



JUDICIARY OF  
ENGLAND AND WALES

**The London 2016 International and Commercial Law Conference**  
**Is Commercial Arbitration the Future of Commercial Justice?**  
**Intervention by the Rt Hon Lady Justice Arden DBE**  
**June 2016**

---

The arbitration world is, I understand, flourishing in Australia. There has been an increase in the use of commercial arbitration and Australia is becoming an ever more popular location for cross-border dispute resolution by arbitration. The pro-arbitration approach of Australian law, and the very high standards of its judiciary and observance of the rule of law, have assisted in this development.

Some states have a panel of specialist judges and also a dedicated arbitration list which enables them to offer a quick turn around and a consistent and high quality service to litigants.

In addition, Australian courts have adopted a restrictive interpretation of the public policy ground for refusal of enforcement of a foreign award. The High Court of Australia has held that enforcement of an award is not to be refused by the courts simply because the court has not satisfied itself as to the correctness of the award (*TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*).<sup>1</sup> The conceptual basis for this conclusion is significant. Crucially the High Court concluded that enforcement of an award does not mean enforcement of rights and obligations imposed by the general law but of rights and obligations created by the parties' agreement, which have merged into an award. In a liberal democracy, the courts allow parties to set up their own regime of rights and obligations.

---

<sup>1</sup> [2013] HCA 5

The importance of an arbitration-friendly environment was vividly brought home to me when preparing for a lecture to be given in India in 2003.<sup>2</sup> I found that the Supreme Court of India had given a very wide interpretation to the ‘public policy’ exception in the UNCITRAL Model Law. It extended to an award which, in the opinion of the Supreme Court, was wrong in law having regard to the Indian Contract Act. Things in India have now changed, with India now promoting arbitration for international commercial dispute resolution.

### **England and Wales**

The position here is that practitioners generally take the view that courts should rarely hear appeals or applications in arbitration disputes.

Parties may indeed exclude the right of appeal to the court. Figures show that the figure of 300 appeals per year before 1979 (when the present restrictions on appeals were first introduced) have now dropped to about 70 per year.

Another aspect of the non-interventionist approach of the court is the doctrine of separability: i.e. the fiction that an arbitration clause is separate from the main agreement. It means that arbitrators can continue to act even though there is a challenge to the host agreement of which the arbitration agreement forms part: see the Arbitration Act 1996, section 7. It is covered in Australia by Article 16 of the UNCITRAL Model Law. I was a party to one of the most important decisions on separability, namely *Fiona Trust Holding Corporation v Privalov*,<sup>3</sup> when it was in the Court of Appeal. The case concerned a dispute between owners of a fleet of ships and charterers. The owners alleged that the charterers had bribed the owners’ agent to enter into unfavourable contracts. The question was whether that dispute affected the arbitration clause in the charterparties. The Court of Appeal held

---

<sup>2</sup> Speech to the Second Conference on Dispute Resolution, The International Centre for Dispute Resolution, New Delhi, September 2003.

<sup>3</sup> [2007] UKHL 40.

that on its true construction the arbitration clause extended to this dispute, and that decision was affirmed by the House of Lords. As Lord Hope said:

"the allegations of bribery are directed to the terms on which the charters entered into - and not to the arbitration agreement itself."

Another instance of the arbitration-friendly attitude of the English and Welsh courts is the establishment of a Financial List. Lord Thomas, Lord Chief Justice of England and Wales, has set up the Financial List which is designed to ensure that commercial cases are more speedily heard. This is a single, specialist list which takes commercial cases from the Chancery Division or Commercial Court which meet certain criteria: in particular, that (1) they raise important issues for the financial markets, or concern banking, derivatives, complex financial products, and so on, and (2) involve more than £50m or (3) require particular expertise in the financial markets. The aim is that these cases will be case-managed and heard speedily by specialist judges.

I am not saying that arbitration cases will necessarily meet this criteria but what is important is that London is open for business and its Commercial Court can offer speedy and high quality commercial dispute resolution where required.

I had myself thought that the issue of the amount of support courts could give for arbitration cases was settled. We had, for instance, a case in which we had to consider whether legislation setting out the powers of the Court of Appeal to hear appeals had inadvertently swept away some important provisions of the Arbitration Act 1996 giving commercial judges sole power to decide whether there should be an appeal from the High Court. We held that this had not occurred.<sup>4</sup> In the decision, a key factor was, we considered, that the policy of the 1996 Act was to reduce intervention by the Court in the arbitration process and that there should be as little interference as possible with arbitration awards.

However, last November, Lord Thomas, a distinguished commercial judge, gave a high profile lecture calling for courts and arbitration to work together and for the existing

---

<sup>4</sup> *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] CB 388.

relationship to be rebalanced. His view is that the UK may have gone too far in favouring private arbitration over the development of the common law. The case for arbitration over court proceedings might have been overstated given the cost and delay involved in arbitration proceedings.

Lord Thomas raised the question whether the 1996 Act should be reformed to enable more appeals to be brought before the English courts, providing "the means to maintain a healthy diet of appellate decisions, capable of developing the law particularly on issues of general public importance".<sup>5</sup>

Lord Thomas' suggestions included:

- revising the criteria for court intervention;
- encouraging greater recourse to the courts; and
- greater use of the court's power to make rulings on points of law during an arbitration.

The Court has power under section 45 of the 1996 Act, on the application of a party to an arbitration, to decide a preliminary point of law. It can only do this if all the parties agree or with the permission of the arbitration tribunal. This all happens in real time because, unless the parties otherwise agree, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court is pending. But parties rarely apply to the court for this assistance, possibly because they would then not have the confidentiality that applies in an arbitration. It is, I think, significant that there have not been more applications under this section as it strongly suggests that there is no great demand by parties to arbitrations for assistance by the court in resolving their dispute. There will, of course, be times when the court has some power which the arbitration tribunal does not have - as in shareholder disputes - which will make court proceedings more attractive for commercial

---

<sup>5</sup> 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, 09 March 2016) [34].

parties. But in other cases I would take the silence on section 45 to be a big vote of confidence in commercial arbitration.

There has been a mixed reaction to Lord Thomas' calls. Notably a principal architect of the policy behind the 1996 Act, Lord Saville of Newdigate, a former Supreme Court Justice, wrote in *The Times* that expanding the right of appeal from arbitral awards under the 1996 Act) would be "a wholly retrograde step".<sup>6</sup>

Confidentiality is a major reason for arbitration. So is enforcement under the New York Convention. But there will be times when recourse to the courts is unavoidable - such as where there is an allegation of bias on the part of arbitrators. Recourse to the court is then absolutely essential in order to maintain the integrity of the arbitral process.

This is particularly true in investor-state arbitration, which has often led to developing countries going away feeling dissatisfied by the process. This is a field where there have been some exciting developments in relation to Australia, which has fought off a challenge by Philip Morris Asia. Philip Morris Asia restructured its group in order to bring a claim under the Hong Kong/Australia bilateral investment treaty to challenge Australia's Tobacco Plain Packaging Act 2011. The tribunal has decided that it does not have jurisdiction to decide this dispute. It held that Philip Morris had committed an abuse of rights because the corporate reorganization was motivated wholly or in part by a desire to make a treaty claim using a Hong Kong company.

This subject leads to the topic of the EU/TTIP negotiations. In the course of these on-going, protracted negotiations, the EU made proposals for a new system of arbitration to replace the present system of investor state arbitrations run by ICSID.

The making of these proposals reflects something of a pushback from the conventional rosy view of international arbitration. Some people hold the view that investor state arbitration is run by highly paid lawyers who seek compensation from governments who try to pass laws

---

<sup>6</sup> Mark Saville, 'Reforms will threaten London's place as a world arbitration centre', *The Times* (London, 26 April 2016) 58.

for the benefit of their own population. There is also a concern about the impartiality of arbitrators who are counsel in other cases where similar issues are being run. In addition, it has to be remembered that investor-state arbitration may raise issues about human rights in the state concerned and thus considerations flowing from public international law. In that respect it is a form of arbitration which is distinct from international commercial arbitration.

The new system proposed by the EU involves a permanent investment court. Each government of the EU would nominate a list of persons who would be qualified to be judges in their own jurisdiction to be judges on this court. Appointments would then be made of five EU judges, five US judges and five judges from other nations. The court would then sit in divisions of three judges (one from each group). The new structure would have its own appeals body with six judges, two from each group, and sitting in constitutions of three. Parties would have to make a choice at the outset of the dispute whether to opt for adjudication under domestic law or arbitration under its new system.

This system would reduce the ability of parties to choose their own arbitrators. In addition they would have to accept judges from the panel of judges appointed by the new body. The reason for the proposal is apparently dissatisfaction on the part of some EU countries with investor-state arbitration.

The proposal made by the EU underscores the need for everyone involved in international arbitration to be on their mettle to ensure that commercial litigation remains a top class alternative to the courts. The last thing anyone wants is a system of arbitration in which the losing party goes away thinking that the tribunal was not just wrong but also that the conduct of the arbitration was improper. The message this proposal sends out is that practitioners and arbitrators have to maintain high professional and ethical standards, and generally to work to ensure public confidence in the arbitration system.

© 2016 Dame Mary Arden DBE

---

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Office Communications Team.