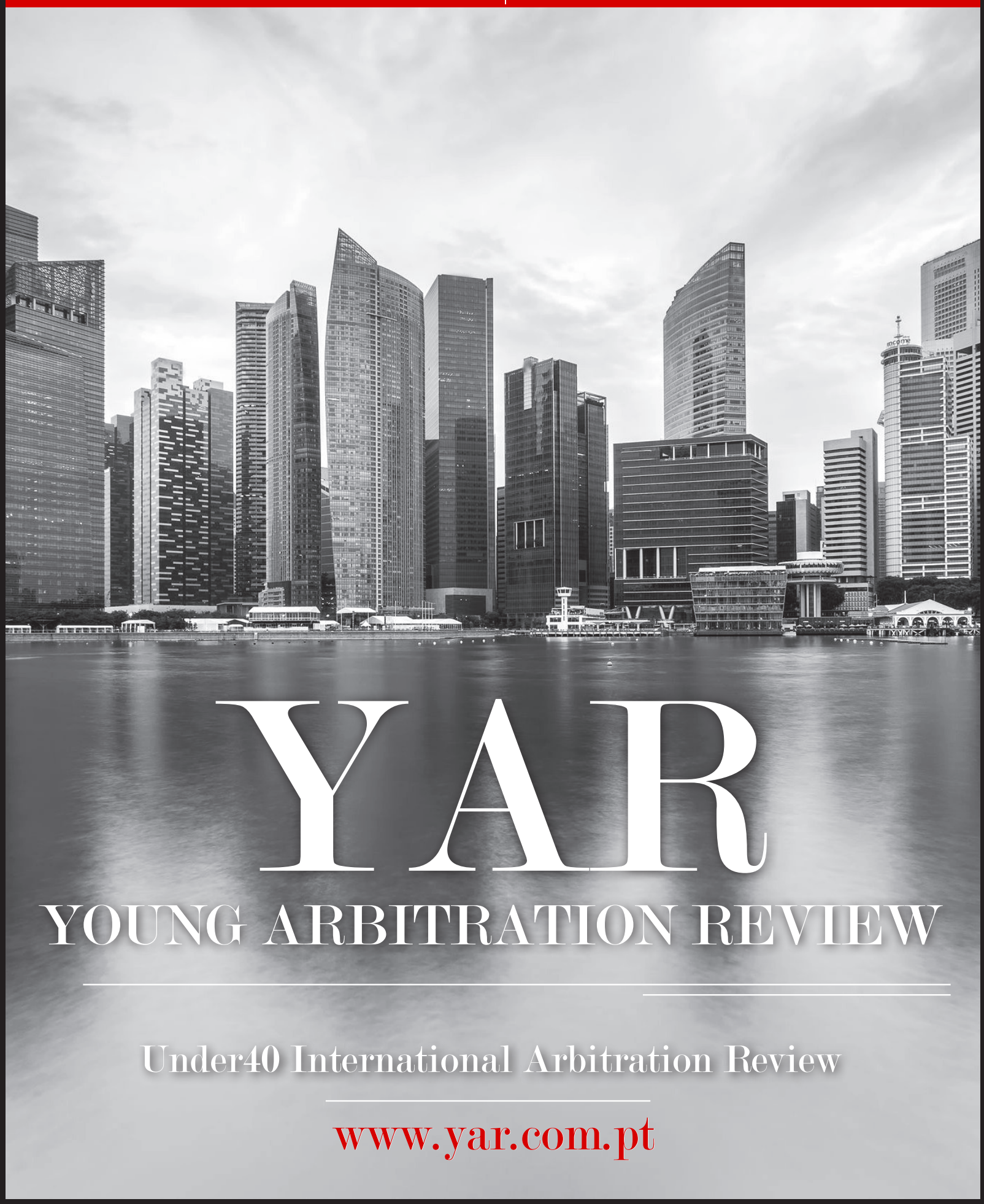
YEAR 5 | Ed. 21



YAR

YOUNG ARBITRATION REVIEW

Under40 International Arbitration Review

www.yar.com.pt


Leuven, Belgium

YAR

YOUNG ARBITRATION REVIEW EDITION

EDITION 21 • APRIL 2016

We are thankful for David Simões' invaluable contribution
to the revision of all articles of this Edition

SUBSCRIPTIONS
To subscribe YAR – Young Arbitration Review, please contact rodrigo.cabral@yar.com.pt;
pedro.s.uva@yar.com.pt; goncalo.malheiro@yar.com.pt
Annual subscription: € 200

QUOD ME NUTRIT ME DESTRUIT – LONDON AS A CENTRE FOR INTERNATIONAL ARBITRATION AND THE THREAT TO THE COMMON LAW

By Matthew Wescott

Over the centuries English law[1] has become favoured the world over as a system for regulating international trade and investment. This is due in great part to the fact that English law is based on precedent which provides a significant degree of certainty and predictability in the interpretation and application of the law. These precedents are created by the judiciary sitting in the English Courts which have rightly won a reputation for impartiality, acuity and efficiency: it follows that London has become a preeminent centre for dispute resolution.

At the same time the English judiciary has been a keen supporter of arbitration, assiduously promoting the independence and autonomy of arbitration, and limiting judicial intervention to the minimum necessary to ensure the administration of justice. As a result arbitration has become an increasingly popular choice for resolving international disputes in London.

Of course there is a paradox at the heart of this apparently virtuous duality: arbitrators do not create binding precedents, so if most cases are being arbitrated, how can the necessary common law precedents be established and then developed? Is the liberal English approach to arbitration undermining the very system on which it is founded, and is there a need to rebalance the relationship between arbitration and litigation?

These were the questions raised and addressed by the Lord Chief Justice of England & Wales[2] in a lecture given on 9 March this year, and which provoked considerable comment in England.[3]

Judicial review of arbitral awards

London has been a centre for international trade since its beginning, and the disputes arising from that trade were often

referred to arbitration. The London market developed particular expertise in the areas of insurance and shipping, two pillars of international trade and industries which were instrumental in establishing the pre-eminence of the City of London. Disputes arising from the trade in grains, sugar, metals and other resources were likewise submitted to arbitration by merchants who were experts in their respective markets. London established itself as a centre for international arbitration before the concept was even known by that name.

However, this extensive use of arbitration did not inhibit the development of common law, because the English Courts were customarily requested to review points of law in arbitration awards, which led to the development of a body of case law, even where the dispute had originally been submitted to arbitration.

Notwithstanding, a perception grew up that such reviews by the courts were delaying the prompt completion of arbitrations, leading to extra costs and in general constituting excessive judicial intervention. This led to a law reform to limit such judicial review of awards, as embodied in the Arbitration Act 1979 and the guidelines set down the by the House of Lords in *The Nema*[4]. London reiterated its commitment to international arbitration, free from judicial interference.

As things stand, the basic English law governing arbitration is set out in the Arbitration Act 1996. Challenges to arbitral awards are available under the 1996 Act on the basis of lack of substantive jurisdiction (section 67) and serious irregularity (section 68): these are mandatory provisions and the parties may not contract out of them.

Appeals may be brought on a point of law under section 69; however that right is limited and subject to certain restrictions. Furthermore, section 69 is a non-mandatory provision, so parties can, and commonly do, contract out of the right to appeal, or adopt arbitration rules which waive the right to an appeal.[5]

At the same time arbitration is ever more popular. Therefore the Courts are dealing with (relatively) fewer commercial disputes and are also being asked to review far fewer awards on points of law. The result, it is posited, is fewer of the precedent forming judgments which are the lifeblood of English common law.

This in turn gives rise to the risk that, for example, standard industry clauses will not be subject to judicial scrutiny and interpretation, undermining the legal certainty which is a quality so highly prized by users of English law worldwide.

Lord Thomas, discussed ways that this risk could be mitigated. First, by the increased use of section 45 of the 1996 Act, which entitles a party to arbitral proceedings to apply to the court to determine any question of law arising in the course of those proceedings. However section 45, like section 69, is subject to limitations and restrictions on its use; it is rarely invoked in practice, and it is difficult to see why parties should suddenly wish to reverse that trend.

Furthermore, and again like section 69, section 45 is not a mandatory provision and an agreement to dispense with reasons for the arbitral tribunal's award is considered an agreement to exclude the court's jurisdiction under section 45.[6]

The balance between arbitration and litigation

Secondly, Lord Thomas observed that parties should not always assume that arbitration will be the most effective way to resolve their dispute, and the Courts should considered as an attractive alternative.

It is true that London is the home of a first class judiciary with extensive experience in dealing with commercial disputes: most members of the bench have decades of experience at the commercial bar, prior to their judicial appointment. Furthermore, recent reforms to the English court system have introduced innovations which could mean that parties have reason to consider whether they would rather pursue litigation rather than use arbitration.

These innovations include the introduction of a specialised "Financial List" to hear banking and financial disputes. Another is the introduction of a Test Case system to resolve issues which affect the interests of a whole market and the availability of "Shorter" and "Flexible" trials. However these reforms are extremely recent and have yet to be tested.

Confidentiality

Lord Thomas also assessed two of the perceived advantages which arbitration has over litigation.

The first is confidentiality. Lord Thomas believes that the value of confidentiality is somewhat over emphasised as an advantage of arbitration. I have to say that I agree with him. Where a company is involved in an arbitration that is material to its operations and financial well-being then it is quite likely that the matter will in any event have to be disclosed to one or more of the company's commercial stakeholders, e.g. its banker, insurer, regulator, the exchange where it is listed, its shareholders or its potential shareholders. Furthermore awards are sometimes published or available to those "in the know".

Lord Thomas also regards commercial disputes as not newsworthy.[7] Again I agree. The general public tends to be more interested in matters that are either not arbitrable, or are not customarily arbitrated: mass torts, industrial disease claims, product liability, environmental damage, criminal and employment matters, including racial and sexual discrimination.

Enforcement

I think however that Lord Thomas did underplay the importance of that other pillar of international arbitration, enforceability. It is true that the New York Convention 1958 is not a passport to seamless enforcement. The New York Convention is not uniformly applied and it is not uncommon for courts around the world to entertain challenges which are

devised merely to delay enforcement and frustrate the rights of award creditors.

Nevertheless, the New York Convention is likely to be the best solution we have for the immediate future and perhaps for some time beyond that. The European Union has devised a mutual enforcement regime which itself is not uniformly applied across all Member States and has been the subject of past abuses, such that the system had to be reformed early in 2015. It remains to be seen whether those reforms will be totally effective or new issues will arise.

In the meantime, there is not even a treaty for mutual enforcement of court judgments between the US and the UK, the two countries with perhaps the greatest cultural and legal affinity and longest standing trading links in the modern world.

One potential future solution is the Hague Convention on Choice of Court Agreements which creates a worldwide framework of rules on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters.

However, despite the fact that the Hague Convention was concluded in June 2005, as things stand it is effectively a bilateral treaty between the European Union and Mexico. The Hague Convention was signed by the US in January 2009 but has yet to be ratified by that most important of nations. Furthermore, even if the Hague Convention is applied worldwide, who is to say that it will not be abused like the New York Convention itself?

It therefore appears that for the time being the New York Convention is the only game in town: it is an instrument of international arbitration, not court litigation.

Conclusions

The observations of Lord Thomas are well made, and perhaps overdue. The question is, what can be done? Parties tend to follow their self-interest, adopting the course that is most commercially advantageous to them, rather than the option which best serves the general development of the common law.

Lord Thomas singled out the financial markets as appreciating that "not only would their own dispute, in the right case involving legal issues, be better determined in a court but, more importantly, the wider interests of their industry and of the common law in general would be much better served by more issues being resolved in court and the law thus developed and clarified."

Another interpretation is possible. Parties are acutely aware of the risks inherent in going to trial and creating a potentially unhelpful precedent which will dog them in future cases and constrain them in the conduct of their business. On the other hand, where there is a chance that a useful strategic precedent may be set, then it may be worth the risk of fighting the case, an aspect of the precedent system which was not mentioned by Lord Thomas in his speech.

After the 2008 financial crisis it was expected that the crash would give rise to a substantial number of misselling claims by customers against City of London banks. In the event, the banks successfully fought a number of cases to trial, which, as it happens, created a line of authority which restricted the ability of plaintiffs to bring future misselling claims.

The recent changes to the commercial court system do perhaps signal a new era in judicial innovation, and those parties who are sufficiently sophisticated and well-resourced will continue to bring cases before the courts where they think a useful precedent may be set.

However questions of enforcement still weigh the balance in favour of international arbitration and the development of the Hague Convention depends on the actions of not just one, but many countries to bring the convention into force globally, something that does not appear likely in the near future.

It seems therefore that unless they have some incentive to change their behaviour, commercial parties operating in the international sphere will continue to opt for arbitration, perhaps to the detriment of the development of the common law.

A closing comment: Lord Thomas took a balanced view, insisting that arbitration and litigation should not be pitted against each other as incompatible and mutually exclusive alternatives. However at the core of his speech was the theory that international arbitration has been instrumental in the decline of the English common law. He makes a compelling case, but he may have identified the wrong culprit altogether.

In the late 1990s Lord Woolf (a previous Lord Chief Justice) introduced an overhaul of civil procedure which led to a substantial reduction in the number of cases passing through the English courts, and in particular, the number of cases proceeding to trial: no trial, no judgment, no precedent.

Two other recent developments have done nothing to encourage the use of the courts or to help develop the common law. First, is the controversial increase in court fees. Second is the introduction of fixed costs in litigation, a reform introduced by yet another Lord Justice, this time Jackson. That reform arguably reduces access to justice for plaintiffs with meritorious, complex, but lower value claims: exactly the kind of litigation that used to be the basis for much case law.

None of this has anything to do with international arbitration, but it should be considered if we really are concerned about the fate of the common law - and it might provide interesting material for the Bailii Lecture 2017.

Matthew Wescott, Partner, DAC Beachcroft LLP

1 Er mwyn byrder byddaf yn cyfeirio yn yr ethygal at “Gyfraith Lloegr”: wrth gwrs yn briodol Cyfraith Lloegr a Chymru ydyw. Gobeithiaf fydd darllenwyr Cymraeg a’r Arglwydd Brif Ustus yn caniatau’r byrfodd.
2 The Right Hon. The Lord Thomas of Cwmgiedd
3 “Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration.” The Bailii Lecture 2016; https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf
4 Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No. 2) [1982] A.C. 724
5 See for example Article 26(8) of the LCIA Arbitration Rules (2014) and Article 34(6) of the ICC Arbitration Rules (2012).
6 It must be said, in its support, that section 45 tends not to be excluded under the institutional rules.
7 Conversely, Lord Thomas emphasises the importance of public awareness of developments in the law.

YAR

YOUNG ARBITRATION REVIEW

The First Under 40 Portuguese International Arbitration Review