Rowley: London arbitration under attack

Monday, 16 May 2016 *(20 hours ago)*

J William Rowley QC, an arbitrator at 20 Essex Street in London and chairman of the LCIA board, responds to a recent lecture by the Lord Chief Justice of England and Wales, **Lord Thomas**, calling for greater court oversight of international arbitration.

London (Credit: Borut Trdina/istockphotos)

Just over a month ago, speaking from a remarkably controversial script, the Right Honourable **Lord Thomas of Cwmgiedd**, Lord Chief Justice of England and Wales, delivered the third annual BAILII lecture in the heart of legal London. Calling for an urgent rebalancing of the relationship between the courts and arbitration, he effectively condemned both the pervasiveness of international arbitration as the first choice means of resolving international disputes, as well as London's role as the world's most preferred seat for such arbitrations. Reminiscent of the historical position of the English courts, which favoured ready and regular intervention into arbitral awards, to "correct errors of law and hence to foster the law's development", Lord Thomas argued that the limited number of appeals from arbitral awards that now come before the courts (about 50 applications for leave to appeal annually, with about 20 being granted) has become "a serious impediment to the development of the common law by the courts in the UK, particularly, through the Commercial Courts in London".

Bill Rowley

The Lord Chief Justice made his case with language calculated to stir suspicion and create concern, using terms often adopted by NGOs in the US to rail against the dispute resolution provisions of Chapter 11 of NAFTA. He complained that arbitral disputes are resolved “firmly behind closed doors”, “hidden from view,” and are “retarding public understanding of the law, and public debate over its application.” He went so far as to say that the consequence of the legislative changes in 1979 and 1996 “provide[s] fertile ground for transforming the common law from a living instrument into, as **Lord Toulson** put it in a different context, 'an ossuary'.” Unless reversed, he claimed, the wider interests of the common law as developed in London, and the real interests of London as an international financial and trading centre were bound to suffer.

Lord Thomas said it was clear to him that Parliament had gone too far in 1979, and again in 1996, when it limited rights of appeal to the courts from arbitral awards. Describing the 1979 and 1996 amendments pejoratively, as “favouring the perceived advantages for arbitration as a means of dispute resolution in London over the development of the common law”, he argued that the time is right to look again at the balance, with a view to enabling a “greater number of appeals which would provide the means to maintain a healthy diet of appellate decisions, capable of developing the law particularly on issues of general public importance.”

In calling for a return to greater scope for judicial intervention in international arbitral awards issued by London-seated tribunals, Lord Thomas accepted that such a change would negatively affect the

attractions of London as a centre of international dispute resolution. But he dismissed any resulting concern for the need to protect dispute resolution in London, based on “the necessity to ensure that there is in place the right dispute resolution method to develop the law that underpins the markets, trade and commerce.”

The context for assessment of Lord Thomas’s recommendations

A proper assessment of the Lord Chief Justice’s call for amendments to English arbitration law requires an understanding of the economic importance to the City, and the UK generally, of London having become the world’s foremost centre for the resolution of international disputes. It also requires a considered view as to whether a credible case had been made that the development of English common law is being stifled by the present relationship between the courts and arbitral tribunals seated in London which, by the parties’ agreement, decide disputes on the basis of English governing law.

London’s pre-eminence as an arbitral centre

The most recent Queen Mary survey on international arbitration, conducted in partnership with the global law firm White & Case, and released in October 2015, confirmed once again, by 90 per cent of those responding, that international arbitration is the most preferred form of dispute resolution for cross-border disputes. The preference for consensual arbitration over the use of domestic court systems is not new and has grown steadily since the turn of the century.

Parties embrace international arbitration rather than dispute resolution in domestic systems for four major reasons. Given the prevalence today of cross-border transactions, which inevitably involve parties from different jurisdictions, one of the most important reasons is one party’s distrust for (or lack of familiarity with) the other’s domestic court system. The ability to avoid a specific legal system is thus a key driver to arbitrate. Other principal reasons are the greater enforceability of arbitral awards (as compared to domestic court

judgments, the ability of parties to choose their decision-makers and the inherent flexibility of the arbitral process.

In response to the survey's question "which seats have your organisations used the most over the past five years?", London was the clear leader, being named by 45 per cent of participants as the most preferred and widely used venue. Paris came second at 37 per cent. Importantly, the percentage of users naming London as their first choice has been increasing steadily over the years; 50 per cent more participants named London last year than in 2010. But London's leadership cannot be taken for granted. The study shows that Hong Kong and Singapore are gaining momentum, coming in third and fourth with 22 per cent and 29 per cent of the vote, respectively.

Drivers of London's popularity

Paul Friedland, head of the international arbitration practice group at White & Case, attributes London's premier position to its enduring reputation as an arbitration-friendly jurisdiction, with very high quality legal infrastructure. The latter includes institutions such as the London Court of International Arbitration (LCIA), the Chartered Institute of Arbitrators (CIArb), the London Maritime Arbitrators Association (LMMA), the Grain and Free Trade Association (GAFTA), the School of International Arbitration at Queen Mary, and, of course, the International Dispute Resolution Centre (IDRC) in Fleet Street. There are a number of matters that weigh heavily in determining whether a jurisdiction qualifies as being arbitration-friendly. These include:

- the neutrality and impartiality of the legal system;
- the national arbitration law;
- its track record for enforcing agreements to arbitrate and arbitral awards; and, all importantly
- a supportive judiciary which has a strictly limited ability, and a natural inclination not to interfere with arbitral proceedings and their resulting awards.

Since the UK's 1996 decision to limit further the right of appeal from arbitral awards to the courts, English courts have generally, and increasingly been viewed internationally as supportive of arbitration, and respectful of the parties' autonomy and desire for finality. Currently, English judges will not interfere with parties or arbitration awards unless arbitrators have clearly misunderstood the law or misconducted themselves. Compared to many other developed countries, whose courts are much quicker to impose their own view on the facts, the English judiciary is much slower to re-open cases where arbitral awards have been made.

The adoption of English law by many non-English parties in their arbitral agreements will also often lead to agreement for a London seat. The 2010 Queen Mary survey showed that companies are more than twice as likely to choose English law over other governing laws for international arbitrations. Just under 30 per cent of the world's 320 legal jurisdictions use the English common law. Another major attraction of English law is that it is based on the principle of freedom of contract. Contracts are put in place to give effect to parties' intentions, and there is nothing hidden in English law designed to defeat those intentions. The English language is also the world's *lingua franca*. This fact, together with the accessibility of English law (because most cases are widely publicised and discussed), supports the use of the latter.

London is a global legal hub

London is also, unquestionably, a global legal centre, not just a global financial centre, a fact recognised by then Lord Chancellor and Secretary of State for Justice, **Kenneth Clarke**, in 2011. Indeed, more than half the world's leading law firms have chosen to base themselves in London, giving the city the largest concentration of judicial and legal expertise anywhere in the world. Over 200 foreign firms have offices in London, and more than 50 of its leading law firms provide specific international dispute resolution services. The larger firms usually have 20 to 30 lawyers in their arbitration practice.

The parties to disputes in the UK may also choose to involve barristers as specialist consultants with particular expertise in advocacy, advisory and drafting work. Many London-based barristers have extensive experience conducting arbitrations both in London and all the major world centres.

According to the Queen Mary 2012 survey, 90 per cent of commercial disputes handled by London law firms now involve an international party, and approximately 80 per cent of the parties to arbitrations administered by the LCIA are of non-UK origin.

Another important advantage of arbitrating in London is the availability of experienced, specialist arbitrators from a wide variety of disciplines, including finance, engineering and shipping in addition to law. There is also an unparalleled depth of talent to provide expert reports on most technical subjects, including valuation and claim quantification.

The key findings in a report published in 2015 by TheCityUK confirm London's legal standing. It notes that three of the five largest global law firms, based on head count, have their main base of operations in London. And, in terms of gross revenue, London-based firms held five of the top 10 places.

When it comes to disputes, in 2013, the latest year for which data was available, the total number of commercial and civil disputes in the UK resolved through arbitration and mediation exceeded 24,000, approximately 5,000 of which were international in nature. In the same year, 80 per cent of the 1,198 claims issued in the Commercial Court involved at least one party whose registered address was outside England or Wales.

The report further reveals that in 2013, the UK accounted for approximately 7 per cent of global legal service fees, and that 316,000 people were employed directly in UK legal services, generating £22.6 billion, or 1.6 per cent of UK GDP and a net exports surplus of £3.1 billion.

The UK is also the world's most international market for legal services, allowing virtually unrestricted access for foreign law firms. The result is that major global corporations come to the UK to access London's unrivalled breadth of legal and financial services, seek advice, raise finance and insure their businesses.

The IDRC

The importance of excellent, purpose-built arbitration hearing facilities cannot be over-estimated in the choice of a London seat. The IDRC in Fleet Street is undoubtedly the largest and most-used arbitral hearing centre in the world. Singapore has been given kudos for its up-to-date and comfortable hearing rooms at Maxwell Chambers and the new ICC and HKIAC hearing facilities in Paris and Hong Kong are also first class, but the IDRC has a much greater capacity and a markedly greater throughput than Hong Kong, Singapore and Paris combined. It also has more extensive facilities and operates more efficiently than any other centre (see the box at the end of this piece).

Reforms to English arbitration law began in 1979

By the late 1970s, the willingness and ability of English courts to intervene in arbitral proceedings had become the subject of serious criticism. In the UK, and internationally, the added delay, cost and expense, and the lack of finality this could lead to, was making London a very unattractive venue for international arbitration.

The case of *L Schuler AV v Wickman Machine Tools Ltd* in the early 1970s is illustrative. There, the special case procedure was used to ascertain the meaning of one word in the contract at issue – *"condition"*. This led, after a seven-day arbitral hearing, to a seven-day hearing before **Mr Justice Mocatta**, a further five-day hearing in the Court of Appeal (presided over by **Lord Denning**) and a further seven days of argument before the House of Lords. Because of widespread concern at the time, the view developed that English arbitration law required change, to bring greater finality and certainty in arbitral awards and to curtail the opportunity for

unwarranted delay. It was also an important objective of those proposing reform to make London a global centre for dispute resolution through international arbitration.

The first step towards this goal was the Arbitration Act 1979, which replaced the special case procedure with a right of appeal to the courts, but only with leave, and with the parties having the ability to contract out of that right in certain cases. The basis upon which courts should grant leave was then argued in, and ultimately established by the House of Lords in *The Nema* case, which set out guidelines that had been earlier foreshadowed by **Lord Diplock**.

In 1985, the Departmental Advisory Committee on Arbitration Law (DAC) was set up to examine, *inter alia*, the effectiveness of the 1979 reforms. It also came to consider the adoption of the UNCITRAL Model Law on International Commercial Arbitration. Rather than adopting the Model Law, the DAC, chaired successively by **Lords Mustill**, **Steyn** and **Saville**, recommended that there should be a new and improved Arbitration Act.

One of the results of the DAC review was the recommendation that the new Act effectively adopt *The Nema* guidelines. Part of its rationale was that the parties had chosen to resolve their disputes through arbitration, rather than through the courts, and, in these circumstances, the courts should not interfere unnecessarily. This recommendation was carried into effect through section 69 of the 1996 Act, which also abolished the special categories in the 1979 Act where contracting out of appeals was prohibited.

The DAC recommendation to limit further the right of appeal from arbitrators to the courts was a deliberate one. This point was confirmed by Lord Saville in a recent article in *The Times* (published on 28 April this year) which was written in response to Lord Thomas's recommendations. He noted that DAC had recommended this curtailment because one of the international criticisms of English arbitration law was that it appeared to offer wide scope for taking

arbitration awards to the courts. DAC's aim was to curtail this custom, so as to encourage international trade and commerce to use England-seated arbitration to resolve their disputes.

Criticism of the Lord Chief Justice's recommendations

As previously reported by *GAR*, Lord Saville's article in *The Times* described Lord Thomas's idea of expanding the right of appeal as one that would "ride [...] roughshod over the bargain parties have made" and would unfairly increase parties' costs for resolving their disputes. Not mincing his words, Saville said that, far from helping to develop the law, to adopt Lord Thomas' proposed direction would be a "wholly retrograde step [...] calculated to drive international commercial arbitration away from London, to the great loss of this country".

In his article in *The Times*, Lord Saville stood behind his committee's decision to limit the right of appeal in the 1996 Act as correct, noting that other international arbitration jurisdictions offer no right of appeal on the merits at all. He pointed out that people use arbitration to resolve their disputes, not to add to the body of English commercial law. Why should they, therefore, be obliged to finance the development of English commercial law? He noted that the same point had been made in 1979 by **Lord Devlin**, in answer to those who were then against curtailing the right of appeal as it then existed: "So there must now be an annual tribute of disputants to feed the Minotaur. The next step would, I suppose, be a prohibition placed on the settlement of cases concerning interesting points of law".
In a similar vein, **Sir Bernard Eder** told the Chartered Institute of Arbitrators in a lecture last month that, although he agreed with Lord Thomas that the number of arbitration cases now reaching the Court of Appeal has reduced dramatically, he did not agree with his view that the common law has been or is being stifled.

Eder explained that the reason so few arbitrations do reach the courts is that the parties have agreed to exclude any appeal, as they are

entitled to do under the Act. Indeed, the exclusion of the right of appeal forms part of the standard rules of both the LCIA and the ICC International Court of Arbitration. And, as he pointed out, these rules reflect what parties want. Moreover, having regard to the prevalence of the UNCITRAL Model Law, which contains no appeal right, he predicted that a “stand alone” decision to expand the English right would drive cases away from London.

Is Lord Thomas’s case persuasive?

When the Lord Chief Justice’s case is stripped of its colourful, and unfair, attack on the perfectly proper confidentiality of most arbitral proceedings that are conducted in the UK, it rests on one premise only: that the English appellate courts are unable adequately to develop English common law because, absent the ability to review far more arbitration awards, they have an insufficient diet of appropriate commercial cases to enable them to do so.

With the greatest respect to his Lordship, when regard is had to the nature and size of the caseloads of the Commercial Court, the Court of Appeal, the Supreme Court and the Judicial Committee of the Privy Council, his argument seems nothing short of astonishing. It is true, of course, that English appellate courts now hear fewer arbitration appeals because of the changes made by the 1996 Act, but when the number of commercial cases that come before the Commercial Court and the appellate courts are considered, his argument seems unsupportable.

In a January 2014 response to a freedom of information request, the Ministry of Justice provided certain caseload statistics for the Admiralty, Commercial and Technology Courts for the five-year period from 2008 to 2012. These revealed an average, but increasing, annual caseload of the commercial courts of over 1,100 cases during the period. Moreover, 72 to 81 per cent of these cases involved at least one foreign party and, as such, can be considered as international commercial cases. And the international parties were not just from Russia or former CIS countries, which are well known users

of the UK courts. They covered the world. The data indicates that US domiciled parties outweighed the former Soviet state parties four to one.

Separate research conducted by Portland Legal Disputes, reported in the *Financial Times* in May 2014, shows that more than three-quarters of those who use London's commercial court are from outside the UK. For the year April 2012 to March 2014, users came from over 66 countries, across 15 regions of the world.

The Ministry of Justice's *Statistics Bulletin*, published in June 2015, indicate that the caseload the Commercial Courts for the previous year had risen to 1,763. In addition, during 2014, the Court of Appeal Civil Division heard 1,269 appeals. The Supreme Court disposed of over 25 cases and Privy Council heard 56. It is worth remembering that the Privy Council serves as the final court of appeal for 27 Commonwealth territories and independent republics and deals both with commercial (civil) and criminal issues.

In the face of these figures, most of which concern purely commercial cases, many of them international, it is hard to accept Lord Thomas's case that the English courts have been significantly undermined in their ability to develop the excellence of the common law by reason of too many cases being resolved by arbitration in London. Indeed, these statistics show that the UK appellate courts have an annual diet of commercial cases fit, some would say, to satisfy the appetite of Rabelais's fabulous Gargantua. One can only hope that the Law Commission, which is now considering amendments to the 1996 Act, will conclude that Lord Thomas's assertion that the present law constitutes "a serious impediment to the growth of the common law" deserves to be consigned to Room 101.

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