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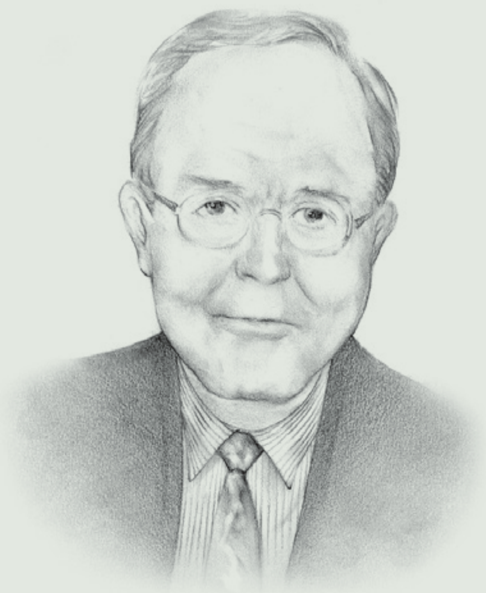
Money in the Law



Anthony Gordon Guest
(*b.* 8 February 1930)

Professor AG Guest was born in 1930, and was educated at Colston's School, Bristol and St John's College, Oxford. He was called to the Bar, Gray's Inn in 1956, and was made a Bencher in 1978.

He started his academic career as a Lecturer, University College, Oxford, 1954–1955; and then became a Fellow and Praelector in Jurisprudence, 1955–1965; Dean, 1963–1964. He was subsequently a Reader in Common Law to the Council of Legal Education (Inns of Court), 1967–1980; and Professor of English Law, King's College, London, 1966–1997. From 1968–1987 he was UK delegate to the United Nations Commission on International Trade Law.

Professor Guest was appointed a Queen's Counsel in 1987 and elected a Fellow of the British Academy in 1993. He is currently a Fellow of the Chartered Institute of Arbitrators.

His area of specialisation is in contract and commercial law with special interest in sale of goods, consumer credit, banking and negotiable instruments.

He has written extensively. Some of his major publications are: edited *Anson's Principles of the Law of Contract*, 21st to 26th editions (1959–1984) (translated into Bahasa Malaysia in 2000); edited *Chitty on Contracts*, 22nd to 28th editions (1961–1999); edited *Oxford Essays in Jurisprudence* (1961); *The Law of Hire-Purchase* (1966); edited *Benjamin's Sale of Goods*, 1st to 6th editions (1974–2002); edited *Encyclopaedia of Consumer Credit* (1975); *Introduction to the Law of Credit and Security* (1978); edited *Chalmers and Guest on Bills of Exchange*, 14th and 15th editions (1991–1998); *Only Remember Me* (anthology) (1993).

At the time when Professor Guest delivered the Second Sultan Azlan Shah Lecture in 1987, he was Professor of English Law at the University of London, and also acted as an external examiner to the Faculty of Law, University of Malaya.

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Money in the Law

Professor AG Guest
King's College, University of London

The Second Sultan Azlan Shah Law Lecture delivered by Professor AG Guest in 1987, has been irretrievably lost.

It is replaced in this volume with *Recent Developments in English Commercial Law*, a lecture delivered in 1980 at the University of Malaya, also by Professor Guest.

Recent Developments in English Commercial Law

Professor AG Guest
King's College, University of London

Text of a public lecture delivered at the University of Malaya, Kuala Lumpur on 5 September 1980.

My Lord Chief Justice, my Lords, Chairman, Ladies and Gentlemen. The academic world is full of paradoxes. There are lecturers who never lecture, tutors who never tutor and I am an external examiner, who is not here to examine. Nevertheless it is a great pleasure to have been invited by the University to visit Malaysia.

It is also a great honour to me to have been asked tonight to lecture to so distinguished an audience. I am rather daunted at the very large number who have come this evening. But I take this as a tribute, not to myself, but rather to the lasting bond of friendship which exists between Britain and Malaysia and particularly to the great bond of the common law. I only hope that the recent decision of the British Government to charge economic fees to overseas students will not break that bond irretrievably.

The subject of my lecture tonight is "Recent Developments in English Commercial Law". I wish to say from the outset that, in my opinion, the only justification for commercial law is that it serves the needs of businessmen. Businessmen require law to be certain so that they can plan ahead with respect to their rights and obligations. But they also require the law not to remain static. They wish it to develop in order to represent changes in trading and financial conditions. It is about such developments that I wish to speak tonight.

Mareva injunction

The first of these is the development of a special form of injunction, the *Mareva* injunction, which restrains a defendant from removing his assets from the jurisdiction. Those in practice will certainly know that it is one thing to obtain a judgment and another thing to enforce it and that this problem is particularly acute when a foreign defendant is involved. A foreign defendant may just sit back and allow judgment to be recovered against him. It may then prove impossible to enforce that judgment in another State because he has not submitted to the jurisdiction. So, at the first whiff of litigation, the foreign defendant will remove his assets from the jurisdiction. It is that removal of assets that the *Mareva* injunction is designed to prevent.

The procedure is very simple. An application is made ex parte to the judge in chambers and it is accompanied by an affidavit which sets out the plaintiff's cause of action and also states the grounds on which he believes that the defendant has assets within the jurisdiction and the grounds on which he believes that those assets will be removed. The injunction when granted is rendered effective, not by serving it on the defendant, but by serving it on the keeper of the funds, normally a bank. The bank is then effectively restrained from parting with those funds since to do so would assist in a breach of that injunction.

Speed and secrecy are of the essence of this procedure. The injunction can be obtained before service of the writ on the defendant and in some cases even before a writ has been issued on an undertaking that the plaintiff will subsequently issue his writ. A return date is fixed on which the application becomes inter partes and the defendant may apply to have the injunction set aside. But in surprisingly few cases does such an application succeed.

Since London is still a commercial centre of the world, the operation of this type of injunction is especially important because of the funds which may be present in London either, say, in a bank or in the hands of insurance brokers and these can be made subject to the injunction. The *Mareva* injunction has been compared with the procedure on the Continent of Europe which is known as "*Saisie Conservatoire*". Very often, in continental legal proceedings, the first step in the proceedings is to seize the assets of the defendant and these will only be released to him if he provides security. It has been suggested that the *Mareva* injunction is, as it were, the English "*Saisie Conservatoire*". But in fact, as we shall see, the analogy is a false one. It has also been compared with the pre-trial attachment which is sometimes found in the United States under which the plaintiff attaches the defendant's assets and then that attachment founds jurisdiction of the court in the action. Again, however, as we shall see, that comparison is not an accurate one.

Where does the *Mareva* injunction spring from? And why is it called a *Mareva* injunction? It is so called because one of the first cases on the matter was entitled *Mareva Compania Naviera SA v International Bulkcarriers SA,*[1] and that has given its name to the injunction. Strictly, it ought to be called a "*Nippon* Injunction" because the very first case in which it was applied was a case[2] brought by a Japanese company, Nippon Yusen Kaisha, for hire under a charterparty. The company obtained an injunction to prevent the defendants, Greek charterers, from removing their assets from the jurisdiction. The injunction springs from section 45 of the Supreme Court of Judicature Act 1925, which provides: "A mandamus or an injunction may be granted or a receiver appointed by a interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." The English courts have deemed it just and convenient in certain circumstances to grant *Mareva* injunctions.

What are the conditions which must be satisfied before this far reaching power is exercised? One might have thought that the plaintiff would at least have to show as strong a case as he would have to show to obtain summary judgment under Order 14. After all the attachment of the defendant's assets at a very early stage in the proceedings is a most serious matter. But the Court of Appeal has

1 [1975] 2 Lloyd's Rep 509.

2 *Nippon Yusen Kaisha v Ktrageorgis* [1975] 1 WLR 1093.

ruled that all the plaintiff needs to show is a "good arguable case". This was established in the case of *Pertamina*[3] in 1978. The same case established that the injunction is not confined to money. It can extend to any property of the defendant which is present within the jurisdiction. As a result of this rather easy test *Mareva* injunctions have multiplied in the High Court, and particularly in the commercial court. This is not surprising because, of course, a great deal of trade is done on contracts subject to English law and the court will assume jurisdiction in such a case.

Nevertheless some qualms began to be felt about the ease with which the *Mareva* injunction was granted and as a result, in a later case, the *Third Chandris*[4] case, Lord Denning MR set out certain guidelines which have to be satisfied before the injunction will be granted. First, he laid emphasis upon a full and frank disclosure by the plaintiff of all matters within his knowledge which are material for the judge to know. Secondly, he said that the plaintiff must set out the grounds of his claim with particularity and the amount thereof, and fairly state the points made against it by the defendant—the latter requirement is perhaps, a counsel of perfection. Thirdly, the plaintiff should give some grounds for believing that the defendant has assets within the jurisdiction, and, fourthly, some grounds for believing that there is a risk of those assets being removed from the jurisdiction before the judgment or award is satisfied. These last two requirements are not too difficult: mere existence of a bank account is sufficient, and in one case[5] the fact that the defendants would not give their name and address openly to the court was held to suffice.

The injunction is not confined to money. It can extend to any property of the defendant which is present within the jurisdiction.

The *Mareva* injunction was never really a pre-trial attachment in the American sense of the word. As time went by, this has proved to be true in view of the decision of the House of Lords in *The Siskina*.[6] The facts of this case were that the plaintiffs were holders of bills of lading in respect of cargo shipped on board *The Siskina*

3
Rasu Maritima SA v Pemsabaan Pertambangan Minyak Dan Gas Bumi Negara [1978] QB 644.

4
Third Chandris Shipping Corp v Unimarine SA [1979] QB 645.

5
Bin Turki v Abu-Taba, The Times, 17 June 1980 (CA).

6
[1979] AC 210.

from Italy to South Arabia. The bills of lading were "freight pre-paid" and referred all disputes to the exclusive jurisdiction of the court of Genoa. A dispute broke out between the shipowners and the charterers of the vessel with regard to payment of freight. The shipowners unloaded the cargo at Cyprus and claimed a lien over the cargo for the freight. The plaintiffs said that the cargo had been wrongfully unloaded. They sought a *Mareva* injunction to prevent the shipowners (who were a one-ship Panamanian company managed from Greece) from removing monies from the jurisdiction. The amount was a considerable sum, for it so happened that, six weeks after the ship discharged her cargo in Cyprus, she had become a total loss. The insurance monies were payable in London to the shipowners' brokers. It was these monies that were the subject of the *Mareva* injunction.

The Court of Appeal upheld the grant of a *Mareva* injunction, but the House of Lords said that it had been wrongly granted. Their Lordships held that there was no substantive cause of action against the defendants within the jurisdiction of the English courts. You will remember that the bills of lading referred all disputes to the court in Genoa exclusively. They said an interlocutory injunction is not a cause of action in itself. It is only ancillary to and presupposes a substantive cause of action. A plaintiff could not, simply by adding a claim for a *Mareva* injunction, bring himself within the jurisdiction of the English court when there was no substantive cause of action within that jurisdiction. This case then clearly shows that a *Mareva* injunction cannot be used, as pre-trial attachment is sometimes used in the United States, to seize the assets and then say that that founds jurisdiction.

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A second point which has arisen is whether a *Mareva* injunction will lie against an English based defendant. Originally it was only granted against foreign based defendants but it has been recently held in three cases[7] that the injunction will also lie against an English based defendant, and quite rightly so. Why should the foreigner be discriminated against? It is true that he may be more likely to remove his assets from the jurisdiction; but so also may an Englishman or an English company. We know that nowadays it is possible to transfer vast sums of money simply by the twinkling of a bank computer's eye, from one financial centre of the world to the other. There is no reason of principle why an English defendant should not be placed in the same position. One of the cases which decides this point was a case,[8] rather strangely in the Chancery Division before Megarry J. The learned judge, in a characteristically comprehensive judgment, pointed out that the *Mareva* injunction constitutes an exception to the previously well-settled rule that the court will not grant an injunction to restrain a defendant from disposing of his assets *pendente lite* merely because the plaintiff fears that by the time he obtains judgment the defendant will have no assets against which the claim can be enforced.

Nowadays it is possible to transfer vast sums of money simply by the twinkling of a bank computer's eye, from one financial centre of the world to the other.

One of the further problems which has arisen in this area is the question of third party claimants to the funds which are frozen. A plaintiff who obtains a *Mareva* injunction may not be the only creditor of the defendant. There may be a host of others. Does it mean that, if a plaintiff obtains a *Mareva* injunction, he "scoops the pool" (so to speak) or at least goes to the head of the queue of the other creditors? What is their position when a *Mareva* injunction has been obtained? There have been two cases in which the position of secured creditors has been assured.

The first of these is *The Cretan Harmony*[9] in 1978. The contest in this case was between judgment creditors who had obtained a *Mareva* injunction and a receiver appointed by a debenture-holder to

7
Chartered Bank v Daklouche [1980] 1 WLR 107; *Barclay-Johnson v Yuill* [1980] 1 WLR 1259; *Bin Turki v Abu-Taba, The Times*, 17 June 1980.

8
Barclay-Johnson v Yuill, ibid.

9
[1978] 1 Lloyd's Rep 425.

whom the judgment debtor (against whom the injunction had been granted) had previously charged his entire property. It was held in this case that the *Mareva* injunction should be discharged so as to allow the debenture-holder to obtain the assets. Another case, in 1980, is that of the *Iraqi Minister of Defence v Arcepey Shipping Co SA*[10] where again the contest was between, on the one hand, the plaintiff who had obtained a *Mareva* injunction to prevent the removal of assets (monies under ship's insurance policies held by brokers) and, on the other hand, interveners who claimed to be mortgagees of the ship and assignees of the policies. Goff J varied the *Mareva* injunction so as to allow the brokers to pay the amount due to the interveners.

There is, however, still little authority on the position of unsecured creditors of the defendant—how they rank once a *Mareva* injunction has been obtained. Presumably, they just have to wait until the trial of the action.

These cases show, I think, quite clearly that it is incorrect to regard a *Mareva* injunction as a "*Saisie Conservatoire*". That procedure is designed to ensure that the assets of the defendant are preserved in case the plaintiff's claim succeeds and confers a degree of priority over other creditors of the defendant. It is quite clear that, in the present context, a *Mareva* injunction does not have that effect.

In the last case that I mentioned, the *Iraqi Minister of Defence* case, a third party was allowed to intervene in the action between the plaintiff and the defendant and the question has arisen whether this right of intervention by a third party is to be generally allowed. The person in reality restrained by the *Mareva* injunction is, as I have said, usually the custodian of the defendant's funds within the jurisdiction and normally a bank. The bank is not, of course, a party to the action between the plaintiff and the defendant. May the bank, in appropriate circumstances, be allowed to intervene in the proceedings to have the *Mareva* injunction set aside? Even if the bank is not a secured creditor, it may have an interest in seeing the injunction discharged.

10 [1980] 2 WLR 488.

If the defendant-customer is a good customer, and still in need of the services of the bank, the bank may, for example, have to advance funds from its own resources to keep the customer's business going.

In a recent case with which I was concerned, a London bank applied to intervene in the proceedings and to have discharged a *Mareva* injunction granted against its customer, a foreign bank. I am glad to say that the London bank was successful in that application. The judge held there was an inherent jurisdiction in the court to allow intervention and to set the injunction aside. The plaintiff subsequently gave notice of appeal to the Court of Appeal but never pursued his appeal against the order made.

At first sight, it seems that the *Mareva* injunction is a useful weapon. Nevertheless, a certain disquiet has been felt. The consequences of, for example, the freezing of the defendant's bank account can be extremely serious. First of all, the bank will be required to dishonour all the defendant's bills and notes: it will not be able to pay. Secondly, the defendant's cash flow will be interrupted, with perhaps, very serious consequences. The money may be locked up for years while the action proceeds. Thirdly, there is the position of other creditors of the defendant who probably will not be able to obtain payment, unless they are secured. And the grant of the injunction depends merely on "a good arguable case".

British banks appear to be straining at the leash. When an appropriate moment comes, they may well challenge the validity of *Mareva* injunctions. But it is getting rather late now. *Mareva* injunctions have been going for six years, and the Master of the Rolls is a very good friend to this new remedy. Further, in *The Siskina*,[11] Lord Hailsham said that the House of Lords was "in no way casting doubt on the validity of the new practice by its decision in the instant appeal".

So, I rather think that the *Mareva* injunction is here to stay, although quite clearly there are going to be further cases, which,

11 [1979] AC 210 at 261.

perhaps, take into account some of the difficulties that I have mentioned.

Fundamental breach of contract

The second recent development with which I wish to deal is one in the field of substantive law. It is the effect on the doctrine of fundamental breach of contract of the recent decision in the House of Lords in the *Securicor* case.[12] It will be remembered, that in the 1950's, the courts in England introduced a new principle, the doctrine of "fundamental breach". This stated that if one party was guilty of a fundamental breach of contract, or a breach of a fundamental term, then no exemption clause inserted in the contract would protect him, regardless of its wording. I think it was Lord Devlin who planted the seed of this new principle, though it was nurtured, watered and tended by Lord Denning MR and eventually grew into a substantial and very sophisticated tree. Put in this form, it was a rule of law. A party could not exempt himself from liability for a fundamental breach.

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But in 1967, the House of Lords decided in the *Suisse Atlantique* case[13] that this rule of law was merely a rule of construction: if the exemption clause on its true construction applied to the breach, then effect must be given to it. Unfortunately, the speeches of their Lordships were very long and contained within them statements that were certainly ambiguous and even contradictory. Lord Denning was quick to see that all was not yet over for the doctrine of fundamental breach. Only three years later an opportunity arose in the famous *Harbutt's "Plasticine"* case.[14] The defendants had supplied to the plaintiffs certain plastic piping for the plaintiffs' factory. The piping was designed to carry hot molten wax and it was heated electrically for this purpose. The system proved to be defective. The thermostat broke down on the first day. The plastic pipes sagged and cracked. The wax escaped, caught fire and

12 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

13 *Suisse Atlantique Societe d'Armenent Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] AC 361.

14 *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447.

burnt down the factory. The loss which was sustained by the plaintiffs amounted to some £150,000. The defendants relied upon a provision in the contract, an exemption clause, limiting their liability to the value of the contract, namely £2,330. Lord Denning in the Court of Appeal held that, where a fundamental breach of contract occurs and the innocent party elects to treat the contract as at an end, then the exemption clause ceases to apply. Likewise if, as in the *Harbutt's* case, the contract automatically comes to an end by reason of the breach, the clause ceases to apply. The Court of Appeal thus resurrected the doctrine as a substantive rule of law. But this has now been condemed as heresy by the House of Lords in the *Securicor* case.

The facts of this case are by now well-known. Securicor agreed with the plaintiffs to provide a mobile visiting patrol service for their factory. The charge per week was very small. It was about RM40 per week. One Sunday night the Securicor man on duty was a man named Musgrove, and he decided that he would light a fire. Whether he intended to burn down the premises is not at all clear. But the premises were burned down and damages were agreed at £615,000. Securicor, however, relied upon an exemption clause: "Under no circumstances shall Securicor be responsible for any injurious act or default by any employee of the company unless such an act or default could have been foreseen and avoided by the exercise of due diligence on part of the company as his employer." The plaintiffs were unable to prove that the fire-lighting propensity of Mr Musgrove could have been foreseen and avoided by due diligence on the part of Securicor. The Court of Appeal nevertheless held that Securicor was not protected. Their task, said Lord Denning, was to ensure the premises were not burgled or set on fire. The act was a deliberate act and not covered by the clause. The *Harbutt's "Plasticine"* case was relied upon. The House of Lords held that Securicor were protected. They stated that the *Harbutt's "Plasticine"* case was wrongly decided and reiterated the principle that the question of the applicability of exemption clauses

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to a fundamental breach of contract was a matter of construction. In order further to justify their decision, they pointed out that the sum paid for Securicor's services was small, that the services were only visiting services and that it was more economical for the plaintiffs to insure the premises than it was for the defendants to insure against acts of arson by their employees.

So we are back to the situation of the "true construction" of the clause unless and until the Master of the Rolls thinks another way of revivifying the doctrine.

The *Securicor* case is, however, of much less importance now in England because, in 1977, that was after the facts of the case arose, a new Act was passed entitled the Unfair Contract Terms Act 1977. This prevents either absolutely or subject to qualifications the restriction or exclusion of liability by exclusion clauses in contracts. It is not for me to say whether this Act is even now in force in Penang, Melaka and East Malaysia. I would not like to venture an opinion on that rather difficult issue.

Broadly, the Act says, first, that a person can never exclude liability for death or personal injury caused by negligence. That seems to be a sensible provision. Secondly, it protects the consumer absolutely against exemption clauses in certain situations, eg the exclusion of the implied conditions as to quality or fitness in sales of goods. Much more controversial are the provisions of the Act which apply to business contracts. These say, for example, that where business is done on a standard form (written terms of business) then the businessman can only restrict or exclude his liability for breach of contract if the term is fair and reasonable. However, no one really knows how the courts are going to interpret the words "fair and reasonable". Practitioners have taken two rather different views. Some of them believe that, since the courts' approach is a matter of guesswork, it is better to advise clients to continue to use their comprehensive blanket exemption clauses. Others, particularly those acting for larger companies who have more at stake, have tended to advise that exemption clauses in standard form documents should be redrafted so as to render them fair and reasonable, or at least to provide some argument that they are fair and reasonable.

I must say that I am of the second opinion—a "dove" rather than a "hawk". The burden of proving reasonableness is upon the person inserting the clause. It would not be an enviable task to have to justify in court an old-fashioned comprehensive exclusion clause as being fair and reasonable. If there is at least some acceptance of liability, there is some ground on which the clause can be defended. The Act has therefore brought about a really major change in English commercial practice among the larger companies in that their standard forms have been redrafted. Some of the major computer companies, for example, are obviously at enormous risk. Computer failure or an error in the software could completely disrupt a customer's business for a long period of time. Many computer manufacturers have, in fact, revised their clauses so as to accept a substantial measure of liability. The difficulty is, of course, the question of consequential loss. It is still a matter of speculation as to whether the courts will find it fair and reasonable to exclude liability for such loss if liability for (say) defects in goods is otherwise accepted.

Arbitration

The third development with which I wish to deal is statutory and it relates to arbitration. It may be that some practitioners here will have been concerned with arbitrations in London because the standard forms produced by the commodity associations frequently provide for arbitration in London and English law to be applied. One may get, for example, a contract between a Pakistan State Trading Corporation and a company in

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Singapore which is governed by the standard provisions of a London trade association contract and provides for arbitration in London. I might just venture, as an aside, that I think that certain trade associations are being very short-sighted in requiring arbitrations to take place in London and only in London, with witnesses having to be transported to England. It would be preferable to liberalise policy so as to enable arbitrations to take place "on commission" so to speak at more convenient places, for example, in the new arbitration centre which has been set up in Kuala Lumpur.

The statute with which I wish to deal is the Arbitration Act 1979. For a long time now, businessmen have felt that something has gone wrong with arbitrations in London. The courts have previously exercised a very considerable control over arbitrations and they have done so in two ways.

Parties who go to arbitration wish to ensure privacy; they wish to have their dispute speedily resolved; they also wish to have it decided by expert arbitrators.

First of all, either party could request the arbitrator to state a point of law for the decision of the court. If he refused to do so, he could be compelled to do so by an order of the court. This procedure has unfortunately been abused. Defendants, seeing that an award would inevitably be made against them, have asked arbitrators to state a case for the decision of the court, and then taken that decision to the Court of Appeal and thence to the House of Lords. They have thereby been able to stave off the day of payment for a considerable time. This was regrettable. Parties who go to arbitration wish to ensure privacy; they wish to have their dispute speedily resolved; they also wish to have it decided by expert arbitrators. These case-stated procedures tended to negate these requirements; there was the possibility of protracted litigation in the courts, with attendant publicity, and lawyers would be making the decision instead of the expert arbitrators.

The second way in which the courts controlled arbitration was if there was an error of law on the face of the award. Since it was open to either party to challenge an arbitration award in this way, arbitrators in London began to make awards in summary form. They would simply state, "We award $25,000 damages to the claimant. The respondent to pay to the claimant his costs and the costs of this arbitration". They then handed down their reasons in a separate document which did not form part of the award. This was to prevent challenge of the award in the courts.

The 1979 Act for the most part abolishes the case-stated procedure. It further abolishes challenge for error of law on the face of the award. It substitutes for these a simple appeal from the arbitrator on points of law to the High Court. At first sight, this might not seem to meet the objections mentioned above. A party to arbitration proceedings will simply appeal the award to the High Court. But the Act limits the opportunities to appeal to the High Court. Unless both parties consent, an appeal can only be brought with leave of the High Court judge. He will only give leave, if he considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement. Moreover, an appeal will not lie to the Court of Appeal without leave, and such leave will only be given if the decision is one of general public importance or one which for some special reason should be considered by the Court of Appeal. In a recent case, the *Pioneer Shipping Case,*[15] the Court of Appeal stated that, in a case where the question is the proper legal interpretation of a "one-off' clause in a "one-off" contract, then the judge should not give leave to appeal. Even in the case of a standard form contract, where a decision on its wording may act as a precedent, the judge should hesitate before giving leave to appeal. In many cases it is better to leave it to the arbitrators to interpret the contract in a commercial sense rather than that it should come to the courts.

The arbitrator can now be made to state the reasons for his award in sufficient detail to enable the court to consider the point of law.

15 *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1980] 3 WLR 326.

There is a further aspect to the 1979 Act. It is now possible in certain circumstances for the parties to exclude the right of appeal. A major inroad has been made into the basic principle that the parties are not entitled to exclude the jurisdiction of the courts. In non-domestic arbitration agreements the parties can, as a general rule, agree to exclude the right of appeal conferred by the Act. This can be done in the arbitration agreement itself. There are exceptions: for example, disputes arising out of insurance contracts, the admiralty jurisdiction and for the time being, commodity contracts. In these cases, the right of appeal can only be excluded after the arbitration proceedings have been commenced. But, normally, in the case of international arbitration agreements, it can in fact be excluded by the parties in the contract itself.

Romalpa clauses

A further development which is of interest is the question of retention of title clauses, sometimes called "*Romalpa*" clauses from the case[16] in which they were upheld. The minimum content of such a clause is that the seller of goods, when he sells the goods, retains title to the goods until he is paid. This is a fairly simple notion. But *Romalpa* clauses are normally more complicated, and contain these provisions:

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1. retention of title: the seller retains title to the goods until he is paid for them, or until all accounts due to him are paid, and in the meantime the buyer is to hold the goods as bailee for the seller;
2. a "product" provision: if the goods sold are mixed with, or incorporated in, other goods, for example, in the manufacturing process of the buyer, the title to the product is to vest in the seller;
3. a "proceeds of sale" provision: if the buyer sells the goods or product, he is to hold the proceeds of sale on trust for the seller.

16 *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

Romalpa clauses have become extremely common in standard form contracts. But there have been two recent decisions in England which have cast doubts upon the validity of certain aspects of these clauses.

The most important decision is that in *Re Bond Worth Ltd.*[17] In that case Slade J held that the particular *Romalpa* clause created a charge on the assets of the buyer company and was therefore void for non-registration under the Companies Acts. It may therefore be of some interest to look at the present status of these three provisions in the usual *Romalpa* clause.

First of all, the retention of title provision. In my view, such a clause will be valid if properly drawn. In *Re Bond Worth Ltd* it went wrong because the sellers reserved merely the equitable title and not legal title. The reason for this is obscure. Possibly they were afraid that if the buyer sold the goods he would be selling as their agent and they would be responsible for the condition of the goods. But if legal title is reserved against payment, the provision seems to be good.

Secondly, the "product" clause. In my view this would not be upheld. In *Borden (UK) Ltd v Scottish Timber Products Ltd,*[18] sellers sold resin to the buyers under a *Romalpa* clause which reserved property in the resin until all accounts due were paid. The resin was used for the manufacture of chipboard. The buyers went into receivership and the sellers claimed to trace into the chipboard and the proceeds of sale of the chipboard. The Court of Appeal refused to allow this claim, holding that once the resin had lost its identity in the chipboard, it could no longer be traced. But Templeman and Buckley LJJ further stated that a provision of the kind that I mentioned, which vests title in the manufactured product in the seller, would be void as an unregistered bill of sale if it was executed by an individual, and, if it was created by a company, would be void as a charge which if executed by an individual would be registrable as a bill of sale.

17
[1980] Ch 228.

18
[1979] 3 WLR 672.

The third part, the "proceeds of sale" provision, is perhaps the most contentious and most important of all. If a company goes into liquidation or receivership, it may be found that the cupboard is bare of any stock in trade. But there may be some monies available, debts due from customers and so forth. Will the provision that the buyer shall hold the proceeds of sale of the goods on trust for the seller be upheld? The provision is very unreal. When the buyer resells the goods he is not going to place the proceeds of sale in a trust account and account to the seller for the profits which he has made on the transaction. That is completely impracticable. Such a provision will only be invoked in the event that the buyer company gets into financial difficulties. It is when the vultures begin to gather around the dying corpse of the company that the seller will invoke the *Romalpa* clause and say that such proceeds of sale as he can identify are held upon trust for him. But surely the situation must be that the proceeds of sale are held on trust simply to secure the liability of the buyer to the seller. It therefore appears to me to be arguably a case of a floating charge over the assets of the buyer company which requires registration. Only if one can say that the charge is not "created" by the buyer company, but arises out of the bailor-bailee relationship between seller and buyer, could such an argument be rebutted.

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Sale of Goods Act

One final development: we have said farewell in England to an old friend, the Sale of Goods Act 1893. It is now the Sale of Goods Act 1979. The parliamentary draftsman has decided that he could improve on the drafting of Chalmers and he has brought the language up to date, for example, for "thereof" he substitutes "of it". Whether he has succeeded by these means in making any substantive changes remains to be seen. The Act is retrospective, so it applies to all contracts of sale of goods made after 1 January 1894. But if I may make a purely academic point—you will expect me to make one at least—the 1893 Act was also retrospective. So the 1893 Act continues to apply to all contracts of sale of goods made before 1 January 1894, although no doubt there will not be many of these still in existence. But, after all, what is the role of the parliamentary draftsman? His role is, I would suggest, to provide insoluble problems for judges and a source of perpetual revenue for lawyers.