the attention of the audience. Suggestions by the arbitrators as to what would suit them best should be listened to with close attention. Twenty or thirty pages of written argument are more likely to achieve this than sixty or eighty. So too, in the case of the oral presentation, adhering to an agreed allocation of time between the parties will work to the parties' benefit in a way that an uncontrolled and prolonged presentation will never do.

§7.06 THE AWARD

Here too, the difference between the public nature of court proceedings and the confidential nature of arbitration makes itself felt, as does the need to provide details of the proceedings from start to finish within the award itself.

The judgments that are given by a judge in open court are addressed to a wide audience. In addition to the parties themselves, it includes all those who may be interested in reading it for a variety of reasons, such as other judges, academics, law students, the general public and the press. When they are being given at the highest level, which is what I was used to, they have an important function too. Both English and Scots common law derive their strength and their consistency from the operation of the doctrine of precedent. Each judgment takes its place in the hierarchy of courts according to this doctrine. Every judgment is a binding precedent as regards all courts below that from which it emanated. The certainty that the doctrine gives to the system is central to the existence of the rule of law in those jurisdictions, as they are not bound by codes. If this were not so, the law in their case would become unpredictable, changing from court to court and case by case.

This imposes a particular responsibility on the appellate judges sitting, as I was, at the highest level. We were, in each case, in effect, making law. A friend of mine who is a professor at the University of Passau found this hard to accept. 'The duty of a judge is to apply the law, not to make it', she said. That is not, however, the way the common law operates. As a consequence, it is the responsibility of those who are writing judgments that are to be given in the UK Supreme Court to set out the reasons for the

decision in considerable detail. The analysis may involve distinguishing the case from any previous case in which a similar issue arose for decision. It will also provide guidance for the judge in the lower courts, for whom it will be a binding precedent.

Freed of that responsibility, the award given by an arbitrator can be much more concise. It is being addressed, after all, to the parties themselves only and to no one else. The factual basis for the decision will need to be set out very clearly, but the law will not normally need to be analysed or explained. Setting out the law that is being applied should not occupy more than a few paragraphs, unlike a Supreme Court judgment where it can run into a hundred paragraphs or more. This lightens considerably the burden that goes into its preparation.

However, the requirement to include details of the proceedings in the award was, for me, an unexpected challenge. As judges, we left this to the clerks of the court, who maintained a detailed record of the whole proceedings from the start to the end without any input from us. That was their job, and we left it to them to carry out according to the well-established practice. I appreciate that arbitrators can employ clerks, but I have not yet had the benefit of that service in the arbitrations in which I have been engaged so far. In any event, I appreciate that good practice requires a narrative of what happened to be set out in the introductory part of the award.

The question which has troubled me is how detailed that narrative has to be? My first encounter with this requirement was not encouraging. It was in the ICC arbitration that I mentioned earlier. Our chairman was very familiar with what the ICC was looking for, so he erred on the side of caution and left nothing out. Some time later I assumed the responsibility of preparing the award in an ad hoc arbitration. I decided to concentrate on the more important stages of the process, avoiding what I regarded as too much detail. I also decided to set out the reasons for the award in an appendix. I felt more comfortable with this approach, as I was able to draft the Appendix in the same way as I used to do when I was preparing my judgments. I avoided what I felt would be the clutter of the procedural narrative. My colleagues accepted my approach. But I am not sure that the ICC would have approved.

§7.07 COSTS

One of the privileges that I enjoyed as a judge was that I never had to deal with the assessment of costs. There was a clear division in the courts on which I sat between the responsibility of the judge, which was to make the order as to costs, and its application to the facts if the parties were unable to agree. It was left to others to make a detailed assessment. Arbitrators do not have that luxury.

Normally, having to resolve disputes about the detailed assessment of costs should not overburden the arbitrator. But that was not so in my most recent case. The procedure, in that case, was very long drawn out, and there were eminently stateable arguments by both sides, who were not on good terms, for arguing that a detailed examination should be undertaken as to where the fault lay for charges that might be regarded as excessive. Many of them had to be examined one by one. Eventually, the parties settled their differences. But that was not until after a lot of work had been done

to prepare a solution that could form the basis of an award. I did not enjoy that experience, which, until the case was settled, we could not avoid.

§7.08 SOME FINAL THOUGHTS

In the Scottish textbook to which I referred earlier,[4] mention is made of a celebrated case that belongs, as the writer said, to fabulous antiquity. This was the award that was delivered on the slopes of Mount Ida by the shepherd Paris on the competing claims for the prize of Beauty between the goddesses Juno, Pallas and Venus.[5] All other means of adjudicating their rival claims had failed. The difficulty was overcome by the parties agreeing to a submission to Paris as their sole arbitrator. A dangerous dispute between such powerful rivals was avoided by his final judgment, which they were all bound to accept.

It has not been my fortune to be asked to be an arbitrator in a case of such charm and delicacy. My cases have all been between state-owned entities and commercial organisations that have undertaken to provide them with goods or services. But they have brought with them the pleasure of working in an amicable environment towards the resolution of their disputes. The procedures that we have adopted, some ad hoc and others under institutional rules, have been easy to use and, for the most part, well-adapted to the cases before us.

In most cases, the fact-finding process was not too difficult, the exception being one in which we had to take the evidence by Zoom, which is not best suited to resolving issues of credibility. The issues of law were interesting and well-argued. When it came to drafting the awards in the cases where I was responsible for doing this, I enjoyed being relieved of the need to frame them in the same very detailed way as I would have had to do had I been sitting in the UK Supreme Court.

Above all, it has been a very real privilege for me to meet and work with the very experienced international arbitrators whom I have met on this unusual journey. I am grateful to them all for their guidance and understanding as I have adapted myself to their ways of working. I hope that I have been able to contribute something in return from my unusual background.

4. JB Bell, *The Law of Arbitration in Scotland* (2nd edn, 1877), p. 1.
5. Known to the Greeks as Hera, Athena and Aphrodite.