



JUDICIARY OF  
ENGLAND AND WALES

**LORD JUSTICE GROSS**

**COURTS AND ARBITRATION**

**THE JONATHAN HIRST QC COMMERCIAL LAW LECTURE**

**LONDON, 1 MAY 2018**

**Introduction<sup>1</sup>**

1. The invitation by Brick Court Chambers to deliver the second Jonathan Hirst QC Commercial Law Lecture is a great honour, all the more so on this poignant occasion – the first such lecture when we are without Jonathan, a close friend and an outstanding colleague, much missed by all here. My title is “*Courts and Arbitration*”. I think it is a fitting topic. It is how Jonathan and I first met, on opposite sides, in successive hearings.
2. From first meeting as opponents, we – and our families – became the closest of friends. It was in the best traditions of the Bar and our system has benefited enormously from the force of such traditions; vigorous opposition in court or arbitration never once becoming personal. Quite the contrary. Subsequently, we worked together on the Bar Council, where Jonathan was (as might be expected) a most effective and popular Chairman. Business was conducted with despatch and good humour. Later still we holidayed together, in this country and abroad. I am delighted to see Fiona, Charles, Pamela (Lady Hirst), Rachel and Leslie Johnston, Sara Cox and Simon Hirst here. In fact, my connection with the Hirst family dates back to happy memories of appearing in front of Sir David, Lord Justice Hirst. I always enjoyed those occasions regardless of the outcome.
3. My theme tonight is that our Courts and London arbitration are complementary and mutually reinforcing, comprising a feature of the first importance for *Legal UK*. We need both as we seek to maintain and strengthen the global leadership position of London and English Law post-Brexit, as I shall seek to explore. I will look, first, at the relationship between the courts and arbitration; then at the courts, finally at arbitration. I should make it clear that the views expressed are my own.

**The Courts and Arbitration**

4. The State has two primary duties: Defence of the Realm and the provision of a justice system. If the State succumbs to its external enemies all is lost. If a State does not uphold law and justice, no other rights can be enforced or entitlements enjoyed.
5. The provision of civil justice by the State is an integral part of that second duty. The provision of civil justice is a public good, securing the rule of law, not simply another public

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<sup>1</sup> I am most grateful to Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, for his considerable assistance in the preparation of this lecture.

service.<sup>2</sup> As famously observed by Lord Diplock, in *Bremer Vulkan v South India Shipping Corp.*:

*'Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access.'*<sup>3</sup>

6. This focus on the State's duty in the justice sphere does not at all diminish the scope and importance of the private sector in arbitration. Conceptually, arbitration is respected and thrives in this jurisdiction as a matter of party autonomy and choice, within a tolerant and light touch statutory supervisory regime, stemming from the *Arbitration Act 1996* (the 1996 Act") - succinctly summarised by Lord Thomas of Cwmgiedd, the former Lord Chief Justice, last year, "*Maximum support. Minimum interference*".<sup>4</sup>
7. It was not always so. Thus, in *Czarnikow Ltd v Roth, Schmidt & Co.*<sup>5</sup>, the suggestion that the parties to an arbitration agreement could exclude the court's jurisdiction to correct errors of law was dismissed by Scrutton LJ with the trenchant or memorable phrase<sup>6</sup>: "*there must be no Alsatia in England where the King's writ does not run*". That said, as noted by his biographer, errors of law apart, Scrutton was not in favour of challenges to arbitration awards and expressed the wish that commercial men would be content with the finality of arbitration awards, not only when they won but also when they lost.<sup>7</sup> It was ever thus!
8. This policy steer from the *Czarnikow* decision prevailed until winds of change began blowing in the 1970s, resulting in the *Arbitration Act 1979* ("the 1979 Act") and culminating in the 1996 Act<sup>8</sup>.
9. The 1979 Act repealed the special case procedure but contained no rules as to how the matter of leave to appeal from the arbitrators to the court should be handled – other than that leave could only be granted on a question of law which had substantially to affect the rights of one of the parties. That gap was filled by the seminal decision of the House of Lords in *The Nema*<sup>9</sup>, in which Lord Diplock, in what would become known as *The Nema* guidelines, "*effectively legislated for the narrowest of gateways....*"<sup>10</sup>.

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<sup>2</sup> Professor Dame Hazel Genn, 2008 Hamlyn Lectures, *Judging Civil Justice*, at pp. 16 and following; Dr John Sorabji, *English Civil Justice After the Woolf and Jackson Reforms* (2014), at pp. 10-11.

<sup>3</sup> [1981] AC 909, at 976

<sup>4</sup> Lord Thomas CJ, *Commercial Dispute Resolution: Courts and Arbitration*, (6 April 2017, Beijing)at [25] <<https://www.judiciary.gov.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf>>.

<sup>5</sup> [1922] 2 KB 478

<sup>6</sup> At p.488

<sup>7</sup> David Foxton QC, *The Life of Thomas E. Scrutton* (2013), at p. 252.

<sup>8</sup> As traced by Sir Bernard Rix, in a learned survey, *Judicial Review of the merits of arbitration awards under English Law*, Chapter 29 in Betancourt, *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators*.

<sup>9</sup> [1982] AC 724

<sup>10</sup> Sir Bernard Rix, *supra*

10. S.69 of the 1996 Act enacted the *Nema* guidelines into statutory form, with some change of language. In essence, there had to be a question of law, which substantially affected the rights of the parties and on which the arbitrator's decision was either obviously wrong or which, being a question of general public importance was at least open to serious doubt. Additionally, it had to be just and proper for the Court to determine the question. In keeping with the philosophy of the 1996 Act, placing party autonomy at the forefront of policy considerations<sup>11</sup>, parties were permitted to contract out of the right to appeal. Where they have not done so, the statutory tests, in Sir Bernard Rix's words "*leave scope for the wisdom of the commercial judges who hear applications for leave to appeal in the Commercial Court*".<sup>12</sup>

11. Intriguingly, Lord Diplock himself, when developing *The Nema* guidelines and narrowing the gateway for recourse to the court, noted the role that court review of arbitral awards had played in developing the English law of commercial contracts, to the benefit of commercial parties. As he put it,

*'It is only if parties to commercial contracts can rely upon a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion. Such uniform construction of standard terms had been progressively established up to 1979, largely through decisions of the courts upon special cases stated by arbitrators. In the result English commercial law has achieved a degree of comprehensiveness and certainty that has made it acceptable for adoption as the proper law to be applied to commercial contracts wherever made by parties of whatever nationality.'*<sup>13</sup>

The downside of course lay in an inability to achieve finality, with attendant cost, publicity and delay – creating a disincentive in the international market to arbitrate in London.

12. The utility of s.69 of the 1996 Act and the appropriateness of such appeal mechanisms generally, is not without controversy. There are contrasting viewpoints. The first is that parties to an arbitration should have no possibility of appealing to a court on a point of law. The arbitral process is thus very largely insulated from judicial scrutiny, and from the cost and time taken up by a court-based appellate process. Article 35(6) of the ICC Rules excludes an appeal process,<sup>14</sup> as does Article 26.8 of the LCIA Rules.<sup>15</sup>

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<sup>11</sup> Sir Bernard Rix, at [29.45]

<sup>12</sup> Sir Bernard Rix, at [29.46]

<sup>13</sup> [1982] AC 724, 737 G-H.

<sup>14</sup> 'Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.' <<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#top>>

<sup>15</sup> 'Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.' <[http://www.lcia.org/dispute\\_resolution\\_services/lcia-arbitration-rules-2014.aspx#Article%2026](http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx#Article%2026)>

13. At the other extreme, there is the view that s.69 should be amended to enable appeals to the court to be more readily available. Underpinning this view, given prominence by Lord Thomas in the 2016 *Bailii Lecture*, is the concern that reducing the flow of arbitral appeals harms the development of the common law. Thus, the very benefits Lord Diplock had identified in *The Nema* of the pre-1979 position, were in danger of being lost. More recently, Lord Thomas has reiterated that view.<sup>16</sup>
14. Where should the balance lie? My own view is straightforward, though not complacent. The answer does not lie with the outliers on either side of the debate, though they may provide food for thought. Broadly speaking, we have the balance right. Let me explain.
15. As foreshadowed, some have promoted the idea of an arbitral *lex mercatoria*. Such a view would see s. 69 as not just an unnecessary encroachment on arbitration, but a wholly unjustifiable interference with it and its development into a free-standing dispute resolution method. With respect, this has always struck me as a fundamentalist pipe-dream, entailing that international arbitration can be an island unto itself; that it could be a self-contained and private means of adjudication, free of the moorings of the nation State and a supportive court system. This idea faces intractable problems and insuperable hurdles. I address it only briefly.
16. First, confidentiality would, at a minimum, impede the development of an arbitral *lex mercatoria*.
17. Secondly, it is difficult to see how, without state support, an arbitral regime could compel witnesses, issue enforceable injunctive relief, or enforce awards. Once this proposition is accepted, then it must be recognised that no state will lend its coercive power unconditionally to some supra-national arbitral law.
18. Thirdly, as Mr John Beechey, with his vast experience has astutely observed, there is a “fundamental distinction to be drawn between transparency of process and procedure and respect for the confidentiality of the substance of the dispute...”.<sup>17</sup> Preserving the latter, does not reduce the need for the former. While there is scope for institutional arbitration schemes to address the need for transparency, there are circumstances where arbitration would struggle to do so without the assistance of a supportive court system.
19. A very recent decision of the Court of Appeal on the alleged apparent bias of an arbitrator provides a telling example. *Halliburton v Chubb Bermuda Insurance Ltd*<sup>18</sup> arose out of the Deepwater Horizon oil rig disaster in the Gulf of Mexico. Halliburton made a claim on its liability insurance against Chubb, which Chubb refused to pay. The terms of the cover provided for London arbitration. The parties could not agree on the identity of the third arbitrator. A Judge of the Commercial Court made an order appointing M as the third arbitrator. When Halliburton subsequently discovered that Chubb had asked M to act as

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<sup>16</sup> In the Jill Poole Memorial Lecture, *Keeping Commercial Law Up To Date*, Aston University, 8 March 2017, at [41].

<sup>17</sup> 2017 lecture by Mr John Beechey, until June 2015, President of the International Court of Arbitration of the International Chamber of Commerce, *Is Arbitration Bad for the Law?*.

<sup>18</sup> [2018] EWCA Civ 817

arbitrator in two other arbitrations concerning overlapping subject-matter, Halliburton applied for M's removal under s.24(1)(a) of the 1996 Act on the ground of apparent bias. The Judge in the Commercial Court refused the application and his decision was upheld on appeal. The Court of Appeal, while holding that, as a matter of good practice in international arbitration and as a matter of law, M should have made disclosure to Halliburton at the time of his appointment, decided that the fair-minded and reasonable observer would not conclude there was a real possibility that the arbitrator was biased. In its judgment, the Court of Appeal gave clear guidance on the proper application of the bias test<sup>19</sup> to arbitrators who take appointments in several arbitrations with overlapping issues and a common party and the nature of any disclosure that needs to be made, together with discussing the consequences of non-disclosure. Even assuming that the rules of an arbitral scheme could have made provision for resolving the issues in *Halliburton*, authoritative resolution by the Court was manifestly preferable, with the additional advantage that guidance could be given for other cases.

20. Turning to the other side of the divide, should appeals to court be made more readily available? There *are* legitimate concerns about the onward march of arbitration. Thus, is arbitration appropriate in the sphere of Non-Disclosure Agreements ("NDAs"), currently receiving much prominence? Similarly, is arbitration the optimal dispute resolution mechanism for employment contracts? In each of these areas, is the confidentiality accompanying private dispute resolution in the public interest? Should there be an absence of scrutiny of conduct that is or might be contrary to the public interest? More generally, in terms of public policy, what are or ought to be the limits of confidentiality in arbitration?
21. The questions raised by Lord Thomas chime with these concerns: are the courts being starved of cases through which the law could be developed? Are parties to arbitration and arbitrators escaping public scrutiny? They are, therefore, entirely proper questions. That said, with great respect, I part company with the approach canvassed by Lord Thomas, namely, widening the gateway/s for appeals to the Court. In that, I am not alone, there being noteworthy contributions from, amongst others, Lord Saville (the principal architect of the 1996 Act) and Sir Bernard Eder.<sup>20</sup> My reasons are these:
- (i) First, conceptually, the approach suggests a "zero-sum" game. A so-called gain for arbitration means a corresponding loss for the courts (and, presumably, *vice versa*). I am afraid that I simply do not see the relationship between the courts and arbitration in these terms.
  - (ii) Secondly, analytically, those who choose private dispute resolution wish to resolve their disputes; that is their legitimate individual free choice and it is a matter of party autonomy. They owe no duty, moral, legal or otherwise, to encourage (and fund) appeals so as to develop the law.<sup>21</sup> As Lord Devlin observed<sup>22</sup> in the late

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<sup>19</sup> See, for instance, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Porter v Magill* [2001] UKHL 67; [2002] 2 A.C. 357; *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 W.L.R. 2416.

<sup>20</sup> See: Lord Saville, <<https://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrid>>; see too Sir Bernard Eder, *Does arbitration stifle development of the law? Should s.69 be revitalised?*,

<[https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIArb%20\\_%20EDER%20AGM%20Keynote%20Address%2028%20April%202016%20AMND.pdf](https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIArb%20_%20EDER%20AGM%20Keynote%20Address%2028%20April%202016%20AMND.pdf)>

<sup>21</sup> See the observations of Prof. Gary Born, quoted in Beechey, *supra*.

<sup>22</sup> Cited by Sir Bernard Eder, at [19]

1970s when the proposal to limit rights of appeal was being discussed, “.... *The next step would, I suppose, be a prohibition placed on the settlement of cases concerning interesting points of law.*”

- (iii) Thirdly, though there are self-evidently fewer cases coming to the Courts since the demise of the special case procedure, it is far from clear that the statistics justify going significantly further. In a valuable Note prepared by Ms Cara North for *JUSTICE*<sup>23</sup>, after analysing Commercial Court figures for 2012-2016, she expressed this view:

*“It is impossible to conclude from these figures that the decline in the number of claims issued before English courts is a consequence of the popularity of arbitration. Such a conclusion would require the collection of data over a longer period of time, a better understanding of the court statistics and comparative analysis of arbitration and litigation trends. Absent such information, it is difficult to confidently assess the decline in the number of cases, the reasons for such a decline, and whether the success of arbitration is truly having the negative impact on commercial litigation that academics and judges fear. This is an area that warrants further research and consideration.”*<sup>24</sup>

- (iv) Fourthly, a flow of important commercial cases continues to find their way to the courts via appeals from arbitration proceedings. Examples are readily to hand and three which reached the Supreme Court will suffice: *The Golden Victory*<sup>25</sup>; *The Achilles*<sup>26</sup>; *Fulton Shipping v Globalia Business Travel (The New Flamenco)*<sup>27</sup>

**22.** Pulling the threads together, I do not see the courts and arbitration as engaged in a competition for work. I see the strength of Legal UK augmented by a strong court reinforcing thriving London arbitration, with London arbitration in turn increasing the attractions of English Law and thus, ultimately, the English Courts. As I have said before, this is a mutually supportive relationship.<sup>28</sup> The strength of one supports the strength of the other and *vice versa*. The attractions of arbitration will not be enhanced by some sort of UDI from State Courts. Equally, the courts should focus on other means of strengthening themselves, a matter to which I shortly turn, rather than a damaging competition with London arbitration. If the careful balance struck in the 1996 Act were to be upset, there would be a risk that both the courts and arbitration in London would be harmed. The latter because a perception of increased court intervention in arbitration would reduce London’s attractiveness as an arbitral centre of choice. The former because it would see the court having to intervene more often in disputes where it otherwise need not. A balance which reflects an arbitral and litigation culture of “maximum support: minimum interference” could all too easily be lost. Compelling and significant evidence would be needed before such a balance should be altered. At the present time, it is not clear that such evidence exists. We should not be unduly troubled about a pendulum<sup>29</sup>

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<sup>23</sup> *The Erosion of Commercial Common Law – the relative merits of litigation and arbitration*, 8<sup>th</sup> January, 2018, at [13]

<sup>24</sup> See too, the (rough) statistical survey conducted by Sir Bernard Rix, *supra*, at [29.49] and following.

<sup>25</sup> [2007] UKHL 12; [2007] 2 AC 353

<sup>26</sup> [2008] UKHL 48; [2009] AC 61

<sup>27</sup> [2017] UKSC 43; [2017] 1 WLR 2581

<sup>28</sup> *Sir Peter Gross, A good forum to shop in: London and English Law post-Brexit*, 35<sup>th</sup> Annual Donald O’May Maritime Law Lecture, London, 1 November 2017 (“*The Donald O’May lecture*”), [20] and following.

<sup>29</sup> Sir Bernard Rix, at para. 29.52

adjusting over time between courts and arbitration; there is, indeed, nothing new about this. In any event, the handling of the s.69 gateway and thus the lever for adjusting the flow of appeals, rests, as Sir Bernard Rix observed<sup>30</sup>, with the good judgment of Commercial Court Judges.

### **The courts**

23. I turn from the interrelationship between the courts and arbitration to the courts. Let me be clear: the strength of the judiciary and the courts are vital for Legal UK, very much including London arbitration, for Brexit and beyond.
24. I have previously suggested<sup>31</sup> that the fundamentals are sound and we can face the future with confidence, though certainly not with complacency. To recap, the judiciary's independence, integrity and incorruptibility are beyond question; so too its impartiality, the English courts do not confer a "home ground" advantage and there is neither advantage nor disadvantage in being a private or a state enterprise. Next, there is the judiciary's well-respected calibre and expertise, generating market confidence. We have, not to be overlooked, a world-class legal profession based in London. The courts operate within a framework governed by the rule of law, a fundamental strength which we tend to take for granted though we should not. Moreover, English commercial law has been fashioned by the genius of the common law in doing practical justice, which, "...when combined with a top calibre judiciary, applying precedent in a disciplined fashion...provides the requisite confidence to commercial parties contracting on the basis of a settled framework of law while furnishing the flexibility necessary to deal with a constantly changing commercial world".<sup>32</sup> Across the board, not only in connection with arbitration, our courts respect party autonomy – for example, when interpreting contracts the court's task is to give effect to that bargain, not to rewrite it to create the bargain the courts think the parties should have made. In summary, the judiciary and the courts are pivotal for our system of justice and comprise a key factor in its international reputation.
25. London and English Law have, however, no pre-ordained right to pre-eminence. We cannot rest on our laurels. Fortunately, we are not doing so and it is worthwhile highlighting some of the work the judiciary is undertaking to face the future.
26. First, *innovation*. The *Financial List* is one such example. So too, the – as yet untested – *Financial Markets Test Case Scheme* introduced in 2015, enabling parties to obtain definitive guidance on novel market issues albeit no cause of action exists between them. Moreover, the judiciary seeks to stay in touch with an ever-changing commercial world, hence the importance attached to the Financial Markets Law Committee ("FMLC") with its wide-ranging programme covering developments in the City.
27. Secondly, *structural reform*, creating the Business and Property Courts<sup>33</sup>, bringing together all the specialist jurisdictions of the High Court in England and Wales thereby, for tonight's purposes, facilitating the appropriate cross-jurisdictional deployment of Judges with suitable experience and expertise while preserving and not diluting the brand of the Commercial Court – itself, if I may emphasise, a matter of the first importance.

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<sup>30</sup> *Supra*

<sup>31</sup> *The Donald O'May lecture, passim*

<sup>32</sup> *The Donald O'May lecture*, at [19]. See too, the observations of Sir Geoffrey Vos C, *Preserving the Integrity of the Common Law*, Lecture to the Chancery Bar Association, 16<sup>th</sup> April, 2018, esp. at [2] and [61].

<sup>33</sup> Strongly driven by Sir Geoffrey Vos C

28. Thirdly, taking advantage of the benefits of *technology*. This is a no-brainer, unless we wish to turn our backs on much of contemporary life<sup>34</sup>. With specific reference to the Business and Property Courts, e-filing is now a reality. It is also the case that the Business and Property Courts do not exist in isolation from the rest of the court system. They too are included in the £1 billion HMCTS Reform Programme, a once in a generation opportunity to modernise the delivery of justice in a manner fit for the 21<sup>st</sup> century, domestically and internationally. It is incumbent on the judicial leadership to provide the necessary steer to ensure the success of that programme.<sup>35</sup> Indeed, it is salutary for commercial lawyers to keep in mind that the Business and Property courts cannot continue to flourish if the remainder of the justice system crumbles. The preparedness and ability to embrace technological change (a necessary part of the Reform programme) will likewise keep the courts up to speed, as new ideas such as “blockchain” and “fintech” introduce the potential for major changes in various markets.
29. Fourthly, *reform of our own procedures*. In keeping with the well-deserved reputation of the Commercial Court (the Court with which I am most familiar) for reform of its own procedures, the Business and Property Courts are grappling with the problems of disclosure in a digital age and are, in my view rightly, pursuing cultural change, in keeping with market demand.<sup>36</sup>
30. Fifthly, *international engagement*. This is a vast field, of major importance but time permits mention of only one aspect tonight, namely the *Standing International Forum of Commercial Courts* (“SIFOCC”). The judiciary is well aware of competition in the market for international dispute resolution, together with the desire of many jurisdictions to develop their own commercial courts. We have embraced these developments constructively and with confidence, through the mechanism of SIFOCC<sup>37</sup>, seeking cooperation, sharing best practice and making a stronger contribution to the rule of law together than each of the courts involved could accomplish individually.
31. All this is to the good and, I hope, dispels any notion of complacency. Inevitably, there are threats and challenges too. I have spoken of them before<sup>38</sup>; my views are unchanged and I do no more than note them tonight:
- (i) First and foremost, we need to address the difficulties we are encountering with judicial recruitment and retention. Given the importance of the judiciary and the courts to our international standing, any decline in the quality of our judiciary will not only undermine confidence in our courts but will likewise pose a threat to London as an arbitration centre.
  - (ii) The challenges and uncertainties posed by Brexit – though let me make it plain that, as a Judge, I express no view whatever as to the politics of Brexit, one way or another and would not want to be misunderstood in that regard. The two particular areas of concern are, first, the absence of a legislative steer as to how the Courts should treat post-exit CJEU decisions, with the attendant risk that there

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<sup>34</sup> Sir Terence Etherton MR, *Civil Justice After Jackson*, Conkerton Memorial Lecture 2018, Liverpool Law Society, 15 March 2018, esp., at [24] and [28]; see too, the speech by Lord Burnett of Maldon CJ, to the Association of District Judges Annual Conference, 13 April 2018, esp., at p.4.

<sup>35</sup> Sir Peter Gross, *Judicial Leadership*, Gresham College Lecture, Barnard’s Inn, 23 June 2016

<sup>36</sup> Sir Terence Etherton, at [11] and following.

<sup>37</sup> A far-sighted innovation of Lord Thomas, ably supported by (*inter alia*) Sir Wililiam Blair and Sir Robin Knowles.

<sup>38</sup> *The Donald O’May lecture*, at [28] and following.



will be “out-sourcing” from Parliament to the courts on a grand scale<sup>39</sup>. The second goes to the need for clarification on a number of issues where our current arrangements hinge on membership of the EU.

32. We need to address these threats and challenges, to meet them and to make the right choices to overcome them.
33. Pausing there, it should not be thought that I am simply focussing on the potential downsides of Brexit. There are apparent opportunities as well. First, an end to CJEU jurisdiction means an end to time-consuming waits for References to that Court. Secondly, a distancing from the jurisprudence of the CJEU may not be unwelcome in the arbitration context (to which I shall come very shortly). Thirdly and perhaps still more importantly, we must maintain perspective, so that Brexit does not become an all-consuming single issue. We need to look beyond Brexit and ensure that this jurisdiction remains ahead of the game in addressing the ever-increasing pace of technological change that will assuredly alter the way business is done. We must and can do so: for the reasons already given, we have the right fundamentals; we also enjoy great advantages in terms of language and time-zone.

**Arbitration:**

34. What of arbitration? I sense interesting challenges ahead. Though confidentiality can properly be described as one of the leading attractions of international arbitration, it generates controversy, giving ammunition to critics, with no obvious consensus on the way forward. Further, comparing arbitration to litigation, there must be scepticism as to the perceived cost advantages of arbitration – not least because the parties need to foot the bill for the premises and the tribunal - a bill likely way in excess of court fees. As with London litigation, so London arbitration needs to keep a close eye on remaining competitive as to costs. Still further, certainly in this jurisdiction, I somewhat doubt that arbitration trumps litigation in terms of speed, from initiation of the dispute to its final resolution (subject only, if not unimportantly, to appeals).
35. Standing back, however, the place of international arbitration in global dispute resolution is secure. At its most basic, it fills the essential need of providing a neutral forum, with appropriate expertise, for the resolution of international commercial disputes, without requiring either party to agree to the other’s court jurisdiction. From the vantage point of Legal UK, the preservation and strengthening of London’s world-leading position as an arbitration centre or hub, is a matter of the highest importance.
36. Provided we work at it, there are good reasons to be optimistic as to the future. On any view, the enforcement of awards under the *New York Convention* is wholly unaffected by Brexit. The legal and commercial infrastructure supporting London arbitration is of the highest quality, both in terms of strength and depth. The supportive role of the court in supervision, the attractions of English Law and the linguistic attraction of the English language, need no further emphasis.
37. Moreover, as already indicated, there is a view that Brexit carries distinct advantages for London arbitration. There have been, with respect, troubling aspects of the CJEU jurisprudence, perhaps appearing to place doctrinal purity ahead of commercial practicality. Most obviously, this manifested itself in the distaste for anti-suit

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<sup>39</sup> To use the graphic expression coined by Professor Anthony King, in *Who Governs Britain?* (2015), at p.273.

injunctions,<sup>40</sup> a robust common law remedy, for which there might be more opportunities in the future.

38. Matters do not end there. Very recently, the uneasy relationship between the CJEU and arbitration has been illuminated by the CJEU decision in *Slovak Republic v Achmea B.V.* (Case C-284/16). The case arose from a dispute between a Dutch insurance company and Slovakia. The dispute was brought by way of an arbitration under a Bilateral Investment Treaty (“BIT”). An arbitration award was made against Slovakia, which then sought to set aside the award before the German courts, contending that the arbitral tribunal had no jurisdiction as the BIT arbitration clause was in conflict with EU law. The dispute was referred to the CJEU, which<sup>41</sup> held that the relevant clause was in conflict with EU law: the parties to the BIT had established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensured the full effectiveness of EU law. In essence, such disputes had been removed from the purview of national courts, the means by which EU law was interpreted and applied. Though the CJEU decision was confined to BITs and the Court sought to distinguish commercial arbitration, the decision and its reasoning could aptly be described as troubling more generally.

## Conclusion

39. There can be no doubting the importance of the topics under discussion tonight. As is, I hope by now, well-known, the UK’s legal services sector contributes £25.7 billion to the UK economy, or 1.6% of gross value added. It generates £3.3 billion in annual export revenue.<sup>42</sup> The courts and London arbitration are crucial to the well-being of this sector.

40. In my view, we can face the future with confidence but aware of the challenges which arise. There will be a crowded agenda. A first-class commercial silk and arbitrator, Jonathan Hirst would have well-recognised the truth in the claim that London and English law are world leaders in the field of international dispute resolution. *Legal UK* stands at the forefront of commercial dispute resolution. There is every reason it should remain that way. Brexit, of course, poses questions, as does the growth of other international dispute resolution centres. As, I am sure Jonathan would have said, competition is a good thing. That was the ethos Jonathan embodied as Chairman of the Bar. *Legal UK* may face challenges, but it is going to compete, and compete vigorously. With sound fundamentals, the challenge of competition is one that will be met. More importantly, it can, and no doubt will, in keeping with the SIFOCC spirit, be a spur to innovation, cooperation and improvement.

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<sup>40</sup> See, for instance, *Turner v Grovit* (Case -159/02) [2005] 1 AC 101; *The Front Comor* (C-185/07) [2009] 1 AC 1138; see too, Sir Peter Gross, *Anti-suit injunctions and arbitration* [2005] LMCLQ 10.

<sup>41</sup> Contrary to the views of the Advocate-General

<sup>42</sup> See *The City UK*, UK Legal Services 2016 (July 2016).

