The Worshipful Company
of Arbitrators

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London Arbitration: The Future in Context

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1. It is now over 40 years since I started in practice. During that time, international arbitration has become something of a global phenomenon. I have no doubt that this is in large part due to the adoption of the 1958 New York Convention by almost 160 countries around the world – apparently the most successful international treaty of all time.

2. The traditional centres of arbitration – London, Paris, New York, Geneva, Stockholm – not only draw in parties from every corner of the world but, at the same time, face increasing competition from every corner of the world - each vying for pole position.

3. Thus, in recent years, we have seen the rise of vibrant arbitration centres in Singapore, Hong Kong and Kuala Lumpur to name just three. Other countries are keen to follow suit. So we see new

arbitration centres springing up around the world – for example Mauritius, British Virgin Islands, Dubai. In Africa, there are – or at least were – at the last count some 72 'Arbitral Institutions'! International arbitrators are now flying around the world at the drop of a hat.

4. In the face of that competition, I am pleased to say that London continues to flourish. The LCIA's 2018 Case Report published only last week confirms that this is the case with a significant rise in the number of disputes in the banking and finance sector.

5. Even so, in this competitive environment, it seems to me essential to understand what makes one seat better than another. Certain factors are obvious:

    - tradition
    - familiarity
    - location
    - infrastructure
    - facilities
    - language; and
    - availability of local legal talent.

    All of these are plainly important and there is no doubt that London gets top marks in each of these categories. But, in my view, the critical factor is the role played by the Court in the seat of arbitration.

6. So the questions I would like to consider briefly this evening are: How does the English Court stand ? Is the framework for challenging arbitral awards satisfactory ? Has it been working well

? And, perhaps more important, is it fit for purpose i.e. to ensure that England will continue as an ideal seat for international arbitration ?

7. It is perhaps remarkable that there is very little analysis of this question – particularly since it is some 40 years since the overhaul of the law of arbitration in England by the Arbitration Act 1979 and over 20 years since the passing of the Arbitration Act 1996.

8. I came to realise the dearth of any proper analysis of the workings of our law of arbitration after attending an arbitration conference in Mauritius in 2014 when I was surprised to hear repeated attacks from a number of international arbitrators from around the world with regard to the role played by the English Courts in the arbitral process.

9. The main thrust of those attacks was that the English Courts intervened far too much in the arbitral process. In particular, the English system was attacked because (so it was said) it allowed a "right of appeal" from an award – with hearings at three separate levels, the High Court, the Court of Appeal and the Supreme Court. The overall message was: Do not go to England to arbitrate.

10. On my return from that conference, I tried to find out whether there was any evidence or analysis to support such attacks – in particular, whether it is true to say that the English Courts intervened too much in the arbitral process. I could find very little. So I decided to look at the evidence myself – to test whether these attacks were well founded.

11. In 2016, I carried out a preliminary analysis. For the purposes of this lecture and with some assistance[1], I have updated that analysis by looking back through the cases as reported in BAILII over the last 7 years – that is 2012-2018. The results are summarised on the first page of the handout.

12. By way of disclaimer, I should emphasise that I do not warrant that the Table is 100% accurate. Indeed, I know that it is incorrect – because unfortunately not all cases are reported on BAILII and, for reasons which I do not understand, there are significant discrepancies between my own figures and various other figures that are available from other sources. In truth what is needed is a full study. However, the present exercise is, I think, sufficient for present purposes.

13. I would like to say a few words about these results. But it may be of assistance to say at the outset that, in my view, the results demonstrate that the attacks which I have referred to are, as Lord Sumption might say, complete tosh.

14. Wherever I now go in the world, I take copies of this handout with me – and if anyone even breathes a word of criticism, I show them this Table. And I urge you to take this table away with you – and do the same.

15. In these days of Brexit, I think it is vital and important to trumpet that England is – and will remain – an ideal arbitral seat.

[1] Luke Tattersall, Essex Court Chambers; Jordan Bernstein, Pembroke College, Oxford.

16. The Table seeks to summarise the various challenges that have come before the English Courts as reported in BAILII during the period 2012-2018 – under ss.67 (*"no jurisdiction"),* 68 (*"serious irregularity"*) or 69 (*"appeal on a question of law"*) of the Arbitration Act 1996.

17. Before looking at the detailed figures in the Table, it is necessary to put the results in context. The threshold question is: how many arbitration awards are published annually in England ? The truth is: no one knows.

18. We have some figures from a number of institutions – notably the ICC, the LCIA and the LMAA. However, these figures do not provide the full picture - partly because there are many smaller arbitrations of various types and also other *ad hoc* arbitrations. My own guess is that there are, on average, somewhere between about 1,000-2,000 of significant awards published every year in England – possibly many more.

19. For the purpose of the present analysis, I would propose to assume that that there are some 1,000 significant awards published every year. In my view, that is probably an absolute minimum – so, over the 7 year period covered by the years 2012-2018, I would estimate that there were at least 7,000 significant awards published. That is the figure which provides the necessary benchmark for considering the results shown in my Table.

20. The figures in the Table are broken down into 3 sections ie ss. 67, 68 and 69 – with results for each individual year from 2012 to 2018 and a total of the relevant figures over the 7 year period.

21. In each case, the Table shows the total number of applications to the Court [Column 2]; the number allowed [Column 3]; the number rejected [Column 4]; and the number of appeals to the Court of Appeal [Column 5] and the Supreme Court [Column 6]. In addition, the Table shows in brackets in Column 2 the total number of applications under each head that were shipping cases. I will say something about this in a moment. Finally, the Table includes the results of any appeal – either allowed or rejected.

22. I start, first, with the figures for challenges brought under s67 i.e. challenges regarding the jurisdiction of the Tribunal. For present purposes, it is sufficient – and probably better – to look at the overall figures during this 7 year period. These show a total of 52 challenges under this head of which some 39 were rejected – and 13 successful challenges. Measured against the benchmark figure of some 7,000 published awards during this period, the total number of both challenges brought and successful challenges is miniscule – something like 0.8% and 0.2% respectively. Perhaps even more significant is the fact that there were only 4 appeals to the Court of Appeal under this head – all rejected. And there were no appeals under this head to the Supreme Court.

23. A similar picture emerges when considering the figures for challenges brought under s.68 on the basis of alleged *"serious irregularity"*. For the same 7 year period, these show that some 60

challenges were brought under this head of which only 6 were successful. There was only one appeal to the Court of Appeal – which was rejected; and, again, no appeals to the Supreme Court. Again, when measured against the benchmark of some 7,000 published awards during this period, the total number of both challenges and successful challenges for alleged serious irregularity under s68 is truly miniscule.

24. In fact, these figures which are, as I have said, based upon an analysis of the cases reported in BAILII are incorrect. It appears that this is so because many challenges under s68 never find their way on to BAILII. Thus, according to the Commercial Court Users' Group Report dated 13 March 2018, the figures show that in 2015, there were 34 challenges under s68 – of which only 1 was successful; in 2016, some 31 challenges, with none successful; and in 2017, 47 challenges with (again) none successful.

25. All these figures should, I believe give considerable comfort to arbitrators fearful of being accused of what some have called *"due process paranoia".* They confirm the strong pro-arbitration approach of the English Court.

26. Finally, I turn to the figures relating to appeals on a question of law under s69 of the Arbitration Act 1996. Before looking at the figures, I would perhaps make some preliminary comments.

27. First, it is fair to say that s69 is often the main butt of much criticism from abroad. I do not propose to stir the waters again about the suggestion made from time to time that the section

should be widened save to say that, in my view, that would be a very bad idea indeed for reasons which are, I believe, well known and which I do not propose to repeat[2].

28. It is also fair to note that the procedure for challenging an award by way of an appeal on a question of law as provided by s69 is, I think, unique. As far as I am aware, no other country in the world allows such an appeal in an international arbitration. For these reasons alone, a study of the statistics is important.

29. Second, it is important to emphasise that the suggestion peddled by some foreign commentators that there is some general "right of appeal" in England is manifestly incorrect – and needs to be squashed firmly at every opportunity.

30. As we all know, the fact is that there is no automatic right of appeal. Rather, s69 of the Arbitration Act 1996 provides a detailed procedure whereby the Court *may* grant leave to appeal on a question of law in certain limited circumstances. The section is carefully constructed and involves various "hurdles" which the Court must consider before such leave is granted. For present purpose, it is unnecessary to consider these in detail – but I have sought to summarise these "hurdles" in the flowchart which has been reproduced on the other side of the handout. The only point I would seek to emphasise is that, unlike ss67 and 68, s69 is not mandatory: it is always open to the parties to agree to exclude the right of appeal – as they very often do.

[2] https://essexcourt.com/recent-keynote-address-chartered-institute-arbitrators-sir-bernard-eder/

31. Third, I regret to say that the Table does not set out the number of applications for leave to appeal. That is perhaps a glaring omission. However, so far as I am aware, those figures are not publicly available.

32. Turning then to the figures in the Table concerning appeals under s69, three points stand out.

33. First, once again, the total number of appeals brought and allowed during this 7 year period is miniscule – less than 1% and 0.5% respectively when measured against my benchmark of 7,000 significant awards.

34. Second, it is noteworthy that the majority – 40 out of 61 or approximately 66% - were shipping cases. That reflects a strong tradition in the shipping industry of proceeding by way of appeal to the Court to resolve important issues of law affecting the industry generally. For example, as some here today may know, there was a long-standing issue in shipping circles as to whether the obligation to pay hire under a time charter was – or was not – a *"condition"* strictly so-called. Different arbitral tribunals would often reach different conclusions – the outcome depending simply on the constitution of the Tribunal. This was highly unsatisfactory. There were then two conflicting decisions at first instance. It was not until the matter reached the Court of Appeal that the point was clarified. That is a very good example of the system working well. No other country in the world is capable of providing a clear answer on a question of law to the great benefit of all concerned.

35. Third, although some 8 cases found their way to the Court of Appeal during this period, this again was a very small proportion of the total number of awards – about one a year and only 0.1% of the total. Perhaps more important, the vast majority of these appeals – some 7 out of the total of 8 – were all dismissed. And there were only 3 appeals to the Supreme Court.

36. In my view, this exercise clearly demonstrates that the English Courts do not intervene too much in the arbitral process; and that the attacks peddled abroad are without any proper basis. Looking ahead, I do not consider that the attractiveness of London is in any way affected by whatever our future relationship with the European Union may be – whether we adopt a hard or soft Brexit. Some 20 years after the Arbitration Act 1996, I think we can safely say that the Act is working well and that we can be justifiably proud of the framework it provides for international arbitration in England.

Thank you.

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