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Litigation & Arbitration Group Client Alert: London Arbitration: Increasing its Appeal?

Is London-seated arbitration facing something of an existential dilemma? Despite London maintaining its position as the most popular seat for international arbitration, it has recently been suggested in the English legal community that London's popularity is a threat to its own lifeblood.

LONDON'S SUCCESS

The Queen Mary's School of International Arbitration's 2015 arbitration survey indicates that London remains the most popular choice of seat in the arbitral community. Participants in the survey had selected London as their arbitral seat in 45% of arbitrations over the last 5 years.[1] Similarly, 47% of those participants nominated London as one of their three preferred seats.[2] The survey suggests that its popularity stems largely from its "*reputation*", as well as the perceived neutrality and impartiality of the local law system and the national arbitration law.[3]

London cannot rest on its laurels though. The survey showed that other seats are threatening its position, as the infrastructure and national laws elsewhere are adapting and improving to meet parties' expectations.[4] Given that party autonomy is the basic principle of arbitration procedure, it follows that flexibility and innovation are key to the continued success of a seat.

VICTIM OF ITS OWN SUCCESS?

London's popularity as the go-to seat for arbitration is not, according to one leading authority in English law, without its problems. In a lecture given earlier this year, The Right Honourable Lord Thomas of Cwmgiedd, Lord Chief Justice of England and

[1] Paris was in second place, accounting for 37%, and Hong Kong in third place with 22%. http://www.arbitration.qmul.ac.uk/docs/164761.pdf. p.12.

[2] Ibid.

[3] Ibid. pp. 13-14.

[4] Ibid. pp. 15-16.

Wales, expressed his concern that arbitration was hampering the development of English law. In particular, Lord Thomas lamented the fact that arbitration awards are subject to a limited right of appeal under English law, which means that very few awards find themselves under the scrutiny of the courts.[5] As such, he argued, the law cannot develop as fluidly as it ought to, since the bedrock of the common law (i.e. court judgments) is drying up while arbitration thrives.

On the face of it, there is obvious sense in Lord Thomas' criticism. The English common law system relies on court judgments to define the law, and without a constant stream of cases that reflect the ever-changing dynamics of commerce, the law would be in grave danger of falling behind the commercial world that it serves. Consequently, if judges (and arbitrators alike) are increasingly bound by an English law that is outdated, London may no longer credibly hold itself out as the best place to resolve commercial disputes in the years to come. As a solution, Lord Thomas' view is that the law[6] should be amended to encourage more appeals to the court and, more drastically, he would like to encourage parties to seek resolution of their disputes in court as opposed to arbitration.[7]

MEETING PARTIES' EXPECTATIONS

The London arbitration community has fought back, and the broad consensus seems to be that the current arbitration law was consciously adopted as it now stands in the Arbitration Act 1996 to meet parties' expectations, and there is no good reason to change it.

One of the architects of the Arbitration Act, Lord Saville, has warned in a recent article published in The Times of the "*wholly retrograde step"* of increasing court involvement on appeal, which would likely injure London's presence as an arbitration centre and undermine one of the key reasons for parties to refer disputes to arbitration.[8] Lord Saville pointedly notes that parties use arbitration "*to resolve their disputes…not to add to the body of English commercial law*."[9]

Indeed, if the finality of an arbitration award were diluted by allowing extensive appeals to the courts in order to foster the development of the common law, the question must arise as to whether arbitration would, in effect, become a quasi-adjudication process. Parties would have to expect that a losing party would apply for

[5] The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales. "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration." The Bailii Lecture 2016. 9 March 2016. https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf.

[6] Namely, s.69 of the Arbitration Act 1996, which currently permits parties to appeal against arbitral awards only on points of law.

[7] https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf. p.14.

[8] Lord Saville. "Reforms will threaten London's place as a world arbitration centre". *The Times*. 28 April 2016. http://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd.

[9] Ibid.

permission to appeal, and that the courts would be inclined to grant permission. In those circumstances, would parties be prepared to spend the same time and effort in pursuing an award that has a significant chance of being appealed, or would they instead seek a quick, but potentially flawed, interim decision that will be binding unless or until the case is heard by the courts (as is generally the case in adjudication)? This is entirely at odds with the purpose of arbitration: to act as a genuine alternative to litigation for parties that want to avoid the national courts for the myriad of reasons that are well known.

Further, the current system already allows for the development of the common law through s.69 of the Arbitration Act, which gives parties the right to appeal against arbitral awards on points of law.[10] Therefore, the courts can and do continue to develop the common law notwithstanding that the relevant dispute originates in arbitration: indeed, one of the tests as to whether permission to appeal pursuant to s.69 should be granted is whether there is a question of general public importance[11] – a test that was recently applied by the courts and led to a judgment by the Supreme Court in the context of the concept of 'agency'.[12]

What the current system aims to prevent is parties seeking to use the appeal process for tactical purposes. This principle was confirmed in a shipping case earlier this year, when the Commercial Court ruled that, even if parties agree to allow appeals for *any* question of law, they always do so with s.69's requirements in mind, reaffirming the court's reluctance to allow a flood of appeals on trivial or simply factual matters.[13]

In any event, the data indicates that the English courts are not being starved of cases. The Ministry of Justice's Statistics Bulletins for the last three years suggests that the case load is fairly constant. These bulletins show that, in the Admiralty, Commercial and Technology and Construction Courts (amongst which the majority of commercial cases are handled), there were 1,763 cases in 2014, 1,854 in 2013 and 1,817 in 2012.[14] Around 20% of those cases in the Commercial Court related to arbitration applications

[10] Albeit the parties can opt to exclude this right by agreement.

[11] Appeals from the High Court to the Court of Appeal are also restricted, in that an appellant must first obtain the court's permission by demonstrating that it has a real prospect of success, or that there is some other compelling reason why the appeal should be heard (CPR 52.3(6)). Similarly, restrictions apply on second appeals (i.e. appeals against a decision that was made on appeal) in that the question must raise an important point of principle or practice, or there is "some other compelling reason" for the Court of Appeal to consider the decision (CPR 52.13(2)).

[12] *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] UKSC 20.

[13] *ST Shipping and Transport PTE Ltd v Space Shipping Ltd* [2016] EWHC 880 (Comm) [42].

[14] Civil Justice Statistics Quarterly, England and Wales and Appellate Court Statistics 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/432070/civil-justice-statistics-jan-march-2015.pdf. p.26.

and appeals.[15] The same bulletins show that the Court of Appeal heard 1,269 appeals during 2014, 1,142 in 2013 and 1,181 in 2012).[16]

The above appears to suggest that there are ample (and consistent) numbers of cases to ensure the adequate development of the common law.

ROOM FOR IMPROVEMENT?

The fact that London is (and has been) one of the most popular choices of seat, suggests that it has been offering what parties want - a viable alternative to litigation that empowers parties with more autonomy, flexibility and privacy, and a more certain route to a binding award.

That is not to say that London arbitration is perfect. While the limited rights of appeal have generally been seen as a positive aspect, the Queen Mary's 2015 survey indicated that 23% of participants were in favour of an appeal mechanism on the merits for arbitral awards in international commercial arbitration.[17] Perhaps this points to an 'opt-in' option for parties to London arbitration?

There is also room for improvement in relation to the 'usual' criticisms of arbitration: cost and efficiency. For example, there is scope for improving the efficiency of London-seated arbitrations in disputes that the courts would otherwise dispense of on a summary judgment basis.[18] This may go some way to addressing the concerns of parties to finance disputes for example, where the factual and legal issues are often straightforward matters of debt. However, London is not alone in this and it is, arguably, more of an issue for the major procedural institutions to address, rather than a matter of national law.

So continuing refinement and adaption is important, but (in many practitioners' view at least) policy-makers should resist the temptation to fundamentally change a recipe that has so far proven successful. Instead, arbitration needs to address the concerns of the parties, who ultimately will determine the success or failure of an arbitral seat, by improving efficiency and costs while maintaining the aspects of arbitration that are currently valued (including the limited scope of appeal).

[15] Ibid.

[16] Ibid. p.24.

[17] http://www.arbitration.qmul.ac.uk/docs/164761.pdf. p. 8.

[18] See, for example, the recent revisions to the Stockholm Chamber of Commerce Arbitration Rules, which allow parties to request the tribunal to rule on factual or legal matters at the beginning of a case. The English courts have shown some willingness to allow summary judgments in arbitration, when the court refused to dismiss an enforcement application relating to an Award made under the ICC Rules on a summary basis. While the court did not rule on the availability of summary judgment (as it deferred judgment pending a determination in New York), it did note that summary judgment would not, in principle, amount to a denial of due process and that the real question was whether, in the circumstances, the Tribunal had acted fairly. See *Travis Coal v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm) (24 July 2014).

Perhaps the more pertinent question is whether the courts can address the threat from arbitration by adapting their own systems and procedures to attract parties to litigation, rather than trying to change the rule book.

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