

# LONDON ARBITRATION AND 'BREXIT'

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## INTRODUCTION

The 'Brexit' referendum result caused a Prime Minister to resign, and a new Cabinet and Prime Minister to be installed. Following this result, many officials in Brussels to be annoyed. The UK is sitting on the European naughty chair. But will London continue to be the arbitral seat? This is a large issue. Livelihoods are potentially affected. And so let us address the fears and hopes, and the current challenges faced by 'London Arbitration'.<sup>2</sup>

There will be four parts to this discussion. In the first we will consider four anxieties which London Arbitration might be suffering. We will see that only one of these has any connection with a referendum held on 23 June 2016. In the second part, various strengths and positive tendencies will be examined. These demonstrate that London Arbitration is, and is likely to remain, a strong global player. The third part is a stock-taking of the relative merits of London Arbitration as compared with court proceedings. Here objective comment is rare. But precise calibration of the rival contentions is impossible. The fourth part concerns substantive contract law. Here

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<sup>2</sup> In this paper 'London arbitration' refers to commercial disputes, normally for a substantial sum, as distinct from consumer complaints, and which are heard by a tribunal within the framework of the Arbitration Act 1996; often, although not necessarily, one or both of the parties might be situated outside the jurisdiction.

the central problem is to balance the arbitral community's wish to sell London Arbitration awards as final and the English legal system's interest in receiving some cases, carefully selected, which might be reconsidered by the judicial precedent-creating system on points of Common Law.

## I

### ANXIETIES

There are four anxieties, the first is focused on Europe, the other three are global.

- (1) *Choosing 'the Seat' within Europe.* Short-term nervousness concerning the 'Brexit' referendum fall-out in Britain might prove helpful to those providing commercial arbitration within continental Europe. They will not be starting from scratch. We are already familiar with the established European magnets of Switzerland, Paris, and Stockholm. But arbitration clauses lie embedded in transactions formed well before 'Brexit' and they are likely to be inserted in identical form post-'Brexit', unless a significant wave of dissatisfaction disturbs market behaviour.
- (2) *Global Competition to Attract Dispute Resolution.* Competition in the global market for dispute-resolution, court proceedings and arbitration, will continue to grow. Everyone is vying for a slice of the action.<sup>3</sup> The rise of commercial court and arbitration centres in the Far East and in the Middle East are challenges to the whole of Europe and not just to London. Lord Thomas in his BAILII lecture (2016) even pointed to a global network of commercial courts based on the Common Law:<sup>4</sup>

*'the past decade or so has seen the creation of a number of commercial courts with the aim of providing a means of international dispute resolution [including] the Gulf courts in Dubai, Abu Dhabi and Qatar, in Asia in Singapore, India and Hong Kong, in Africa in South Africa and Nigeria, in North America in Delaware and New York and in the Caribbean, the Cayman Islands. These are all courts based on the common*

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<sup>3</sup> J Kerton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press, 2013), 56-77.

<sup>4</sup> Lord Thomas CJ, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration', at [7], lecture given 9 March, 2016 <<http://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>> (hereafter 'Thomas 2016') and citing his lecture, given to the Dubai IFC Academy of Law, 1 February 2016 'Commercial Justice in the Global Village: The role of Commercial Courts' <<http://www.judiciary.gov.uk/wp-content/uploads/2016/02/LCJ-commercial-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf>>.

*law...The development has been such that at the turn of the year, I wrote to the Presidents or Chief Justices of these courts suggesting the formation of a forum of Commercial Courts.'*

Karton comments:<sup>5</sup>

*'competition [to attract arbitration business] takes place on three levels: arbitrators and would-be arbitrators compete with each other for appointments, arbitral fora (institutions and states) compete with each other to host arbitrations, and practitioners of arbitration collectively compete for market share against other forms of dispute resolution.'*

(3) *Global Circulation of Arbitration Experts.* Common law arbitrators, including former judges, can travel and lend their support to rival systems of arbitration. Reflect on the capacity of the Premiership to attract foreign managers and footballers to England and Wales; and reflect on the Indian Premier League's seductive capacity to attract cricketers to India.

(4) *Global Circulation of English Law.* English contract law is a national treasure. But it is a treasure deeply buried in the remote seams of Westlaw, LEXISNEXIS, and the Lloyd's Reports. That treasure might be rendered more accessible and clearer. The Common Law of contract and commercial law, although dense and detailed, can be summarised in soft-law codes, as Andrews<sup>6</sup> and Burrows<sup>7</sup> have recently demonstrated. This makes the law portable. It can be copied by others.

## II

### POSITIVE POINTS

There are six reasons for the London Arbitration community to smile.

(1) *Legal Infrastructure.* The London seat is attractive because the capital provides experienced law firms, specialist advocates, a pro-arbitration supervisory court (the Commercial Court), a mass of niche commercial expertise in all sorts of fields, a good

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<sup>5</sup> J Karton, op cit n 3 ante, 58.

<sup>6</sup> Neil Andrews, *Contract Rules: Decoding English Law* (Cambridge: Intersentia Publishers, 2016).

<sup>7</sup> Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016).

pool of arbitrators, translators,<sup>8</sup> an arbitration statute which has performed well over 20 years (a 2006 report recommended no change to the Arbitration Act 1996, although the Law Commission in 2016 has hinted that minor revision might be considered).<sup>9</sup> Bill Rowley QC has commented on the London legal infrastructure:<sup>10</sup>

*'[it] includes institutions such as the London Court of International Arbitration (LCIA), the Chartered Institute of Arbitrators (CI Arb), the London Maritime Arbitrators Association (LMAA), the Grain and Free Trade Association (GAFTA), the School of International Arbitration at Queen Mary, and, of course, the International Dispute Resolution Centre (IDRC) in Fleet Street.'*

(2) *Judicial Deference.* The English courts respect the qualified autonomy of the arbitral process. The Commercial Court has a good track-record in modern times of sensitive support for commercial arbitration. That court must continue to attract the brightest and the best judges. Its influence on English arbitration law is considerable. It will be a major blow if that court becomes erratic and makes poor decisions which are out of tune with the expectations of the arbitration community. Bill Rowley QC identifies four desirable elements of a potential 'seat':<sup>11</sup>

- (i) *the neutrality and impartiality of the legal system;*
- (ii) *the [quality of] national arbitration law;*
- (iii) *[that system's] track record for enforcing agreements to arbitrate and arbitral awards; and*
- (iv) *all importantly, a supportive judiciary which has...a natural inclination not to interfere with arbitral proceedings and their resulting awards.'*

(3) *Choice of Law.* English law remains attractive as the substantive law of choice governing cross-border deals. Where better to have English law applied than in London? Bill Rowley QC<sup>12</sup> (2016) noted that the 2010 Queen Mary College survey:<sup>13</sup>

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<sup>8</sup> J Karton, *op cit* n 3 ante, 70.

<sup>9</sup> The Law Commission in 2016 asked for suggestions, including (i) expedited or summary procedure; (ii) adaptation of the Act to apply to disputes concerning trusts: Consultation questionnaire: *'recent research from Queen Mary University of London suggests that tribunals are reluctant to use streamlined procedures to resolve matters quickly. Making explicit provision for summary judgment might encourage arbitrators to take a bolder approach in the interests of efficient case management'* <<http://www.lawcom.gov.uk/arbitration/>>.

<sup>10</sup> J William Rowley, 'London Arbitration Under Attack'

<[http://www.idrc.co.uk/media/26078/rowley\\_-\\_london\\_arbitration\\_under\\_attack.pdf](http://www.idrc.co.uk/media/26078/rowley_-_london_arbitration_under_attack.pdf)>.

<sup>11</sup> *Ibid* (numbering added).

<sup>12</sup> *Ibid*.

<sup>13</sup> Queen Mary College, London, School of International Arbitration, 2010 Survey, 'Choices in International Arbitration', chart 9, page 13: recording that companies prefer to select the governing

*'showed that companies are more than twice as likely to choose English law over other governing laws for international arbitrations. Just under 30 per cent of the world's 320 legal jurisdictions use the English common law. Another major attraction of English law is that it is based on the principle of freedom of contract. Contracts are put in place to give effect to parties' intentions, and there is nothing hidden in English law designed to defeat those intentions.'*

- (4) *Linguistic Dominance*. English is an important language. This is as well because the English seldom speak anything else. Of course, the *lingua franca* point cuts both ways: now that most of the world is accustomed to business English (a benefit of association with the Americans), arbitrations heard in Paris or Stockholm or Kazakhstan can be readily conducted in English. And Lord Thomas in his BAILII lecture (2016) noted the intention that Amsterdam will open in 2017 a commercial court where the *lingua fori* will be English.<sup>14</sup>
- (5) *Enforcing the Commitment to Arbitrate: Anti-Suit Injunctions to Secure Compliance with Arbitration Clauses*. When the EU Jurisdiction Regulation ceases to apply to the UK, the anti-suit injunction will become unshackled and be restored as a remedy capable of being issued from London in respect of conduct occurring anywhere in the world. Post-''Brexit'', that is, after the UK ceases to be governed by the Jurisdiction Regulation, a London injunction will be available with respect to respondents who, in breach of an exclusive jurisdiction clause or an arbitration clause, have initiated civil proceedings within EU Member State courts. The London injunction does not require any follow-up enforcement by a Member State court. It follows, therefore, that the anti-suit injunction will again be available wherever the respondent's court proceedings have been commenced in violation of the arbitration agreement, including proceedings within the courts of EU Member State courts (as for court jurisdiction clauses, the European Court of Justice's decision in *Turner v. Grovit* (2005)<sup>15</sup> also prevents the English courts from issuing anti-suit injunctions to enforce exclusive English jurisdiction clauses where the offending court proceedings have been commenced within the European jurisdictional zone).

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law for their transaction as follows: 'Law of home jurisdiction 44 per cent; English law 25 per cent, Swiss law 9 per cent, New York law 6 per cent, French law 3 per cent; US law (other than New York law) 1 per cent; Other 3 per cent; Not possible to say/none in particular 9 per cent'

<<http://www.arbitration.qmul.ac.uk/docs/123290.pdf>>.

<sup>14</sup> Thomas 2016, n 4 ante, at [7].

<sup>15</sup> Case C-159/02 *Turner v. Grovit* [2005] 1 AC 101, ECJ; for comment, Neil Andrews, 'Abuse of Process and Obstructive Tactics under the Brussels Jurisdictional System ...' (2005) *European Community Private Law Review* 8–15.

The only qualification is that the UK might become a full member, post- 'Brexit', of the Lugano Convention league of jurisdictions. The Lugano Convention regulates matters between the EU Member States and Iceland, Switzerland and Norway. Its text is not identical to the Brussels Recast text.<sup>16</sup> It might be that it is considered undesirable to defy the European Court of Justice's prohibition on the anti-suit injunction within the EU and Lugano territories; however, decisions of the European Court of Justice are not binding under the Lugano system, but are merely persuasive.<sup>17</sup>

At the moment, if a party to a London arbitration clause breaches that commitment by, for example, commencing court proceedings in Tokyo, he can be enjoined in London. But if instead the infringing court proceedings are brought in a EU Member state, such as famously, in the Italian jurisdiction, the European Court of Justice's decision in the *West Tankers* case (*Allianz SpA etc v. West Tankers, 'The Front Comor'*, 2009)<sup>18</sup> prevents the English High Court from issuing an anti-suit injunction against him. This was affirmed by the European Court of Justice in the *Gazprom* case (2015)<sup>19</sup> (there the Court did not endorse Advocate General Wathelet's Opinion<sup>20</sup> that *West Tankers* has been impliedly reversed by Recital 12 of the Brussels 1 Regulation (recast)). The European Court of Justice in the *Gazprom* case (2015)<sup>21</sup> noted that it is incompatible with the Jurisdiction Regulation for the court of a Member State to issue a decision prohibiting the respondent from continuing, or initiating, civil or commercial proceedings covered by the Jurisdiction Regulation<sup>22</sup> in another Member

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<sup>16</sup> Brussels 1 Regulation (recast) (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>17</sup> (Lugano) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (30 October 2007), Protocol 2, Article 1(1): *Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities.* For comment, RG Fentiman, *International Commercial Litigation* (Oxford University Press, 2<sup>nd</sup> edn, 2015), 2.187.

<sup>18</sup> *Allianz SpA etc v. West Tankers, 'The Front Comor'* (C-185/07) [2009] 1 AC 1138; noted E Peel (2009) 125 LQR 365.

<sup>19</sup> *Gazprom OAO* case (Grand Chamber, ECJ, 13 May 2015) (Case C-536/13) [2015] 1 WLR 4937.

<sup>20</sup> Opinion of Advocate General Wathelet (delivered 4 December 2014), at [130] to [152].

<sup>21</sup> [2015] 1 WLR 4937.

<sup>22</sup> The *Gazprom* case (2015) was decided under the pre-2012 Jurisdiction Regulation, Council Regulation (EC) No 44/2001 of 22 December 2000, Advocate General Wathelet explained that Recital 12 in the preamble to the Brussels 1 Regulation (recast) (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and

State. This is because the latter court must be permitted to determine for itself whether it has jurisdiction,<sup>23</sup> and this includes determining whether there is a valid arbitration clause in respect of the relevant civil or commercial matter.<sup>24</sup>

The European Court of Justice in the *Gazprom* case (2015) distinguished<sup>25</sup> the grant by an arbitral tribunal of an anti-suit order from the issue by a Member State court of an anti-suit injunction (as in the *West Tankers* case). A Member State court does not act inconsistently with the Jurisdiction Regulation if it decides to recognise or enforce such an arbitral award by deciding not to receive or continue to hear a civil or commercial matter (wholly or partially). Such a decision is compatible with the Jurisdiction Regulation because: (a) issues of arbitration fall outside the scope of the Jurisdiction Regulation<sup>26</sup> (a decision on such matters made by one Member State court will not be binding on the courts of other Member States); (b) such an arbitral award involves no attempt by a Member State court to preclude or constrain (directly or indirectly) another Member State court's attempt to determine its jurisdiction; and so there can be no conflict *between courts* in the matter of jurisdiction;<sup>27</sup> and (c) the arbitral tribunal has no direct power to issue penalties against the party who fails to comply with the anti-suit prohibition;<sup>28</sup> instead the party who is subject to an arbitral tribunal's prohibition has an opportunity to contest<sup>29</sup> whether the prohibitive arbitral award should be recognised and enforced (in the case of a foreign arbitral award by applying the New York Convention's criteria).<sup>30</sup>

*The wider picture concerning London arbitration and the EU jurisdiction system after a 'Brexit'-exit.*

Here it is necessary to make five points.

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enforcement of judgments in civil and commercial matters) is a 'retroactive interpretative law', which 'explains how [the arbitration] exclusion must be and always should have been interpreted' (*per* A-G Wathelet, Opinion, 4 December 2014, at [91] ff).

<sup>23</sup> *Ibid*, at [32] and [33].

<sup>24</sup> *Ibid*, at [34].

<sup>25</sup> *Ibid*, at [35].

<sup>26</sup> *Ibid*, at [36] (and at [28]).

<sup>27</sup> *Ibid*, at [37].

<sup>28</sup> *Ibid*, at [40].

<sup>29</sup> *Ibid*, at [38].

<sup>30</sup> *Ibid*, at [38], [41], [42], [43].

1. Post-`Brexite' the courts of the EU Member States cannot fashion an aggressive regime designed to invalidate or obstruct arbitration nominated to take place in London. Article II.1 of the NYC (1958) requires all Contracting States to `recognize' a written arbitration agreement. It would be incompatible with that obligation for a Member State's legal system or court to act in such a way as to undermine, impede, or act inconsistently with, the existence of a valid arbitration clause or the commencement and continuation of arbitral proceedings brought in accordance with such an arbitration agreement (whether the arbitral proceedings are commenced in a foreign court or in a local one).
2. A stay of judicial proceedings is the primary mechanism for `giving effect' to an arbitration agreement.<sup>31</sup> On this topic Article II.3 of the New York Convention (1958) provides: *'The court of a Contracting State, when seised of an action in a manner in respect of which the parties have made an agreement within the meaning of this article [viz an arbitration agreement], shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'*
3. There is nothing in the Jurisdiction Regulation which invalidates arbitration clauses. In fact the Brussels 1 Regulation (recast) (2012, effective 2015) provides that a Member State court's ruling whether an arbitration clause exists or is valid, etc, is not subject to the EU rules concerning recognition and enforcement of judgments. Recital (12) of the Jurisdiction Regulation (2012) makes clear that: *'This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of the arbitral tribunal, the powers of the arbitrators, the conduct of the arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award'* (see content of this note<sup>32</sup> for full text). This is so `regardless of whether the court decided on this

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<sup>31</sup> Mustill & Boyd, *Commercial Arbitration: Companion Volume* (2001), 267; D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edn, 2015), chapter 11.

<sup>32</sup> In detail, recital (12) of the Council Regulation (EU) 1215/2012: (Brussels I bis) `on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', of 12 December, 2012, provides:

*This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*

as a principal issue or as an incidental question.’ This reverses the English decision in *National Navigation Co v. Endesa Generacion SA* (‘*The Wadi Sudr*’) (2009).<sup>33</sup>

4. A judgment on the substance of a case (for example, granting or denying damages for breach of the underlying and main transaction) is binding even though the Member State’s decision involved a preliminary decision rejecting the suggestion that the matter was subject to a valid arbitration clause. This ratifies the English decision in *Youell v. La Reunion Aerienne* (2009).<sup>34</sup>
5. An award which satisfies the NYC (1958) is to be recognised and enforced under Article II.1 of that instrument in the courts of any NYC signatory state. This has nothing to do with EU law. ‘Brexit’ has no impact on that system of arbitral enforcement.

(6) *English Protective Relief in Support of Arbitration*. *Mareva* injunctions, that is, freezing relief,<sup>35</sup> are helpful forms of judicial support for arbitration.<sup>36</sup>

The Arbitration Act 1996<sup>37</sup> authorises grant of freezing relief in support of arbitration, including arbitration taking place outside England, even if the seat of the arbitration is not<sup>38</sup> England or Wales.

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*A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.*

*On the other hand, where a court, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognised and, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (‘The 1958 New York Convention’), which takes precedence over this Regulation.*

*This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of the arbitral tribunal, the powers of the arbitrators, the conduct of the arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.*

<sup>33</sup> [2009] EWCA Civ 1397; [2010] 2 All ER (Comm) 1243; [2010] 1 Lloyd’s Rep 193.

<sup>34</sup> [2009] EWCA Civ 175; *The Times*, 27 March 2009, at [32].

<sup>35</sup> *Andrews on Civil Processes: Volume 1 Court Proceedings and Principles* (Intersentia, Cambridge 2013), chapter 21; the leading work is S Gee, *Commercial Injunctions* (6<sup>th</sup> edn, 2016).

<sup>36</sup> On freezing relief in the context of arbitration, *Andrews on Civil Processes: Volume 2 Arbitration and Mediation* (Intersentia, Cambridge 2013), 13.16 to 13.44; S Gee, *Commercial Injunctions* (6<sup>th</sup> edn, 2016), 6-026 ff.

<sup>37</sup> s 44, Arbitration Act 1996.

<sup>38</sup> s 2(3)(b), Arbitration Act 1996.

The Court of Appeal in *Cetelem SA v. Roust Holdings Ltd* (2005)<sup>39</sup> held that the court can make an order under section 44(3) of the Arbitration Act 1996 in the case of ‘urgency’ in anticipation of arbitral proceedings (‘on the application of a party or proposed party’) for ‘the purpose of preserving evidence or assets’.

Freezing relief can be useful not just before or during the arbitral proceedings, but after an award has been granted. In *Linsen International Ltd v. Humpuss Sea Transport PTE Ltd* (2011)<sup>40</sup> the applicant obtained freezing relief against the first and second defendants, in support of enforcement (under section 66, Arbitration Act 1996) of arbitration awards made in England. Such relief is not confined to ‘substantive’ protection against dissipation by the respondent of his assets, but extends crucially to obtaining a worldwide inventory of those assets. Such information is of great forensic importance when chasing mercurial assets.

In *Cruz City 1 Mauritius Holdings v. Unitech Ltd* (2014)<sup>41</sup> Males J held that, when granting freezing relief in support of arbitration, the court cannot target that relief at non-parties. However Gee (see end of this paragraph) has rejected the reasoning. In the *Cruz* case C had obtained an English arbitration award against U, an Indian company. But no payment had been made. Males J held that ‘the better view is that section 44 [of the Arbitration Act 1996] does not include any power to grant an injunction against a non-party’,<sup>42</sup> partly because ‘it seems unlikely that Parliament intended to give the English court jurisdiction to make orders against non-parties in support of arbitrations happening anywhere in the world’<sup>43</sup> and partly because Males J did not consider that the Act’s *travaux préparatoires* directly contemplated such an order.<sup>44</sup> But the latter point is highly debatable because the following comment was made in the DAC Report (1996) concerning section 44: ‘there may be instances where a party seeks an order that will have an effect on a third party,

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<sup>39</sup> [2005] EWCA Civ 618; [2005] 1 WLR 3555.

<sup>40</sup> [2011] EWCA Civ 1042.

<sup>41</sup> [2014] EWHC 3704 (Comm); [2015] 1 All ER (Comm) 305, Males J.

<sup>42</sup> *Ibid*, at [47].

<sup>43</sup> *Ibid*, at [49].

<sup>44</sup> *Ibid*, at [50], Males J said: ‘[paragraphs [214] to [216] in the Departmental Advisory Report (1996) report] contain nothing to suggest that it was intended to confer jurisdiction on the court to make orders against non-parties. This is something which, if it was intended, could be expected to be stated with clear words. Instead, the report merely recognises that orders under section 44 may affect third parties, but that is rather different from saying that orders may be made against third parties.’ DAC Report is accessible at: <<http://uk.practicallaw.com/5-205-4994?service=arbitration>>.

which only the Court could grant.<sup>45</sup> More generally, Steven Gee has condemned the decision as wrong in law.<sup>46</sup>

What if the seat is not England and Wales? In *Mobil Cerro Negro Ltd v. Petroleos De Venezuela SA* (2008)<sup>47</sup> Walker J emphasised that worldwide freezing orders are made ‘only sparingly’ in support of arbitration. The seat of the arbitration was New York, and the parties were Bahamian and Venezuelan. The governing law of the main contract was Venezuelan. PDVSA successfully applied to set aside the London freezing order. Walker J found that there was no evidence that the respondent was likely to dissipate its assets. But he gave three *additional* reasons for setting aside the freezing injunction:<sup>48</sup> (1) ‘*Mobil cannot surmount the... hurdle [in section 44(3) of the Arbitration Act 1996] show that the case is one of “urgency”*’; (2) ‘*in the absence of any exceptional feature such as fraud, [Mobil] would have had to demonstrate a link with this jurisdiction in the form of substantial assets of PDV located here*’ but ‘*Mobil cannot demonstrate such a link*’; and (3) ‘*in the absence of any exceptional feature such as fraud, and in the absence of substantial assets of PDV located here, the fact that the seat of the arbitration is not here makes it inappropriate to grant an order under section 2(3) of the Arbitration Act 1996...*’

At the Tokyo arbitration discussion (19 June 2012), and at the Rikkyo University symposium (also in Japan) (20 June 2012), it was suggested that (contrary to the restrictive emphasis of Walker J’s *dicta* in the *Mobil* case) it would in fact be commercially attractive for English freezing relief to be available in support of arbitration and that Walker J’s *dicta* should be revisited on appeal or by another Commercial Court judge.

In response to the need for interim relief or accelerated final relief, some institutional rules, including Article 9B<sup>49</sup> of the LCIA Rules (2014), provide for appointment of emergency arbitrators.<sup>50</sup>

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<sup>45</sup> DAC Report, *ibid*, at [214].

<sup>46</sup> S Gee, *Commercial Injunctions* (6<sup>th</sup> edn, 2016), 6-037, 6-045.

<sup>47</sup> [2008] EWHC 532 (Comm); [2008] 2 All ER (Comm) 1034; [2008] 1 Lloyd’s Rep 684, noted Adam Johnson (2008) CJQ 433-44; see also *ETI Euro Telecom International NV v. Republic of Bolivia* [2008] EWCA Civ 880; [2009] 1 WLR 665.

<sup>48</sup> [2008] EWHC 532 (Comm); [2008] 2 All ER (Comm) 1034; [2008] 1 Lloyd’s Rep 684, at [28].

<sup>49</sup> On which, S Wade, P Clifford, J Clanchy, *A Commentary on the LCIA Arbitration Rules 2014* (London, 2015), 9-024 ff.

<sup>50</sup> D Jones, ‘Emergency arbitrators and Court-Ordered Interim Measures: Is the Choice Important?’, in

### III

#### ARBITRATION RATHER THAN COURT PROCEEDINGS?

Arbitration is a joint decision to bypass the courts. For those who can afford arbitration by a tribunal of experience and quality, this process offers: (i) control over the selection of the tribunal; (ii) confidentiality; (iii) the absence of appeal on the factual merits (on excluding appeal on points of English law under section 69 see section IV below; and it should be noted that resort to the LCIA or ICC rules<sup>51</sup> has the effect of incorporating such an exclusion of section 69); (iv) access to the system of enforcement under the NYC (1958).

Lord Thomas in his BAILII lecture<sup>52</sup> attempted to pour cold water on the advantages which are frequently suggested to flow from selecting arbitration, namely procedural flexibility, confidentiality, and cross-border enforcement. Although the author agrees<sup>53</sup> that the advantages of commercial arbitration are not as clear-cut<sup>54</sup> as the arbitration community is wont to suggest, there is a continuing belief that the arbitral system offers potential benefits, not easily calibrated, not always secured, but alluring in principle.<sup>55</sup>

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JC Betancourt (ed), *Defining Issues in International Arbitration* (Oxford University Press, 2016), chapter 14; G Hanessian, 'Legal Standards Applicable to Deciding Applications for Interim Relief', in Betancourt (ed), chapter 15; G Hanessian, 'Emergency Arbitrators', in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3<sup>rd</sup> edn, New York, 2014), chapter 14.

<sup>51</sup> LCIA Rules (2014), Article 26.8; ICC Rules of Arbitration (2012), Article 34(6).

<sup>52</sup> Thomas 2016, n 4 ante, at [38] to [43].

<sup>53</sup> N Andrews, 'The Foreign Party's Choice between Arbitration and Court Litigation: Points Weighing Against Arbitration', in S Shetreet and W MacCormack (eds), *The Culture of Judicial Independence in a Globalised World* (Brill publishing, Leiden and Boston, 2016), chapter 20.

<sup>54</sup> *Ibid*, where Andrews has suggested, in conclusion, that the following factors, in particular, are counter-considerations which might (when weighed in the balance) incline advisors to choose a mature commercial court: (i) summary judgment can produce cheaper and quicker results when the dispute is taken to court; (ii) some practitioners consider that judgments given by High Court judges in England more closely reasoned and the results more predictable; (iii) the arbitration system is high-risk because an award on the factual or legal merits cannot be re-opened (however, as discussed in the present paper, England permits High Court appeal for errors of English substantive law, under s 69 of the Arbitration Act 1996; although the parties can, and often do, exclude that possibility).

<sup>55</sup> As Karton suggests, 'extolling the virtues of [arbitration] (especially its superiority over litigation) is part of the business of an arbitrator. Many arbitrators seldom miss an opportunity to proclaim arbitration's superiority.' J Karton, n 3 ante, at 71.

Commentators have remarked that in some legal systems arbitration is the only game in town.<sup>56</sup> But in London there is more than one game available, even Rugby league, or American football. London is an established magnet for cross-border litigation, including arbitration. So what is the state of civil courts in England?

The Commercial Court is at the heart of that cross-border work. That court sits within the Rolls building in London<sup>57</sup> (which houses the Commercial Court, the Chancery Division in London, and the Technology and Construction Court).

There is no doubt that procedure on the multi-track is dense and detailed. For example, CPR 3.9, re-drafted in 2013, concerns relief against sanctions. It is enough to say that what should be in principle a straightforward exercise in judicial discretion has become a dense thicket of case law. The many thousands of words devoted to this topic in 'The White Book' are hardly an alluring advertisement for English civil procedure (the ratio of comment by the editor of that book to statutory text is 200:1, that is 16,000 words concerning a provision which is 80 words long; the LCIA Rules (2014) are, by contrast, only 13,200 words long).

Sir Michael Briggs in his Final Report (2016)<sup>58</sup> notes the closure of many County Court hearing centres in England and Wales.<sup>59</sup> The main theme of that report is, of course, the creation of an online solutions court for certain types of claim under £25,000. Members of the London Arbitration community will not feel threatened if that online project gets off the ground. But it is indicative: that the nation is on the look-out for ways of economising on civil justice and diverting cases into mediation, online systems of dispute resolution, and early neutral evaluation. Briggs (Interim Report, 2015)<sup>60</sup> has noted that the contribution of non-judicial systems is very

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<sup>56</sup> Eg, VV Veeder, 'On Reforming the English Arbitration Act 1996?', in J Lowry and L Mistelis (ed), *Commercial Law: Perspectives and Practice* (Lexis Nexis, 2006), 243, at 14.33.

<sup>57</sup> Rolls Building, Fetter Lane, London; on which, Sir Michael Briggs *Chancery Modernisation Review: Final Report* (December, 2013), 1.74, 1.86 (hereafter 'Briggs CMR 2013') <<http://www.judiciary.gov.uk/announcements/chancery-modernisation-review-final-report/>>.

<sup>58</sup> Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (2016) (hereafter 'Briggs FR 2016') <<http://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>>

<sup>59</sup> *Ibid*, at 2.3: 'Thirty six County Court hearing centres are planned to close...Plans for re-locating the workload of the closing centres are being put in place, on the general principle that local alternative provision will be considered where increased travel time to court is considered a particular issue.' And at 2.4: 'It remains the case that this round of closures is unlikely to be the last, and that further closures of County Court hearing centres may be included...'

<sup>60</sup> *Civil Courts Structure. Review: Interim Report* (2015) (hereafter 'Briggs IR 2015') <<http://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf>>. On which, N Andrews, 'Improving Justice Despite Austerity: Making Do or Making Better?' ZJP Int 1-24.

significant:<sup>61</sup> 'the rapid growth of ...ADR during the last thirty years leaves the civil courts as very much the last resort for the resolution of civil disputes. Negotiation, arbitration, mediation, early neutral evaluation<sup>62</sup> and adjudication by ombudsman services<sup>63</sup> and others resolve far more disputes than the civil courts.' He also supports judicial promotion of mediation.<sup>64</sup>

Sir Michael Briggs (Final Report, 2016) has provided a candid five-fold analysis of deficiencies in the English civil court system: (i) lack of access for ordinary individuals and small businesses (practical access to justice<sup>65</sup> is achieved for small claims and, at the other pole of the spectrum, access is enjoyed in the High Court by oligarchs and large companies litigating matters worth several million pounds; otherwise, there is a crisis of lack of access to justice, and a proliferation of litigants-in-person); (ii) there has been a lack of proper IT support; (iii) the Court of Appeal logjam (on which see the next paragraph); (iv) there has been under-investment in the provinces; (v) the system of enforcing judgments is unimpressive, at least at some levels.<sup>66</sup>

The most shocking information in Sir Michael Briggs' report concerns delay consequent on a log-jam within the Court of Appeal.<sup>67</sup> The congestion has become acute, and it will take a long time to clear the road for speedy justice before that court. In short, Lords Justices had become bogged down in (to adopt an analogy) undergraduate admissions interviews (permission to appeal hearings), to the detriment of the students already admitted and hoping to be taught (conducting hearings on real appeals). However, a recent rule change (October 2016) will help

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<sup>61</sup> Briggs IR 2015, n 60 ante, 2.22 (see also 7.18 to 7.27).

<sup>62</sup> *Ibid*, at 7.20, on 'early neutral evaluation' within the Financial Ombudsman Service.

<sup>63</sup> *Ibid*, 2.92: the Financial Ombudsman Service resolved 310,000 disputes in 2014; it has a staff of 4,000; there are 300 ombudsmen; there are 2,000 adjudicators; 2.93, 'the civil courts have no formal link with ombudsmen services. But [the courts] remain...a vital last resort and upholder of the rule of law, without which those services would be deprived of at least part of their effectiveness.'

<sup>64</sup> On the interaction of the courts and ADR, Briggs IR 2015, n 60 ante, 2.86 to 2.93; 11.20 and 11.21; Briggs CMR 2013, n 57 ante, chapter 5; 16.36 to 16.38; see also *Andrews on Civil Processes* (Cambridge, Intersentia Publishers, 2013), vol 2, *Arbitration and Mediation*, chapter 1.

<sup>65</sup> E Palmer, T Cornford, A Guinchard, Y Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart Publishers, 2016).

<sup>66</sup> Briggs FR 2016, n 58 ante, at 12.4.

<sup>67</sup> Sir Michael Briggs notes that this crisis will require 50,000 hours of hearings to clear the backlog, Briggs, FR (2016), n 58 ante, at 2.9.

relieve the pressure, because it will now be exceptional for oral hearings to take place to determine whether permission to appeal should be granted.<sup>68</sup>

The courts regulate their procedure through the Rules Committee. Their drafting changes have been frequent (October saw the 81<sup>st</sup> update of the CPR 1998) but not always sensible. For example, Sir Rupert Jackson's suggestion (Final Report, 2010)<sup>69</sup> that pre-trial case management be extended, in a 'gradualist' and discretionary fashion, to embrace costs budgeting was a good idea in principle. But it has become a bad idea in practice because the Rule Committee has applied<sup>70</sup> this to all multi-track claims of less than £10 M.<sup>71</sup> . A crisis was unnecessarily created. The change was deleterious for two reasons: first, this required judges to learn a new skill without adequate training; secondly, some parts of the judicial system became swamped with this influx of new work. The courts were placed under great pressure, to the detriment of their other tasks. But in 2015, in his capacity as General Editor of 'The White Book', Sir Rupert Jackson reported that things are 'bedding down' and that users of the Commercial Court are opposed to cost management by only a slight majority.<sup>72</sup>

But it has not all been doom and delay in the civil courts. Lord Thomas noted in his BAILII lecture (2016) that there have been positive procedural developments: (i) the

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<sup>68</sup> CPR 52.5 (wef October 2016) '(1) Where an application for permission to appeal is made to the Court of Appeal, the Court of Appeal will determine the application on paper without an oral hearing, except as provided for under paragraph (2). (2) The judge considering the application on paper may direct that the application be determined at an oral hearing, and must so direct if the judge is of the opinion that the application cannot be fairly determined on paper without an oral hearing...'

<sup>69</sup> Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2010), at 7.17 <<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>>

<sup>70</sup> CPR 3.12 to 3.18; on the system, P Hurst et al (eds), *Costs and Funding following the Civil Justice Reforms: Questions and Answers* (2<sup>nd</sup> edn, 2016), chapter 4; *Sarpd Oil International Ltd v. Addax Energy SA* [2016] EWCA Civ 120; [2016] CP Rep 24, at [33] ff, *per* Sales LJ (note that the rules departed from Sir Rupert Jackson's recommendation that the scheme be introduced incrementally: R Jackson, *The Reform of Civil Litigation* (2016), chapter 14, especially at 14.015).

<sup>71</sup> Bemoaned in the Commercial Court by B Eder, 'Does arbitration stifle development of the law? Should s.69 be revitalised?', Chartered Institute of Arbitrators (London Branch) AGM Keynote Address – 28 April 2016, at [9] <<http://arias.org.uk/wp-content/uploads/2016/05/CIArb-EDER-AGM-Keynote-Address-28-April-2016-AMND.pdf>>.

<sup>72</sup> *Civil Procedure* (2016), preface at xiii.

Financial List in London; (ii) the piloting of (ii) Financial Markets Test Scheme,<sup>73</sup> (iii) the shorter trial procedure and (iv) the flexible trial procedure.<sup>74</sup>

As for (i), from 1 October, 2015, there is a new court (technically a new list in either the Commercial Court or Chancery Court in London),<sup>75</sup> known as the Financial List, which receives very high value (normally, £50 M plus) and complex litigation concerning financial markets.<sup>76</sup> Such matters are defined as follows:<sup>77</sup>

*“Financial List claim” means any claim which—(a) principally relates to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement, and is for more than £(UK) 50 million or equivalent; (b) requires particular expertise in the financial markets; or (c) raises issues of general importance to the financial markets. (3) “Financial markets” for these purposes include the fixed income markets (covering repos, bonds, credit derivatives, debt securities and commercial paper generally), the equity markets, the derivatives markets, the loan markets, the foreign currency markets, and the commodities markets.’*

Lord Thomas, in a speech in July 2015, explained the rationale for this innovation as follows:<sup>78</sup>

*‘First, it will promote access to the courts and the expertise of trial judges, for market actors in an area that is of significant importance both to the development of the domestic economy and to open the markets internationally. Secondly,...[it] will help to avoid costly and time-consuming litigation, through providing a mechanism for authoritative guidance before disputes have arisen. It thus helps to provide the necessary environment, identified by Adam Smith, for economic activity to thrive.*

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<sup>73</sup> PD(51M).

<sup>74</sup> Thomas 2016, n 4 ante, at [25] to [30].

<sup>75</sup> CPR 63A, para 2(1).

<sup>76</sup> CPR 63A; PD(63AA); *Civil Procedure* (2016), third supplement, August 2016, at section 2FA, summarising cases so far decided; on contested transfers into this list, for contested transfers into this list, *Property Alliance Group Ltd v. Royal Bank of Scotland* [2016] EWHC 207 (Ch); [2016] 1 WLR 2783, at [40], per Etherton C;

for the complete list, <<http://www.judiciary.gov.uk/court/financial-list/>>;

*Financial List Guide*

<[http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/465590/financial-list-guide.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/465590/financial-list-guide.pdf)>; Briggs IR 2015, n 60 ante, 3.20.

<sup>77</sup> CPR 63A, para 1(2).

<sup>78</sup> Speech at the Mansion House, London, 8 July 2015, cited in *Property Alliance Group Ltd v. Royal Bank of Scotland* [2016] EWHC 207 (Ch); [2016] 1 WLR 2783, at [3], by Etherton C.

*Thirdly...[it] will promote the rule of law both nationally and internationally....At the international level it does so through acting as a beacon. The courts and the judiciary of this jurisdiction are widely respected throughout the world, for their expertise, knowledge of the markets, their incorruptibility and their independence. The new Financial List—embodying these virtues—will set an international benchmark. The new List will not only encourage international litigants to continue to use our courts, the principles they embody and their jurisprudence, but in doing so they will help to raise standards. Setting the bar high here will help to raise the bar across the world.'*

As for (ii), the piloted Financial Markets Test Scheme<sup>79</sup> (operative for two years from 1 October, 2015) is an innovative mechanism allowing declaratory relief to be 'determined'<sup>80</sup> and 'resolved'<sup>81</sup> in a 'test case',<sup>82</sup> where the facts are agreed,<sup>83</sup> on a point of English law<sup>84</sup> which is contested by parties with 'opposing interests'<sup>85</sup> who are, or were, 'actively in business'<sup>86</sup> in the relevant market, even though no 'present cause of action'<sup>87</sup> has arisen between them. Such matters will be commenced 'by mutual agreement'.<sup>88</sup> and then, where appropriate, permitted by the court to proceed as a 'qualifying claim'<sup>89</sup> within the Financial List.<sup>90</sup> Such claims must concern issues of 'general importance to the financial markets'<sup>91</sup> and they will be brought in order to procure 'authoritative English law guidance'.<sup>92</sup> The court can be constituted, in cases of 'particular importance or urgency',<sup>93</sup> to comprise more than one Financial List judge or one such judge and a Lord or Lady Justice of Appeal. 'A relevant trade, professional or regulatory body or association'<sup>94</sup> or interested third parties<sup>95</sup> can be represented or joined in such proceedings. No costs order will be made.<sup>96</sup>

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<sup>79</sup> PD(51M).

<sup>80</sup> *Ibid*, para 2.2.

<sup>81</sup> *Ibid*, para 2.3.

<sup>82</sup> *Ibid*, para 2.5(a).

<sup>83</sup> *Ibid*, para 2.5(b).

<sup>84</sup> *Ibid*, paras 2.1 and 2.3.

<sup>85</sup> *Ibid*, paras 2.3, 2.5(a).

<sup>86</sup> *Ibid*, para 2.3.

<sup>87</sup> *Ibid*, para 2.2.

<sup>88</sup> *Ibid*, para 2.3.

<sup>89</sup> *Ibid*, para 2.5(a) prescribes this need for judicial permission.

<sup>90</sup> *Ibid*, para 1.1(b).

<sup>91</sup> *Ibid*, para 2.1.

<sup>92</sup> *Ibid*, para 2.1.

<sup>93</sup> *Ibid*, para 2.5(d).

<sup>94</sup> *Ibid*, 2.5(a).

As for (iii) and (iv), there are two further pilot schemes within the Rolls building (which is the London base for the Commercial Court, Chancery Division, and the Technology and Construction Court). These schemes will operate for two years from 1 October, 2015.

The first, the Shorter Trials Scheme, enables truncated proceedings to be used where a trial (including pre-trial judicial reading time) is unlikely to last more than four days.<sup>97</sup> Such matters will be subject to complete docketing, that is, the designated judge will conduct the case from case management conference to trial.<sup>98</sup> There will be no pre-action protocol;<sup>99</sup> particulars of claim and the defence will be short;<sup>100</sup> but proceedings will require early concentration on central issues;<sup>101</sup> witness statements will not exceed 25 pages<sup>102</sup> and might be restricted to particular issues or topics;<sup>103</sup> expert evidence will be primarily by report, oral expert evidence being confined to 'identified issues';<sup>104</sup> disclosure will be strictly controlled;<sup>105</sup> trial should be scheduled for a date or window not more than 8 months after the case management conference;<sup>106</sup> trial, conducted by the designated judge,<sup>107</sup> will be controlled<sup>108</sup> so as not to exceed the time estimate<sup>109</sup> (cross-examination<sup>110</sup> being 'strictly controlled'); costs will normally be determined by summary assessment,<sup>111</sup> and there will usually be no Costs Management;<sup>112</sup> judgment will be given within six weeks of trial or final written submissions.<sup>113</sup>

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid*, para 2.5(c).

<sup>97</sup> PD(51N); Briggs IR 2015, n 60 ante, 3.21.

<sup>98</sup> PD(51N) 2.6.

<sup>99</sup> *Ibid*, 2.16.

<sup>100</sup> *Ibid*, 2.22, 2.31.

<sup>101</sup> *Ibid*, 2.31, 2.38.

<sup>102</sup> *Ibid*, 2.44 (normally 25 pages).

<sup>103</sup> *Ibid*, 2.45.

<sup>104</sup> *Ibid*, 2.48.

<sup>105</sup> *Ibid*, 2.42 (documents on which the disclosing party relies, and specific documents requested by the other side before the case management conference); further requests discouraged, 2.43.

<sup>106</sup> *Ibid*, 2.38(e).

<sup>107</sup> *Ibid*, 2.52 ('unless it is impractical for that judge to do so').

<sup>108</sup> *Ibid*, 2.51, including directions concerning the trial timetable set at the Pre-Trial Review.

<sup>109</sup> *Ibid*, 2.53.

<sup>110</sup> *Ibid*, 2.53 (second sentence).

<sup>111</sup> *Ibid*, 2.59(a).

<sup>112</sup> *Ibid*, 2.56.

<sup>113</sup> *Ibid*, 2.55.

The second pilot, the Flexible Trials Scheme, provides a default procedure, that is, one which applies subject to party agreement.<sup>114</sup> In the interest of rendering justice both speedier and cheaper, this scheme dispenses with pre-trial hearings, restricts documentary disclosure and confines the final hearing to a modest amount of oral evidence and argument, the bulk of evidence being adduced in writing.

#### IV

### LONDON ARBITRATION AND ENGLISH SUBSTANTIVE LAW

The general approach among national arbitration systems is that awards cannot be judicially annulled on the merits, whether by reference to findings of fact or points of law. In England, however, there is limited scope to obtain the High Court's permission to hear an appeal on a point of *English* law contained within, or underpinning, the arbitration award.<sup>115</sup>

In fact it is possible for parties to English arbitration, by precise wording,<sup>116</sup> to stipulate that there will not be any recourse to such an appeal. This is a standard term of both the LCIA and ICC institutional rules of arbitration.<sup>117</sup>

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<sup>114</sup> *Ibid*, 3.1 to 3.9; Briggs IR 2015, n 60 ante, 3.22.

<sup>115</sup> s 69(2)(3) Arbitration Act 1996 (England and Wales), cited in text below. There are many cases on this provision, for example, *CMA CGM SA v. Beteiligungs KG MS Northern Pioneer Schiffahrtsgesellschaft mbH & Co* [2002] EWCA Civ 1878; [2003] 1 WLR 1015; and Flaux J in *ASM Shipping Ltd of India v. TTMI Ltd of England*, ('*The Amer Energy*') [2009] 1 Lloyd's Rep 293, at [17], [18] to [19]; for an outstanding account of the history and modern development of this topic, B Rix, 'Judicial Review of the Merits of Arbitration Awards under English Law', in JC Betancourt (ed), *Defining Issues in International Arbitration* (Oxford University Press, 2016), chapter 29; 'Report (2006) on the Arbitration Act 1996', at [66] to [75], (2007) 23 Arb Int 436-460; Thomas 2016, n 4 ante; Neil Andrews, 'Arbitral Awards and Errors of English Law: Refining The Law-Making Function of the Judicial Appeal System', in S Shetreet (ed), *The Culture of Judicial Independence: Rule of Law and World Peace* (Martinus Nijhoff Publishers, Leiden and Boston, 2014), chapter 23.

<sup>116</sup> Gloster J in *Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm) held that the words 'final, conclusive and binding' merely indicated that the award would be final and binding as a matter of *res judicata*; and this leaves the door open to the award being subject to appeal to the High Court on a point of law (if permission to appeal to the High Court can be obtained from a judge under s 69(2)(3), Arbitration Act 1996). To exclude this possibility of appeal on a point of English law, it would be necessary explicitly to state that the award would not be subject to appeal or other recourse: T Dedezade, 'Appeals on a Question of Law: Are You In or Are you Out?' [2006] Int ALR 56 <<http://corbett.co.uk/wp-content/uploads/Taner-s-69-article.pdf>>.

<sup>117</sup> Thus the rules of the London Court of International Arbitration (LCIA, 2014), Article 26.8, provide: '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) [which concerns correction of awards by the arbitration tribunal on request by a party or on the initiative of the tribunal]; 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.'

At the section 69 gateway the court must take into account the chances of the appeal succeeding and the importance of the relevant point.<sup>118</sup> Unless both parties agree to an appeal,<sup>119</sup> the High Court, acting as its own 'gate-keeper', is required to apply specified restrictive criteria, in effect a statutory 'filter', to determine whether to grant permission for such an appeal on a point of English law:<sup>120</sup>

*Leave to appeal shall be given only if the court is satisfied—(a) that the determination of the question will substantially affect the rights of one or more of the parties, (b) that the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award—(i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*

Furthermore, the High Court is slow to grant such permission. Statistics concerning applications made during the period 2006-2008<sup>121</sup> show that only roughly a quarter of such applications succeeded.<sup>122</sup> As for the period 2012-2015, Sir Bernard Eder reports that there was an average of 70 applications each year, of which under 20 per year were successful, of which about 10 proceeded to appeal, and 6 on average

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Similarly, ICC Rules of Arbitration (2012), Article 34(6): '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.'

<sup>118</sup> s 69(3)(c), Arbitration Act: 'that, on the basis of the findings of fact in the award—(i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt...'

<sup>119</sup> Walker J in *Royal & Sun Alliance Insurance plc v. BAE Systems (Operations) Ltd* [2008] EWHC 743 (Comm); [2008] 1 Lloyd's Rep 712, at [29]; case is noted in the report of Lord Mance's Advisory Committee, by VV Veeder and A Sander (2009), at [13] and [14]; report available at: <http://www.lmaa.org.uk/uploads/documents/First%20Interim%20Report%20Mance%2024%2005%202009.pdf>.

<sup>120</sup> s 69(3), Arbitration Act 1996.

<sup>121</sup> Figures provided in the report of Lord Mance's Advisory Committee, by VV Veeder and A Sander (2009), Schedule A, p 8; report available at: <http://www.lmaa.org.uk/uploads/documents/First%20Interim%20Report%20Mance%2024%2005%202009.pdf>.

<sup>122</sup> *Ibid*, recording 36 applications in 2006, of which 9 were granted permission; in 2007, 58 applications, permission granted in 13; in 2008, 57 applications, permission granted in 4; disclosing an average of 50 application per year, with permission granted in 12 (noted M O'Reilly, 'Provisions on Costs and Appeals: An Assessment from an International Perspective', paper delivered at the British Institute of International and Comparative Law conference, February 2010).

resulted in reversal; and that only 5 Court of Appeal hearings took place in all, and only one Supreme Court final appeal.<sup>123</sup> As for 2015, Lord Thomas reports that 58 applications were made, of which 19 succeeded, that is, about one third.<sup>124</sup>

In 2016 Lord Thomas re-stirred the section 69 hornets' nest by suggesting in his BAILII lecture<sup>125</sup> that the Common Law system is being unacceptably starved by the section 69 control on appeals.

Some might support Lord Thomas's suggestion that section 69 needs to be applied less cautiously. He says: 'across many sectors of law traditionally developed in London, particularly relating to the construction industry, engineering, shipping, insurance and commodities, there is a real concern which has been expressed to me at the lack of case law on standard form contracts and on changes in commercial practice.'<sup>126</sup> Certainly, section 69 becomes problematic if it chokes off too many commercial cases; the Common Law system does require some irrigation from the world of arbitration.

There are other members of the Thomas school. In his dissent to the 2006 report on the English arbitration legislation,<sup>127</sup> Paul Arditti (2006),<sup>128</sup> of the law firm Ince & Co, considered that section 69 is too restrictive. Similarly, Embiricos (2009), a shipping expert, said: 'shipping [law and practice] are always on the move, and undesirable vacuums can soon proliferate if English law does not keep up with these changes'; and he added that 'the same applies where...the law is clear, but argument abounds on how it applies to some new set of facts which the industry faces.'<sup>129</sup> Furthermore, Sir Bernard Rix (2015) complained that commercial law 'is going underground',<sup>130</sup>

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<sup>123</sup> B Eder, 'Does arbitration stifle development of the law? Should s.69 be revitalised?', Chartered Institute of Arbitrators (London Branch) AGM Keynote Address – 28 April 2016, at [6] <<http://arias.org.uk/wp-content/uploads/2016/05/CIArb-EDER-AGM-Keynote-Address-28-April-2016-AMND.pdf>> (hereafter, 'Eder 2016').

<sup>124</sup> Thomas 2016, n 4 ante, at [21].

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, at [23].

<sup>127</sup> 'Report (2006) on the Arbitration Act 1996', (2007) 23 Arb Int 436-460; available at <<http://arbitration.oxfordjournals.org/content/arbint/23/3/437.full.pdf>>; and for a summary, Bruce Harris, 'The Arbitration Act 1996 – 10 Years On Preliminary Observations of a Major Survey of Users' Views' <[http://www.biicl.org/files/2126\\_the\\_arbitration\\_act\\_1996\\_10\\_years\\_on.pdf](http://www.biicl.org/files/2126_the_arbitration_act_1996_10_years_on.pdf)>.

<sup>128</sup> 'Report (2006) on the Arbitration Act 1996', at para 95, n 2.

<sup>129</sup> Epaminondas Embiricos, 'Appeals from Arbitration Awards' <<http://www.lmaa.london/uploads/documents/C50AppealsfromArbitrationAwards.pdf>>.

<sup>130</sup> B Rix, 'Confidentiality in International Arbitration: Virtue or Vice?' Jones Day Professorship in Commercial Law Lecture, SMU, Singapore\_ 12 March 2015; available at:

and in 2016 he noted that 'outside the area of investment arbitration, arbitration awards are not published and thus the development of the law remains hidden and uncertain.'<sup>131</sup>

However, there is a second school, of section 69 sceptics. This school regards section 69 as an unacceptable English eccentricity, or even as a harmful point of contact between arbitration and the courts, certainly a major exception to arbitral finality. Lord Saville,<sup>132</sup> Sir Bernard Eder,<sup>133</sup> and Bill Rowley QC<sup>134</sup> (all in 2016, in response to Lord Thomas' 2016 lecture) have declared their membership of this school. Eder said:<sup>135</sup>

*'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.'*

It seems unlikely that section 69 will be repealed. The 2006 report on the Arbitration Act 1996 stated that a majority of respondents considered that it should be retained.<sup>136</sup> This is because appeals to the courts from commercial arbitration have

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<[http://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes\\_Confidentiality\\_in\\_International\\_Arbitration.pdf](http://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf)>.

<sup>131</sup> B Rix, 'Judicial Review of the Merits of Arbitration Awards under English Law', in JC Betancourt (ed), *Defining Issues in International Arbitration* (Oxford University Press, 2016), para 29.57.

<sup>132</sup> Lord Saville, 28 April 2016 <[http://www.google.co.uk/webhp?sourceid=navclient&ie=UTF-8&gws\\_rd=ssl#q=Saville+times+28+april+2016](http://www.google.co.uk/webhp?sourceid=navclient&ie=UTF-8&gws_rd=ssl#q=Saville+times+28+april+2016)>

'People use arbitration to resolve their disputes, not to add to the body of English commercial law...From the international point of view, any suggestion that the English courts be permitted to interfere in the arbitral process by substituting their decisions for those of the tribunal chosen by the parties is regarded with little short of astonishment...I have no doubt that any move to expand the right of appeal from arbitration awards would be a wholly retrograde step. Far from helping to develop English law, it would be calculated to drive international commercial arbitration away from London, to the great loss of this country.'

<sup>133</sup> B Eder 2016 (n 123 ante), at [6].

<sup>134</sup> J William Rowley, QC, 'London Arbitration under attack'

<[http://www.idrc.co.uk/media/26078/rowley\\_-\\_london\\_arbitration\\_under\\_attack.pdf](http://www.idrc.co.uk/media/26078/rowley_-_london_arbitration_under_attack.pdf)>.

See also S West et al for further criticism <<http://globalarbitrationnews.com/a-zero-sum-analysis-of-arbitration-and-litigation-is-to-the-detriment-of-both-an-assessment-of-lord-thomass-BAILII-lecture-and-sir-bernards-ciarb-speech/>>.

<sup>135</sup> B Eder 2016 (n 123 ante), at [17].

<sup>136</sup> 'Report (2006) on the Arbitration Act 1996', at [66] to [69], (2007) 23 Arb Int 436-460 (available at <http://arbitration.oxfordjournals.org/content/arbint/23/3/437.full.pdf>); and for a summary, see Bruce Harris, 'The Arbitration Act 1996 – 10 Years On Preliminary Observations of a Major Survey of Users'

enriched English contract law. Many seminal cases have emerged into the daylight from the subterranean tunnels of the arbitral process.<sup>137</sup> It is a question of balance. There is no need for a flood of cases. English arbitration law should not alienate potential international customers.

But could section 69 be rendered more effective, even without increasing the supply of cases? In earlier discussion<sup>138</sup> I have proposed this change: once permission to appeal has been granted under section 69, the substantive appeal should proceed straight to the Court of Appeal, so that the precedent-creating potential of such a matter can be maximised and so that the process can be speeded up.<sup>139</sup>

My suggestion is based on these considerations. In a major commercial arbitration the sole arbitrator or chairman of the arbitral tribunal will be an experienced commercial lawyer, often a QC (a senior barrister), or a former English judge of distinction. It is questionable, therefore, whether, on points of real legal difficulty

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Views' <<http://www.biicl.org/files/2126>>.

<sup>137</sup> Notable examples include: *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696, HL (frustration); *Universal Cargo Carriers Corporation v. Citati* [1957] 2 QB 401, 436-8, Devlin J (anticipatory breach; not disturbed on appeal on this point: [1957] 1 WLR 979, CA and [1958] 2 QB 254, CA; MJ Mustill, *Anticipatory Breach: Butterworths Lectures 1989-90* (1990), 69 ff, and MJ Mustill (2008) 124 LQR 569, 580 n 23 notes the galaxy of commercial talent employed in arguing this case); *The Mihalis Angelos* [1971] 1 QB 164, CA (breach); *Schuler (L) AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235, HL (contractual terms; conditions); *Pioneer Shipping Ltd v. BTP Tioxide Ltd ('The Nema')* [1982] AC 724, HL (frustration); *Golden Strait Corporation v. Nippon Yusen Kubishika Kaisha ('The Golden Victory')* [2007] UKHL 12, [2007] 2 AC 353 (damages); *Transfield Shipping Inc v. Mercator, 'The Achilles'* [2008] UKHL 48; [2009] 1 AC 61 (remoteness of damages in contract law); *Flame SA v. Glory Wealth Shipping Pte Ltd ('The Glory Wealth')* [2013] EWHC 3153 (Comm); [2014] QB 1080, Teare J (sequel, [2016] EWHC 293 (Comm); [2016] 2 All ER (Comm) 151; [2016] 1 Lloyd's Rep 571, also Teare J) (damages); *Bunge SA v. Nidera BV* [2015] UKSC 43; [2015] 3 All ER 1082 (damages); *Fulton Shipping Inc of Panama v. Globalia Business Travel SAU, ('The New Flamenco')* [2015] EWCA Civ 1299; [2016] 1 WLR 2450 (mitigation and damages) (appeal outstanding); *PST Energy 7 Shipping LLC v. OW Bunker Malta Ltd ('The Res Cogitans')* [2016] UKSC 23; [2016] AC 1034 (debt claim in respect of bunkers; scope of Sale of Goods Act 1979). On the *Schuler* case, Thomas 2016, n 4 ante, at [12] and [13] and [16]; and on the *Transfield* case, Eder 2016, n 123 ante, at [21].

<sup>138</sup> Neil Andrews, *Arbitration and Contract Law* (Springer Publishers, Dordrecht, Heidelberg, London, New York, 2016), 8.12 to 8.40; Neil Andrews, 'Arbitral Awards and Errors of English Law: Refining the Law-Making Function of the Judicial Appeal System', in S Shetreet (ed), *The Culture of Judicial Independence: Rule of Law and World Peace* (Martinus Nijhoff Publishers, Leiden and Boston, 2014), chapter 23.

<sup>139</sup> Eg, the delay consequent on the appeals in (i) *Schuler (L) AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235, HL (noted by Thomas 2016, n 4 ante, at [16]); and (ii) *Transfield Shipping Inc v. Mercator, 'The Achilles'* [2008] UKHL 48; [2009] 1 AC 61 (remoteness of damages in contract law) (noted by B Eder, 2016, n 123 ante, at [21]).

sufficient to pass the test prescribed by the 'filter' of section 69, an appeal to a Commercial Court judge, sitting alone, will be perceived as conferring additional weight to the award, or capable of convincingly repudiating it on legal grounds. All too often, where the point of law is fundamental and highly contentious, the Commercial Court's decision will prove to be merely a procedural stepping-stone, the Commercial Court judge acknowledging the need for a re-think by a higher appellate court and thus giving permission for a second appeal. Might it not be better to adopt a more pragmatic approach, and to take a bold leap, eliminating the first instance stepping-stone?

Given the paucity of appeals under section 69 (see the reference to statistics at notes at 121-40 above), it would not over-burden the Court of Appeal for the matter to be automatically assigned to the Master of the Rolls. He (or she) should have power (when appropriate) to co-opt current members of the Commercial Court (either two such members, or four, in the case of obviously important points of law) to hear the appeal as adjunct Lords Justices of Appeal. Only in quite exceptional circumstances would the Supreme Court of the United Kingdom consider it appropriate to grant permission for a second and final appeal.

To this proposal the first objection might be that the Court of Appeal has become infamously overloaded<sup>140</sup> and thus hardly leads to acquire a new jurisdiction. But the answer to this is that the Court of Appeal needs to ration its precious resources more efficiently and to concentrate on the most important matters. Clarifying English contract law in a commercial context is surely the most important civil jurisdiction of all.

Furthermore, it would be prudent to provide that arbitration appeals to the Court of Appeal must be heard within a specified number of weeks.

A second objection might be that my proposal would inhibit the grant of permission to appeal because the first instance 'gateway' decision-maker would not wish to overload the Court of Appeal. But I believe that the new arrangement, a fast route to the Court of Appeal, would re-focus attention on the fact that section 69 is a vital membrane allowing important points of law to be the opportunity for important Common Law decision-making. Another possibility is that the Court of Appeal itself should act as a section 69 gate-keeper, provided the permission process is both expeditious and does not involve an oral hearing.

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<sup>140</sup> Briggs FR 2016, n 58 ante, at 2.9, notes that this crisis will require 50,000 hours of hearings to clear the backlog.

Of course, we should keep the current rule that appeals under section 69 can be excluded by the parties, using clear language, or by adopting institutional rules containing such an exclusion (for example, under LCIA and ICC rules).<sup>141</sup>

If section 69 were scrapped, might it be enough that there were greater publication by arbitral institutions of (anonymised) awards which would shed light on reasoning adopted in awards and the doctrinal trends or applications which they indicate?<sup>142</sup> The problem with this is that such reports are of limited value. They indicate how things are being decided but do not supply authority. This is because an arbitral award carries no precedent value and is merely binding upon the parties to the award.

## CONCLUSION

My concluding suggestion is that the tradition of English arbitration is not imperilled by 'Brexit'. The period between the 'Brexit' referendum and the UK's 'Brexit'-exit is a time to recognise that arbitral laurels are not to be rested upon, and that the virtues of a successful legal system are not to be taken for granted. We should aim, and not only for personal, professional, or pecuniary reasons, to improve and expand (i) the practice of London-based arbitration; (ii) the global reach of London-based law firms; (iii) the influence of London-based experts and arbitrators; and (iv) we should try to keep alive the vitality and commercial attractiveness of English substantive law.

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<sup>141</sup> LCIA Rules (2014), Article 26.8; ICC Rules of Arbitration (2012), Article 34(6).

<sup>142</sup> J Karton, n 3 ante, at 33-35, commenting on ICC awards.