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London — Still the Cornerstone of International Commercial Arbitration and Commercial Law?

by The Rt Hon The Lord Mayor of The City of London, Alderman Robert Finch

Introduction

Chairman, Ladies and Gentlemen: It is a great privilege for a Lord Mayor to be invited to give this prestigious lecture to such a distinguished international audience. Thank you so much for inviting me.

This is the sixth Cedric Barclay Memorial Lecture. Cedric Barclay was a legendary international arbitrator in the City in the 70s and 80s. He was a Renaissance man who had a broad knowledge of science and literature; he spoke many languages; he understood what made commercial men and the City tick; he was renowned for his wit and wisdom as well as his patience. He attended many international arbitration congresses such as this and once said: [1]

> "At these Congresses the subjects for discussion are invariably dull and uninteresting, being formulated in an attempt to satisfy divers national interests.... It would be an understatement to qualify the debates as less than profoundly soporific."

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1 *Cedric Barclay His Wit and Wisdom* compiled by Imogen Rumbold and Jose-Maria Alcantara (1996).

He also said:

> "These meetings should waste less time in theorising on the brotherhood of man and should get down to turning exhortations into practice. There is now fierce competition between the World's Arbitration Centres. This competition could become constructive if properly directed towards emulation rather than publicity."

I hope the great man will forgive me if, occasionally during this lecture, I inadvertently (but unashamedly) publicise the City of London, its lawyers and London arbitration. As a city solicitor and as Lord Mayor of London, it is in my blood as well as in my job description to bang the drum for the City of London as the centre for all things financial, commercial and legal. I believe that the unique history and contribution of London as the centre for the development of trade and common law in past centuries means that there is great scope for London to continue to play a pivotal role in international commercial arbitration and the provision of legal services as the 21st century gathers pace.

I have chosen as the title for this lecture "London — still the cornerstone of international commercial arbitration and commercial law?"

In order, however, not to breach the first of Cedric Barclay's injunctions, I intend to be mildly controversial and place my drill on the slightly raw nerve of the power of the court to review arbitration awards. I shall encourage the view that there should be more appeals from arbitrations to the court not less. This challenges the orthodoxy to which I know many in this room adhere and which also obtains in many foreign jurisdictions. There is even a school of thought which regards any interference by the courts as an adulteration of the purely consensual system of arbitration. Let me develop in due course why I believe that the present restriction on appeals under the English 1996 Arbitration Act is not only stultifying the development of the common law but is also unhealthy for the development of international arbitration in the long run.

I also want to come on to emphasise how the bedrock upon which the City has been founded has been the rule of English common law, in

particular English commercial law as developed by the Commercial Court in the last century, and how vital it is for the City and for London arbitration that facilities are provided for the London Commercial Court fit for the 21st century.

Historical Analysis

I want to begin by tracing the historical development of law and commercial arbitration in the City which have gone hand-in-hand since Londinivm started as a trading centre during the Roman occupation. For it is in this historical context that one can see the roots of modern international commercial arbitration.

The earliest recorded examples of commercial cases having been settled in London stretch back to 7th century AD. William the Conqueror granted a charter to the inhabitants of the City of London that they should enjoy the same law as they had done under Edward the Confessor. Henry I issued the great charter of 1132 confirming the old legal customs of London and allowing citizens to appoint whom they wished of themselves to "keep the pleas of the Crown".

There then followed a "golden age" — which some of my predecessors hankered after — when criminal and civil law in the City was administered by the Lord Mayor and the Aldermen, not by judges and arbitrators. For a long time the Lord Mayor was "The Law" in London! Sadly, as the years passed and the law became more complicated, the law became administered by those who actually knew about it, the Recorders of London whose job had previously been simply to record the decisions of the Mayor. From Anglo-Saxon times until quite recently the City had its own Civil [2] and Criminal [3] Courts and distinctive City law. Commercial law was

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2 The Mayor's and City Court still exists and hears commercial disputes.

3 This tradition is still seen today in the Central Criminal Court when the Lord Mayor attends in full state at the opening of the sessions at the Old Bailey. Indeed, technically he is always supposed to be present but his absence is represented by the Old Bailey Sword.

originally declared by the merchants themselves. Custom was recognised to be of equal antiquity and authority within the common law. It became sufficient for the Recorder to explain the custom of the City and this was accepted without demur. The law was the cornerstone of the development of the City of London and its worldwide success. For it was in this legal context that the rich commercial life of London flourished and commercial arbitration began in earnest.

History of Commercial Arbitration in London

It was common practice in medieval England [4] for disputes and quarrels to be submitted by the parties to the decision of one or more arbitrators selected by the parties who would secure the arbitration by executing private conditional bonds, [5]

The old White Book of London made special provision for business litigation allowing for the empanelling of a jury of "half a dozen denizens and half of foreigners dwelling in the town" to decide cases of contract, debt and trespass.

In the 13th century regular trade between England and Spain began and the merchants of Barcelona had their own banks in London. There are records as early as 1303 of Catalonians being appointed as London arbitrators. [6]

In the 14th century there was provision for "quality" arbitrations. The Statute of Staples 1353 provided for the determination of disputes concerning the quality of wool sold or the method of packing by six assessors, four alien and two English whose decision would be binding on the court.

Merchant guilds of the City of London began to spring up, such as the

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4 See the Year Books and Holdsworth, History of English Law, Vol XIV p 187.

5 Simpson, A Brief History of the Common Law of Contract, Clarendon 1975; 1505 case, 21 Hen VII f 28 p 7.

6 Frederick Sandborn, Origins of Early English Maritime Commercial Law, (1930 edition) p 268.

Mercer's (the wool exporters' guild), the Goldsmiths and Vintner's. Some established arbitration tribunals to hear disputes between their members.

In 15th century the courts for the first time affirmed the need for finality and certainly in awards. [7]

During the Tudor and Stuart reigns, that centralist organ of government, the Court of Star Chamber, jealous of its own power, began to develop jurisdiction to hear commercial cases; but still sent cases involving freight and average to arbitration by merchants. [8]

During the latter half of the 16th century, however, it was clear that the tribunals that gave the merchants most satisfaction were not the courts of the land but those in which they had a hand. [9] An observer wrote at the time: "... what a ridiculous thing is it, that judges in Chancery must determine of merchants' negotiations, transacted in foreign parts, which they understood no better than do the seats they sit on." [10]

During the Middle Ages period there must have been resort to informal arbitrations in some of the coffee-houses in London that had sprung up, such as Lloyd's and Rainbow's. In the 17th century, London began to flourish as a financial and business centre and this acted as a spur to the development of commercial and maritime law as parties grappled with the problems of charterparties, bottomry bonds and salvage. This also led to an increase in the number of commercial arbitrations in London and the passing of the first English Arbitration Act by William III: the Arbitration Act of 1698 [11] which formally recognised that it was lawful for merchants to submit disputes to arbitration.

During the 18th and 19th centuries there was a gradual but inexorable extension of judicial control over arbitration and awards, for instance the Common Law Procedure Act 1854. It was, however, the Victorian era that

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7 Year Books (Anon [1468] YB 8 Edw 4, fl 11, p 9).

8 Dasent's cases, 1549–1589.

9 Holdsworth, History of English Law, Vol V at p 149.

10 W Cole in A Rod for Lawyers (Marl Miscell iv, 323).

11 9 &10 Will III c 15 (see also Consuetudo, vel Lex Mecatoria (c 1670).

saw the extraordinary expansion of trade and banking in England and, with it, commercial law and arbitration. Investment in steamships, railways, mines, industry and commodities took off. London became the financial centre of the world. There was a proliferation of disputes involving credits, time charters and contracts for the sale of goods, all of which needed speedy resolution. [12]The first edition of Russell on the Law of Arbitration was published in 1837. [13]The number and type of disputes involving shipping, commodities and finance, grew and grew. The traditional courts were not regarded as up to the task. Trade associations, such as the Sugar Refiners and the Grain and Feed Trade Association, eventually set up arbitration systems. London arbitration expanded. The Arbitration Act of 1889[14] codified practice relating to arbitration and enabled the arbitrator to state his award in the form of a "special case" enabling the court "to adjudicate on any point of law arising in the reference". The genesis of the Commercial Court, to which I shall refer in due course, lay in the general dissatisfaction about the ability of the ordinary courts to deal with commercial cases.

History of Maritime Arbitration in London

Before turning to this I want to highlight the important role that shipping and maritime arbitration have played in the development of the City of London.

London's contemporary reputation as a maritime centre is founded upon its historical importance as a port. Indeed, the first London shipping registers of traffic on the Thames date back to the time of King Ethelred who first imposed a tax on ships coming to London. Later on, the famous Lloyd's Coffee Houses became markets for maritime insurance, arbitration

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12 See generally Lord Parker, 1959 Lionel Cohen Lecture, Hebrew University of Jerusalem.

13 Currently in its 13th edition. It remains widely used by barristers, solicitors and academics.

14 Lord Bramwell drafted a fully comprehensive Arbitration Bill but the government fell before it was enacted. Subsequently a modified version was introduced in the form of the Arbitration Act 1889.

and deal making. The 16th century innovations in insurance in Lloyds were mirrored by further innovations in the marine sector.

The Port of London really became the centre of the world's maritime industry in the 17th century. This role continued to develop and grow in importance. This was due to its close connections with the maritime legal sector as well as through organisations such as Lloyd's Register of Shipping.

Today, there is a veritable hub of maritime related professions with a strong international focus. Nowhere else in the world is there such a comprehensive range of lawyers, financiers, insurers and ship brokers. Anything maritime can be arranged in London.

The oldest legal institution which relates directly to the maritime industry is the Admiralty Court, which can trace its origins back 800 years. [15] It was established to hear disputes related to shipping, particularly collision and salvage cases. [16]

In addition to the courts, the London Maritime Arbitrators Association ("LMAA") is increasingly playing a crucial role in settling maritime disputes and forming decisions. They are supported in this by 800 members, including brokers, shipowners, agents and of course barristers and solicitors world wide. And of course the Lloyd's Open Form of Salvage Agreement is one of the oldest forms of maritime agreement still in use, with some 100 cases determined in this way each year.

Today, this flourishing maritime industry in the City of London is the largest and most comprehensive in the world. Owners of about one fifth of the world's fleet tonnage are represented in London. This represents a substantial customer base for the UK maritime community.

It is this blend of history coupled with London's maritime industry which has shaped the development of maritime arbitration, both in England

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15 See F L Wiswall Jr's, The Development of Admiralty Jurisdiction and Practice Since 1800, Cambridge University Press, 1970.

16 This was supplemented in 1895 by the separate Commercial Court which was incorporated by the High Courts to cater for the special needs of the maritime community. About half of the court's work today relates to maritime cases.

and internationally. And so it is both fitting and logical that London which is home to the lion's share of global maritime business' and the origin of the arbitral system should today be the heart of global maritime arbitration as well.

The Origins of the Commercial Court in London

Let me now turn to the emergence of the Commercial Court. The catalyst for its establishment in London can be traced back to a case before Mr Justice Lawrance called *Rose v Bank of Australia*.[17] Lord Justice Mackinnon famously later recorded:

> "The Judge knew as much about the principles of general average as a Hindoo about figure skating. He listened with a semblance of interest . . . , reserved judgment and forgot all about the case. After a long delay he was somehow reminded that he ought to give judgment. This he did — in favour of the plaintiff. To his horror Gorrell Barnes QC then rose and said he had failed to deal with a very important point. Not having the least idea what the point was, he pulled himself together and said: 'Oh Yes; I meant to say that having considered that I think the adjusters took the right view, and in that respect also I think the claim as made out by them ought to succeed.' The defendants went off to the Court of Appeal [who] reversed Lawrance J. As appears in [1894) AC 687, the House of Lords restored the judgment of Lawrance J."[18]

This led to the resolution of the judges of the Queen's Bench Division in 1894 that a Commercial Court should be constituted and led to the appointment of Mr Justice Mathew as the first Commercial judge. Since then, the Commercial Court in London has had a long and distinguished

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17 Unreported (1892). Counsel included Gorrell Barnes QC and Scrutton.

18 Reproduced in Dundas, Appeals on Questions of Law: Section 69 Revitalised, (2003) 69(3) Arbitration 172 at p 183; see also 60 LQR 324–5.

history in developing English commercial law and sitting on appeals from arbitrations. It is this latter function I will examine in due course.

Lord Parker wrote in 1959 of the Commercial Court and London arbitration:

> "The two systems ought indeed to be properly regarded as co-ordinate rather than rival. Many disputes, like questions as to quality, are clearly more suitable for arbitration. No question of law is involved, and an arbitrator in the trade can, by handling the sample, determine the dispute in a moment without the necessity of hearing advocates, and without the procedure and trappings of a court of law. At the other extreme, a dispute depending solely or mainly on the construction of an exemption clause in a commercial contract is more suitable to be determined by the Commercial Court. That is not to say that an experienced arbitrator, be he lay or legal, might not arrive at a correct decision, but such a case ... will, no doubt ultimately come to the courts and that being so it might as well come there at once thereby avoiding considerable delay." [19]

He had in mind the wry observation of Lord Goddard in a case in the previous year *Kyprianou v Cyprus Textiles Ltd.* [20]

> "The matter goes to an arbitrator: it then goes to the Appeal Committee of the [trade] Association: who reverse the Arbitrator: it then goes to the Judge, who reverses the Appeal Committee: and it now gets to this Court which reverses the Judge. That is one of the beauties of, and shows the 'economy' of, going to arbitration."

Lord Parker and Lord Goddard would be amazed, 50 years later, at three

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19 Supra n12.

20 [1958] 2 Lloyd's Rep 63.

things: (1) how so many points of commercial law were entrusted to commercial arbitrators, (2) how many of them in their previous life were former members of the Court of Appeal, if not House of Lords and (3) how difficult it now is for appeals on points of law to reach the Commercial Court.

I must record the passing, last year of one of the great supporters of the London commercial and maritime arbitration community, Lord Wilberforce. He enjoyed sitting as a commercial arbitrator after retiring from the House of Lords. His obituary in The Guardian recorded that "He believed that a good arbitration system was a vital part of our whole justice system."

The Debate

The debate I want to encourage is whether a good arbitration system is one where the right of appeal to the courts is extremely narrow or, indeed, non-existent? Has the pendulum in relation to appeals from London arbitration swung too far by the force of the 1996 Act, even to the point where the pendulum is off the wall? Is the present state of affairs healthy for the development of London arbitration or, indeed, English commercial law generally? Should the scope for the Commercial Court to hear appeals from arbitration awards be widened again?

Brief History of Appeals from Arbitrations

Until comparatively recently, the English courts tended to be jealous of arbitration and to regard arbitrators as rivals to be kept in their place. In the 1856 case of *Scott v Avery*, [21] Campbell LJ advanced the theory that this arose from a desire by the judges to get cases into Westminster Hall. The traditional position was still being pursued in 1922: for instance, Scrutton LJ was indignant in *Czarnikow v Roth, Schmidt & Co* [22] at the suggestion

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21 (1856) 5 HLC 811.

22 [1922] KB 478 at p 488.

that the parties to an arbitration might, by agreement, put their chosen arbitrator beyond judicial scrutiny: "There must be no Alsatia in England where the King's writ does not run." Today, of course, the International Dispute Resolution Centre to which the Corporation of London whom I represent has made a significant contribution, has just moved to precisely the corner of Fleet Street and Whitefriars Street where that Alsatia once was!

Judicial attitudes to arbitration began to change in the mid 20th century and the Commercial Court began to support the autonomy of the arbitration process. However, the courts remained heavily involved in supervising arbitrations through the "case stated" procedure: an arbitrator, who was presumed likely to make an error of law, could be required to state a case on a question of law for the opinion of the court. In fact, by the 1970s, the right to appeal on points of law was almost automatic.

The regime under which decisions of arbitrators were brought before the High Court by case stated was radically altered by the Arbitration Act 1979. Section 1 (4) of that Act provided that the High Court should not grant leave to appeal unless, 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. The Act itself would not have brought about such a change; it was the court's approach to the discretion given to them under the Act that achieved this.

In 1982, the House of Lords in *Pioneer Shipping Ltd* v *BTP Tioxide. Ltd* [23] gave guidance on the circumstances in which permission to appeal to the High Court from the decision of an arbitrator should be given:

1. In one-off cases, leave to appeal was only granted if the decision was obviously wrong;
2. In cases of general importance, permission to appeal was granted if there was a substantial likelihood that the arbitrator(s) got it wrong.

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[23] [1982] AC 724 ("*The Nema*").

This decision involved reversing the approach taken by Mr Justice Robert Goff in the Commercial Court when it fell to him to make the initial interpretation of s 1 (4) of the 1979 Act.

Three years after The Nema, Lord Diplock in *Antaios Naviera SA v Salen Rederiema AB*[24] revisited the issue of permission to appeal and held that in arbitrations which turned on the construction of a standard term, leave should not be given unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction. Lord Diplock was of the view that this applied even in circumstances where there were judicial statements (but not decisions) in other reported High Court cases which suggested that upon a question of the construction of that standard term there may among commercial judges be two schools of thought.

Lord Diplock's injunction led initially to the drying up of appeals in the 1980s. But a new wave of commercial judges led to a more enlightened attitude to appeals and the meaning of "one off" for a time in the early 90s. The effect of the 1996 Act, however, has been to seek to return the position very much to the austere post-*The Nema* days.

The Objective of the 1996 *Act*

The objective of the 1996 Act was to improve and clarify the major elements of English arbitration law. During the consultative process which led to the enactment of the 1996 Act, various commentators questioned whether the right to appeal an arbitration award on a point of law should be abolished entirely. Lord Saville, who became Chairman of the Departmental Advisory Committee in the autumn of 1994, said in a speech delivered on 4 November 1996 in London: [25]

"Another feature of our existing law which has caused disquiet

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24 [1985] AC 191 at pp 203–204 ("*The Antaios*").

25 The Arbitration Act 1996 and its Effect on International Arbitration in England, (1997) 63 Arbitration 104 at p 108, col 1.

> abroad and which many regard as detracting from arbitrating here is the ability to seek leave to appeal to the Court from the substantive award of the arbitral tribunal. What is said is that to allow an appeal of this kind is to frustrate the agreement of the parties to resolve their disputes by arbitration, since the result of a successful appeal is to substitute a court resolution for an arbitral resolution."

The Committee decided against recommending the abolition of any right of appeal on the substantive merits of the dispute, preferring further to limit the right to appeal. Lord Saville explained the rationale behind that decision in these terms: [26]

> "... it is well arguable that this limited right of appeal can properly be described as supportive of the arbitral process. Where the parties have agreed that their dispute will be resolved in accordance with English law, and the tribunal then purports to reach an answer which is not in accordance with English law, it can be said with some force that unless the Courts correct this error, the tribunal itself will have failed to carry out the bargain of the parties."

It is fair to say that such an argument has not always been met with universal approval. [27]

The Position Under the 1996 Act

In 1996, *The Nema* guidelines were replaced with the statutory criteria contained in s 69. The test for permission to appeal under s 69 is four-fold. [28] Thus permission will only be granted if the court is satisfied:

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26 Id at col 2. See also para 285 of the Departmental Advisory Committee Report.

27 For instance, see the Holmes and O'Reilly, Appeals from Arbitral Awards: Should s 69 be Repealed?, (2003) 69 Arbitration 1 at p 6.

28 Section 69(3) Arbitration Act 1996.

(i) that the determination of the question will substantially affect the rights of one or more of the parties; and

(ii) that the question is one which the tribunal was asked to determine; and

(iii) that on, the basis of the findings of fact in the award

— the decision of the tribunal on the question is obviously wrong; or

— the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(iv) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

Those statutory criteria are clearly strongly influenced by *The Nema* guidelines and the decision in *The Antaios*. The Court of Appeal in *The Northern Pioneer*[20] considered that s 69 "opened the door a little more widely to the granting of permission to appeal than the crack that was left by Lord Diplock." Only a thin whisper of air now penetrates the crack in that particular door.

English Position on Appeals on Points of Law

England already allows more appeals on points of law than all other jurisdictions. London is sometimes regarded as a pariah by the international arbitration community for allowing any appeals on points of law at all. However, perhaps controversially, my view is that we should widen the scope for appeals from arbitrations on points of law still further.

It is true to say that there are many commentators that criticise s69 of the 1996 Act by arguing that the amendments to the arbitration legislation should have gone further and excluded all rights of appeals on points of law. One such proponent of this view is Professor Michael Needham, who in an article published in the 1999 edition of the journal Arbitration

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20 [2003] 1 Lloyd's Rep 212 at p 216, col 1, para 11.

said: [30]

> "Section 69 departs from the principles upon which arbitration is founded. It acts to the detriment of London as a centre for international arbitration. It acts as a detriment to the use of arbitration for the resolution of English domestic disputes. It places England at a disadvantage when compared against those countries that have adopted the UNCITRAL Model Law."

Indeed the conclusion of a contributor at the Seventh Geneva Global Arbitration Forum in December 1998[31] was that "what is clear is that less intervention by the court is appropriate, not more." I respectfully disagree. It cannot be assumed that every party who elects to go to arbitration necessarily wishes to preclude the possibility of an appeal on a point of law, still less that they do not want an answer that it is not in accordance with English law.

Although the traditional view has been to promote a homogeneous system, perhaps the global arbitration community ought to give thought to the possibility that we should collectively be promoting international diversity, not international uniformity. What I am contending is that parties should be given real choice and that London should be an arbitration forum offering them something different.

Advantages of the Present System

It is often said that the present system has three advantages: it assists finality, preserves confidentiality and supports party autonomy. Parties who have wished not to retain the right to appeal to the court on a matter of English law have been able to do so through the contracting out provision contained in s 69(1) of the 1996 Act. Parties can therefore arbitrate in England without fear that their disputes will be diverted by unwelcome

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30 Appeal on a Point of Law Arising out of an Award, (1999) 65 Arbitration 205 at p210.

31 "Settling Disputes on a Shrinking Planet" given by Mr Geoffrey M Beresford Hartwell at the afternoon session on 2 December 1998 at the Seventh Geneva Global Arbitration Forum.

court proceedings and with the confidence that they have autonomy to choose the level of judicial scrutiny.

However, in my view these advantages are either illusory or overstated.

Finality

In the 1982 edition of Russell on The Law of Arbitration, the authors noted:

> "There is a never ending war between two irreconcilable principles, the high principle which demands justice though the heavens fall, and the low principle, which demands that there should be end to litigation."[32]

As Lord Atkin said in 1933 "Finality is a good thing but justice is better."[33]

Traditionally the English courts have given greater weight to the principle of justice than of finality. As Evans J said in *Indian Oil Corp Ltd v Coastal (Bermuda) Ltd.*[34]

> "These two factors, in my view, are not inconsistent with each other. If either of them is to prevail, then it should be the requirement of justice. But justice, even fairness, is not an abstract concept. It has to be applied in this context between two parties who were in dispute with each other and who agreed that the dispute should be resolved by an arbitral tribunal."

Confidentiality

The need to preserve confidentiality has been the subject of the relatively recent judgment of Mr Justice Cooke in *Moscow City Council v Bankers*

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32 Russell on The Law of Arbitration (Anthony Walton & Mary Victoria, eds, 1982).

33 *Ras Behari Lal v The King-Emperor* (1933) 50 TLR 1.

34 [1990]2 Lloyd's Rep 407 at p 414, col 2 —415, col 1.

Trust Co[35] where he propounded the view (surprising to some) that the strength of the requirement of confidentiality or privacy in arbitration, as exemplified by the Departmental Advisory Committee report at paras 11 and 12, militated even against the publication of the court's judgment in relation to a challenge to an arbitration award. He held that the presumption of open justice and publication of judgments was not directly applicable to arbitration claims which fell within the privacy provisions of the Civil Procedure Rules r 62.10. However, Mr Justice Cooke did tacitly acknowledge that it may be appropriate to publish judgments where real issues of law were involved. [36]

The Court of Appeal has upheld Mr Justice Cooke's decision that the judgment should remain confidential on the facts of that case. [37] However, Lord Justice Mance who gave the leading judgment laid particular stress on the factors militating in favour of giving a public judgment on arbitration claims. [38] It seems unlikely, therefore, that the *Moscow City Council* case will herald a new closed chapter in the development of English commercial law.

In my view the degree to which confidentiality in fact exists is overrated. It is often common knowledge within an industry that particular parties are involved in arbitration. In any event confidentiality can be preserved to the same extent on appeals to the court by the use of "private hearings" similar to those used in applications for search orders and freezing injunctions. Confidentiality could also be preserved through the sensitive reporting of cases: a system akin to the Lloyds Maritime Law Newsletter could be adopted whereby arbitrations are reported using a number, and the names of parties and ships are redacted.

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35 [2003] EWHC 1377 (Comm) ("*Moscow City Council*").

36 See para 41 of the judgment where he said: "In the context of an arbitration claim, where no real issues of law arise and where the material is of a highly sensitive nature both politically and commercially ... the fact that all the hearing involved confidential information is a dominant factor."

37 [2004] EWCACiv 314.

38 See para 43 of his judgment.

Autonomy

This is something of a myth because arbitration clauses are commonly incorporated into contracts by standard terms. In such cases it cannot be said that the parties "choose" to arbitrate because it is not a term which has been individually negotiated. I doubt whether when making a "deal" the parties are really concentrating on the choice of forum in the event that something goes wrong with the "deal": they are businessmen conducting business. In any event the extent that party autonomy exists can be preserved by allowing an '"opt-out" provision.

Disadvantages of the Present System

The majority of commentators, albeit for diametrically opposite reasons, would agree that the present system is unsatisfactory. In my view, the present system is unsatisfactory for four reasons.

First, it allows erroneous decisions to go uncorrected and inhibits the development of commercial law. As a solicitors' in-house newsletter put it: [39]

> "So few arbitrated disputes now reach the courts that one wonders how English commercial law will develop, all appealed awards being private matters. This is particularly worrying in the context of some of our key markets, such as ship chartering and, of course, reinsurance, where standard form contracts or clauses are widely used, the effect of which impacts on many of our clients."

There is a real concern, which I share, that the present very restrictive system of appeals from arbitration is having a stultifying effect on the development of English commercial law[40] and there is a danger that if this situation persists it may do long term damage. Further, the choice of law

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39 Supra, n 18 at pp 172–183.

40 It is noteworthy that this is also a concern shared by the LMAA — see its Autumn Newsletter 2003.

governing the contract is often linked with the choice of jurisdiction. [41] If parties wish to opt to have their contracts governed by the law of a country which has a more developed commercial law, will they choose English law in 20 years time if there is a dearth of relevant modern decisions on current areas of commercial law?

Secondly, it is contrary to the principle of arbitration to refer questions for decision by those who are not experts in the field. One of the advantages of arbitrating maritime disputes is that the tribunal can be made up of experts in the shipping world. However, questions of law arise upon most substantial arbitrations, particularly in the maritime sphere. Often tricky questions of law are not highlighted until after the appointment of arbitrators who may have legitimately been chosen for their commercial and technical rather than their legal training: legal questions are therefore determined not by legal experts. This undermines one of the central objectives of arbitration: the determination of a dispute by an expert.

Thirdly, it ignores the growing complexity of disputes. Arbitration is no longer simply a question of "scratching and sniffing" a commodity to decide whether it is fit for purpose. Maritime arbitrations often involve highly complex contracts, difficult technical issues of marine engineering, work practices, the application of a wealth of international codes such as SOLAS (Safety of Life at Sea) and ISM (International Safety Management), in addition to legal questions.

The disadvantages of the present system detract from London as a centre for international dispute resolution. The London market would be boosted by a growth in appeals.

International Dispute Resolution in London

It is estimated that countless international arbitrations and mediations take place in and from London each year including some 500 ad hoc

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[41] The flip side of this is the line of English cases starting with *Cie Tunisienne v Cie d'Armement* [1971] AC 572 where an express choice of English arbitration is an implied choice that English law will govern the contract.

arbitrations. Some 50 organisations are involved including trade associations, professional institutes, derivatives exchanges and arbitral and mediation organisations such as the London Court of International Arbitration, the Chartered Institute of Arbitrators, the International Dispute Resolution Centre and the Centre for Dispute Resolution. [42] New arbitration systems are being set up in different areas all the time: see, for instance, the arbitration and mediation system dedicated to aviation and aerospace disputes being set up under the aegis of the Royal Aeronautical Society in London.

"London arbitration" is a term which covers a huge range of disputes — from the classic London shipping arbitrations under the LMAA to what I call "international international" arbitrations which are heard in London but involve cross-border transactions and often foreign law. Many consider it important in those cases that the latter type are not too closely tied to national courts and keep their "global" perspective.

The Way Forward

In my view, it is vital to the reputation of London as a centre of international expertise and commercial excellence that changes are made to the 1996 Act regarding appeals on points of law. The Commercial Court needs to have a regular through flow of commercial cases derived from the sort of everyday commercial disputes that arise in arbitrations in order to continue to develop and refine English commercial law in a way that is most relevant to the market.

Section 69 of the 1996 Act should be revised to give parties to arbitration agreements the opportunity of real choice and appropriate appeals. Some sort of filter would still be needed so as to prevent the problems which occurred in the 1970s.

May I suggest an alternative approach? If judges were to take a different approach to the application of the Act, there might be a sufficient

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42 International Financial Services, London statistics.

shift to satisfy the demand for more appeals. The point is that s 69 depends on what satisfies a judge on various matters. That is a subjective standard. One judge may be more easily satisfied than another. If they all loosened up a bit and were more easily satisfied, the problem might go away. This would also avoid the knotty problem of finding a formula that would give what is felt to be needed without opening the floodgates.

Questions Which Remain

This lecture is not intended to offer the entire solution to the difficulties of s 69 of the 1996 Act. Many questions remain to be answered. They are for us all to consider.

The Commercial Court's Role

As I have said, the Commercial Court plays a crucial role in the success of the City of London as the world's leading centre for finance and business. It also plays a central role in the success and reputation of London's international legal services which are a major employer and contributor to the UK economy. By 2002, the number of people employed in London's largest 100 law firms had grown to 16,000 and the fee income for the largest 100 law firms in the UK, most of which are based in London, amounted to £ 8.4 billion.[43] In pure financial terms, the Commercial Court itself attracts over £ 800 million pounds worth of business each year.[44]

Yet the Commercial Court of London does not have a proper home. It has been housed for years in part of a cramped and unsuitable building in Fetter Lane[45] which detracts from its international reputation, surprises and disappoints most international users and inhibits its development. Indeed I hear it described as really rather "miserable".

I remain disappointed that a Treasury decision to allow the

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43 Id.

44 In 2001, there were 1,150 cases in London with 74 trials.

45 St Dunstan's House.

construction of a new Commercial Court remains in the wings. I do not believe that the Treasury understands the huge contribution that legal services in the UK provide to the Exchequer. Indeed, I have calculated that the tax-take by the Exchequer from the top five law firms exceeds £ 700 million per annum. Are we not stakeholders?

We simply cannot allow the City and the UK to slip behind our competitors, particularly as we have unrivalled expertise here. We must have the resources to match our knowledge and skills in order to promote and utilise the UK Commercial Court internationally.

Conclusion

In conclusion, the City of London's continued success as the world's leading centre for finance and business depends on the continual success and excellence of the legal system in which it operates. I believe that London is still the cornerstone of international commercial arbitration and commercial law. But to remain the cornerstone, two things must be ensured: first, the continued development, refinement and modernisation of English commercial law by the Commercial Court and, second, the maintenance of a first class international arbitration and mediation system. I believe a widening of the scope of appeals from commercial arbitration awards would help ensure both these objectives. The City's global institutions cannot be cutting edge if English commercial law lags behind. London arbitration will be less attractive if English commercial law loses its bloom. We need to ensure that the court system and arbitration systems in London work hand-in-hand. We need to ensure that the Commercial Court in London is housed in a building that is fit for the challenges of the 21st century.

Finally, I would like to acknowledge and thank the team at 4 Essex Court, now known as Quadrant Chambers, for their help in preparing this lecture. In particular, my thanks go to Charles Haddon-Cave QC, Michael Howard QC and Ruth Hosking. I wish them every success in their wonderful new building in Fleet Street, just by Temple Bar.

Thank you all very much.

Professor Tommy Koh

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