Chartered Institute of Arbitrators (London Branch)

AGM Keynote Address – 28 April 2016

"Does arbitration stifle development of the law? Should s.69 be revitalised ?"

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1. It is a great pleasure to be able to give this talk this evening; and I would like to thank the London Branch of the Chartered Institute of Arbitrators and your Chair, Irvinder Bakshi, for asking me to speak.

2. My talk is something of a hot topic because it is by way of response in part to the recent BAILII Lecture given last month by Lord Thomas, the Lord Chief Justice[1]. I do not propose to try to summarise that speech – mainly because it covers a very broad canvass, raises a number of controversial issues and any summary would not do it justice. But it is plainly a very important speech; and for those who did not hear it or have not read it, I commend it to you. Equally, if you have not seen it already, I would urge you to read the short article by Lord Saville in The Times today. He was, of course, the main architect of the Arbitration Act 1996 – and his views deserve the most serious attention.

3. There is much in Lord Thomas' speech with which I agree; and, with great respect, much with which I disagree. Let me start, if I may, to highlight some of the points of agreement.

4. First, it is worth noting at the outset that it is almost 20 years to the day that the Arbitration Act 1996 was passed. It is therefore perhaps a convenient time to consider whether or not the Act has been successful, whether it remains "fit for purpose" and what, if any changes, might now be introduced. There is no doubt that in these past 20 years, arbitration has become increasingly popular as a method of resolving disputes

[1] The Bailii Lecture 2016 (9 March 2016): *"Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration".*

not only in England but also around the world – and an open debate on these issues is, in my view, both timely and most welcome.

5. Second, I strongly agree with the general theme that runs through much of Lord Thomas' speech viz. that decision making in the Courts plays a vitally important role in commercial law as in other spheres. In particular, as he stated, it enables the law to develop in the light of reasoned argument which is itself refined and tested before a number of tiers of judiciary; it enables public scrutiny of the law as it develops; and it ensures, as a necessary underpinning to public scrutiny, that the law's development is not hidden from view[2].

6. Third, it is an undeniable fact that since the passing of the Arbitration Act 1979 – which was, of course, the predecessor to the 1996 Act – the number of cases that reach the Courts on appeal has been dramatically reduced. According to Lord Thomas, in the years before 1979, the number of what were then called "special cases" had been 300 whereas, according to statistics published in 2009, the number of applications for leave to appeal was about 50. More recent statistics covering the four year period 2012-15 appear in the attached summary table. These are based in part on information from the Commercial Court Registry; and in part from a review which I carried out myself of cases reported in BAILII. The latter exercise was carried out very quickly and I do not warrant that the figures are 100% accurate. But I think that they are sufficient for present purposes and confirm the general trend. In summary, during the last three years, the figures show an average number of about 70 applications in the Commercial Court for leave to appeal under s.69 with leave being given in under 20 cases i.e about 30%; and about 10 appeals being heard each year of which about 6 were allowed. It is particularly noteworthy that the vast majority of these appeals – by my account, about 75% - were shipping cases. During this same period, it would appear that there were only 5 appeals to the Court of Appeal – all rejected apart from one. There was only one appeal that reached the Supreme Court.

7. Fourth, I agree that the diminishing number of appeals reduces the potential for the courts to develop and explain the law – although I am not sure that I would go so far

[2] Para 11.

as to say, as Lord Thomas states, that this consequence provides fertile ground for transforming the common law into an "ossuary". But I agree that since arbitrations are generally conducted behind closed doors, the effect is to retard public understanding of the law and public debate over its application As stated by Sir Bernard Rix in a lecture which he gave last year[3]:

> *"Once however we come to awards which are concerned with standard forms of contracts, or jurisdictional issues, or principles of law, or important forms of interim relief, the lack of publication, the lack of transparency, the difficulty or impossibility of getting such awards into the public domain, a fortiori in the light of institutional rules which bar any challenge or appeal to the courts whatsoever, mean that our commercial law is going underground. As more and more international commercial cases go to arbitration rather than the courts, we are more and more losing sight of the basic feedstock of our commercial law."*
> *In such circumstances, it is in my opinion inevitable that the public interest is being and will increasingly be damaged as more and more decisions on areas of commercial law become inaccessible to the public arena."*

8. In passing, it is worth noting that some institutions – for example, the ICC and the LMAA – provide a mechanism for publication and dissemination of some awards (or at least parts of award) in certain circumstances usually in an anonymised form; and this procedure alleviates to some extent the problem identified by Lord Thomas. However, such publication as exists is very limited and cannot, on any view, be a substitute for the decision of a Court in a public Judgment.

9. Fifth, I agree that there are important steps which have been taken and which can be taken to improve our Court system and to ensure the continued development of the law which, as Lord Thomas states, underpins our trade, financial system and our prosperity. In that context, I strongly endorse the initiatives to which he refers and much of what he says – although I would myself go much further. What is badly needed – and needed urgently – is more investment in our Court systems to increase efficiency - and reduce costs and delay. There is much that can, should and, in my view, must be done to ensure that our system of litigation delivers justice fairly, efficiently, within a reasonable time-frame and at a cost which is reasonable and proportionate. It is, in my view, no good complaining that the development of the

[3] *"Confidentiality in International Arbitration:Virtue or Vice?"* Jones Day Professorship in Commercial Law Lecture, SMU, Singapore 12 March 2015

common law is being hindered because parties prefer arbitration unless those responsible for the administration of our court system take the necessary positive steps to make it more attractive. Speaking for myself, I would start by scrapping costs budgeting in the Commercial Court. But all that is a lecture for another day.

10. So, turning back to the first question, I am prepared to agree that the development of the law may possibly have been hindered by the reduction in the number of cases reaching the Courts on appeal. However, I would not agree that it has been "stifled". A quick glance at the law reports and forewords of the major textbooks over recent years would, in my view, show that the common law continues to develop at a pace with a constant stream – indeed flood – of cases over a wide area of jurisprudence.

11. I am not sure whether many in this room – or indeed outside this room – would disagree with much of what I have said – if at all. However, given Lord Thomas' speech, the second question – that is, whether s.69 should be revitalized – is somewhat more controversial.

12. In considering that question, I think it is important to understand and indeed emphasise that the reason why many arbitrations never reach the Courts is simply because the parties have agreed between themselves to exclude any appeal - as they are perfectly entitled to do under the 1996 Act. In such circumstances, s.69 is a complete irrelevance. It is also important to note that the exclusion of the right of appeal forms part of the standard rules of, for example, the LCIA and the ICC. Those institutions no doubt have considered and continue to consider that that is what parties want – and, in my view, it would be inconceivable to deny parties such right. To suggest otherwise would be to drive a coach and horses through the fundamental principle of party autonomy and, in my view, would be hugely detrimental to London as a centre of international arbitration. To be clear, there is nothing in Lord Thomas' speech to suggest any possible change in this respect. But the important point is that, regardless of s.69, a large number of international arbitrations will never reach the Courts.

13. So, it is against that background that I turn to s.69 itself. It is perhaps convenient to remind ourselves as to the structure of the section. In order to assist in the task of

considering applications for leave to appeal under that section, I prepared for myself some years ago a flowchart – and I have given you all a copy. I do not propose to go through all the questions that have to be considered. For present purposes, it is sufficient to highlight the following points which I am sure are obvious to all of you. First, leave to appeal can only be given in respect of a *"question of law"* arising out of an award which the arbitral tribunal was asked to determine. Second, the determination of the question of law must *"substantially affect the rights of one or more of the parties"*. Third, leave can only be given if the decision of the tribunal on the question is *"obviously wrong"* or, if the question is one of general public importance, if the decision of the tribunal on the question is *"open to serious doubt"*. Fourth, the Court has to consider whether it is *"just and proper in all the circumstances for the court to determine the question"* before, finally, exercising its discretion.

14. It is perhaps convenient at this stage to correct a misunderstanding that would seem to have arisen following comments in a paper I delivered in 2014 at a conference on international arbitration[4] which was quoted by Mostyn J. in a recent decision in the family division of the High Court, *DB v DLJ*[5]*,* and which was, in turn, the subject of some comment by Sir Hugh Bennett in a paper he recently delivered to the Worshipful Company of Arbitrators[6]. In my paper, I recalled Michael Kerr, a former judge in the Court of Appeal and one of the leading figures in the recent development of the law of arbitration in England, once telling me: *"Remember, when parties agree arbitration they buy the right to get the wrong answer"*. For the avoidance of doubt, that comment was not made in the context of an arbitration award where the right of appeal was excluded. To be clear, what Michael Kerr was saying was that, even where the right of appeal was not excluded, the mere fact that an award may be "wrong" does not, of itself, justify intervention by the Courts. That is, I think, a very important and salutary message - and it underlines the overall structure of what is now s.69.

15. As to the operation of that section in practice, it is sometimes said that the problem is that the Judges apply these provisions too strictly – and that this is the reason why

[4] https://www.judiciary.gov.uk/announcements/challenges-to-arbitral-awards-at-the-seat-december-2014/
[5] [2016] EWHC 324 (Fam)
[6] http://www.familylaw.co.uk/news_and_comment/Family-Law-Arbitration-A-better-way-to-Justice-lecture-to-the-worshipful-company-of-arbitrators#.VyHJOJMrKEI

there are fewer appeals. However, apart from the odd disgruntled would-be appellant, there is no evidence to suggest that this is the case. And having sat in the Rolls Building for almost 5 years dealing with numerous applications for leave and substantive appeal hearings, I have seen nothing to suggest that the Judges are to blame or are somehow at fault.

16. An important part of Lord Thomas' speech is that the UK went too far in 1979 and again in 1996 in favouring the perceived advantages for arbitration and that change to the s.69 test is one of the options that must be considered. Consideration is, of course, one thing. But, I disagree with Lord Thomas that the UK went too far; and I also disagree with any suggestion that s.69 should be changed. My reasons are as follows.

17. First, I think that it is important to recognize that we live and work in a global world. We are, I believe, the only country in the world which allows an appeal on a question of law in the case of an international arbitration. To that extent, we stand alone. The frequent criticism from abroad is that English Courts intervene too much in arbitration. I do not agree with that criticism and the statistics show that this is demonstrably untrue – particularly when one bears in the mind the total number of arbitrations in England in any one year. But what is certainly true is that most other countries have adopted the UNCITRAL Model Law or similar which, of course, does not permit any such appeal. That is presumably because it is recognized that that is what parties prefer. The suggestion that we should now permit more appeals clashes with that apparent strong preference and, if implemented, such change would, in my view, operate to the great detriment of international arbitration in this country.

18. The counter-argument, of course, is that, if s.69 is widened to permit more appeals, the parties can always exclude the right of appeal – so it will not matter. However, the obvious possibility – and, in my view, substantial risk - is that either (i) parties will decide to arbitrate in other jurisdictions or (ii) even more parties will exclude the right of appeal; and, if that happens, there will be even fewer appeals. So I am extremely doubtful whether any widening of s.69 would, in fact, lead to any further appeals.

19. Second, if the problem is that the common law is being stifled or even hindered because there are fewer appeals, I am totally unpersuaded that the answer lies in

forcing private litigants to finance the development of the common law by pursuing appeals to the High Court, the Court of Appeal and even the Supreme Court. Whatever public interest there may be in that object, I see no reason why its achievement should depend on their time and money – unless they so desire. As referred to by Lord Saville in The Times, the same point was made in 1979 by Lord Devlin, answering those who were against curtailing the then existing right of appeal on the grounds that the development of English commercial law would suffer if decisions on debatable points were not published in the law reports. *"So there must 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."*

20. Moreover, it is important to bear in mind that a very large proportion of the parties who come to England to arbitrate are, of course, not English. Why should the cost of developing English law be paid for by foreign litigants ?

21. Third, quite apart from the cost of appeals, it is important to bear in mind that any appeal process inevitably postpones the time for finality. Such delay is anathema to most parties. Let me taken a recent example, *The Achilleas*[7]. The case concerned the measure of damages in a charterparty dispute – although the facts do not matter. For present purposes, what does matter is that the arbitral tribunal in that case produced an Award dated 17 May 2006 in favour of the shipowners. The sum awarded by way of damages was relatively modest – some US$1.3 million. The appeal was heard and Judgment was delivered by Christopher Clarke J. on 20 October 2006. He upheld the Award. An appeal was then heard by the Court of Appeal in 2007. Judgment was delivered on 6 September 2007 upholding the Judgment below. A further appeal was then heard by the Supreme Court. Judgment was delivered on 9 July 2008. The Supreme Court reversed the decision of the Court of Appeal. For present purposes, it is sufficient to note that having won decisively in the arbitration, at first instance and in the Court of Appeal, it must have been somewhat galling for the shipowners to lose in the Supreme Court over 2 years after the Award had been published. I put on one

[7] *Transfield Shipping Inc v Mercator Shipping Inc* [2009] AC 61

side the many criticisms of that Judgment in the Supreme Court and whether it can properly be said that it has helped to develop the common law.

22. Let me take another example, *The New Flamenco*[8] – another shipping case concerning the measure of damages. The award in that case was published on 3 June 2013. Leave to appeal was given and the appeal was allowed for reasons set out in a Judgment delivered by Popplewell J. on 21 May 2014. The Court of Appeal heard the further appeal last year and in a Judgment delivered on 21 December 2015 – some 2½ years after the original award – allowed the appeal and, in effect, upheld the original award. I do not know whether this case is going further. In any event, it is interesting to note that, according to my limited researches, this would seem to be the only decision in the Court of Appeal in the last 4 years which has reversed a decision at first instance on an appeal under s.69. As far as I am aware, there have only been 5 other cases in the Court of Appeal – all of which have been dismissed by the Court of Appeal.

23. I cite these two cases - *The Achilleas* and *The New Flamenco* – by way of example only. In my view, they do not fit easily with the general principle enshrined in s.1(a) of the 1996 Act viz that the object of arbitration is to obtain the fair resolution of disputes *without unnecessary delay or expense.* If anything, they provide a strong argument for restricting the right of appeal – not widening it.

24. Fourth, the DAC Report which preceded the Arbitration Act 1996 provides a compelling case for the regime now in place. Anyone who has any doubts should read the relevant part of that Report. The structure of s.69 was, in truth, a "pragmatic compromise". In my view, it was an excellent piece of legislation which has helped to ensure that London remains the world's leading international arbitration centre. Although there are some isolated voices in the wind blowing in different directions, there is, so far as I am aware, no general call for any change to s.69. On the contrary, I should mention that I recently attended a seminar organised by the London Shipping Law Centre and chaired by Lord Saville. The audience of over 100 consisted of a motley collection of solicitors, arbitrators, barristers, brokers and others involved in

[8] *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2015] EWCA Civ 1299

maritime arbitration. When put to the vote, the vast majority (my recollection, in fact, is 100%) were in favour of the status quo. Absent strong support from the arbitration community (and by that I mean not only lawyers and arbitrators but the parties themselves), I would suggest that any proposal to widen s.69 simply does not get off the ground.

25. Fifth, it is not clear to me what changes might be made to s.69. No one would, I think, suggest that there should, in effect, be an automatic right of appeal to the Courts or even an automatic right of appeal on a question of law. That would be a most retrograde step.

26. One possibility might, I suppose, be to extend the right of appeal to include not only a "pure" question of law but also a mixed question of law and fact. It is fair to say that were some who thought that the original Arbitration Act 1979 should be interpreted in that way so as to permit appeals in such circumstances. Indeed, in the context of the question of frustration, no less a Judge than Mr Justice Robert Goff (as he then was) described the contrary argument at first instance in *The Nema*[9] in the following trenchant terms:

> *"... Now, with the utmost respect to Mr. Diamond, this is an old warhorse that has been trotted out of the stable. The last time it was seen on the battlefield was in The Angelia,[1972] 2 Lloyd's Rep. 154, some seven years ago. After that unsuccessful appearance, it was returned to the stable and so far as I know has been munching hay happily for the last seven years, so much so that everyone has forgotten about it. But, here it is again and I am simply going to say this, that I find myself in total agreement with every word of what Mr. Justice Kerr said in The Angelia. I had thought that this was now accepted law. Mr. Justice Kerr there pointed out that not only was In re Comptoir Commercial Anversois and Power, Son and Co., [1920] 1 K.B. 868 C.A., not cited to Mr. Justice Devlin in Citati, but that since Citati water has been flowing very rapidly under the bridge indeed and in Tsakiroglou and Co. Ltd. v. Noblee Thorl G.m.b.H., [1961] 1 Lloyd's Rep. 329; [1962] A.C. 93, and Davis Contractors Ltd. v. Fareham Urban District Council [1956] A.C. 696, both decisions of the House of Lords, it was made clear beyond doubt that frustration is, in the ultimate analysis, a question of law ...."*

[9] *B.T.P Tioxide Ltd v Pioneer Shipping Ltd (MV Nema)* [1980] 1 Lloyd's Rep. 519 (Note). [1980] 2 Lloyd's Rep 83.

In the event, however, that view was rejected by both the Court of Appeal and the House of Lords; and the modern approach was set out by Lord Diplock in what became known colloquially as *The Nema Guidelines,* subsequently enshrined in the 1996 Act. To expand the right of appeal now to include not only a "pure" question of law but also a mixed question of law and fact would be setting the clock back almost 40 years and would, in my view, be totally unacceptable. As stated by Longmore LJ in *The New Flamenco* at [20]: *"In appeals from an arbitrator's award a court has to be particularly respectful of the boundaries between fact and law which the parties, by their choice of tribunal, have created."*

27. Another possibility would be to lower the threshold for granting leave. For example, in the case of a question of law of "public importance", the threshold requirement might, I suppose, be adjusted from *"open to serious doubt"* to *"open to doubt"* or even just *"arguable*". But, in my view, this ignores one of the main reasons why parties choose arbitration instead of litigation, would give insufficient weight to the decision of the tribunal chosen by the parties and would open the gates far too wide. In my view, the *"open to serious doubt"* test achieves the right balance in cases of *"public importance"* – as does the *"obviously wrong"* test in other cases. The truth is that there is no evidence whatsoever that there have been any applications for leave to appeal which have been refused but which, if they had succeeded, would have led to substantive appeals which would have contributed in any significant way to the development of English law. And, although this is a guess on my part, I would be surprised if there were any – or at least many – cases that fell into that category.

28. For all these reasons, it is my strong view that there should be no change to s.69.

29. I will finish, if I may, by quoting from Lord Saville's conclusion in The Times today: *"To expand the right to appeal from arbitration awards would, far from helping to develop English law, be calculated instead to drive international commercial arbitration away from London, to the great loss of this country.*" I wholeheartedly agree; and I hope you do too.

30. Thank you.