Kluwer Arbitration Blog

Roebuck Lecture 2019: Has Arbitration Always Been Favoured in England?

Kateryna Honcharenko (Chartered Institute of Arbitrators) · Thursday, July 11th, 2019 · Chartered Institute of Arbitrators (CIArb)

The Roebuck lecture, delivered this year on 13 June 2019, is an annual gathering of renowned scholars, practicing lawyers, arbitrators, students and arbitration enthusiasts. It pays tribute to Professor Derek Roebuck MCIArb, the arbitration historian who made an invaluable contribution to the Institute's work and development, in particular as editor of the CIArb's prestigious academic Journal.

This year the Institute was honored to invite the current editor of the Journal, Professor Stavros Brekoulakis (Queen Mary University of London; 3 Verulam Buildings), as the speaker. The purpose of his presentation was to demonstrate that, throughout history, English law and the judicial system, notwithstanding popular misconception, adhered to a policy that favored promotion and use of arbitration, rather than restricted it. Tracing back the development of arbitration in England supports and elaborates on current debates as to the legitimacy of arbitration and strengthens its future positions, in particular taking into account UK's current uncertainty in light of Brexit.

Professor Brekoulakis started with the purpose of his research: to highlight a misconception that English law in 17-19th centuries did not favor pro-arbitration policies and that they have only been taking place within the last few decades, with a climax after adoption of the 1996 Act. The general perception of the judicial and legal approach to arbitration seemed to be antagonistic and "jealous" of arbitration (*Scott v. Avery*), in particular due to a rapid rise of common law and, as a result, authority of courts. The perception of arbitration as a threat to such authority, therefore, by most accounts, prevailed.

To the contrary, Professor Brekoulakis stated that arbitration in the last few centuries developed hand in hand with common law and English courts.

Background

Professor Brekoulakis' survey of arbitration begins in the 17th century, when

merchants, attracted by lower price and time efficiency of arbitration, chose it as a method to resolve their disputes, before resorting to litigation. Arbitration was also a default dispute resolution provision in construction and insurance contracts. At those times, arbitration agreements already contained the number of arbitrators, as well as their preferred specialization.

Historical writings show that not only private parties, but also the Government and even the Crown sought to resolve their disputes by means of arbitration, conducted swiftly and voluntary by individuals, entrusted to this end by their community. Arbitrators easily assumed jurisdiction over cases, even notwithstanding parties of different nationalities.

Peace and Trust

Communities preferred for disputes to be resolved by compromise decisions, serving as a basis for the prevailing nature of arbitration over litigation among people: arbitral proceedings involved not only a review of the bare facts of a case, but also the overall picture of relationships between parties. A sensitive and individual approach to each case was thus guaranteed and supported the desire for a sense of peaceful community. For these reasons, at the end of the 17th century, the advantages of arbitration were considered by merchants as the best way to not only resolve disputes, but also maintain peaceful environment in the trading community.

Two main types of arbitration eventually developed: submission of the parties to arbitration and reference to arbitration by courts. Decisions in arbitration initiated by submission were, however, not enforceable. This issue was resolved by a later commitment of parties to enter into an arbitration agreement in case disputes arise. This, however, still bound parties to go to courts to enforce awards and thus implied additional costs.

Reference of the parties to arbitration was made at the complete discretion of courts, which negated the time and cost savings of arbitral proceedings.

English Arbitration Acts

The first Arbitration Statute (the Locke Act) was adopted by the Parliament in 1698, as a response to an unfavorable arbitration environment and provided the first legal basis “for Promoting of Trade and for rending the Awards of Arbitrators the more effectual in all Cases” (John Locke). Parties, therefore, got an opportunity to resort to arbitration without the necessity to commence litigation.

A third type of arbitration, statutory arbitration, was introduced by the Act and increased the number of arbitrations in the 18th century, while subsequent Acts contributed to the policy favoring arbitration: statutory powers to refer the parties to arbitration, where their disputes were covered by an arbitration agreement, were first

embodied in the 1854 Act, followed by making all arbitration agreements irrevocable in the Act of 1889 and giving power to arbitrators to grant interim relief in the 1950's Act. By the 1979 Act, arbitral awards could no longer be subject to a judicial review for the matters of law. Finally, the process reached its pinnacle with the adoption of the 1996 Act, which complexified the awards' challenge procedure.

Position of the English Courts

Despite the revolutionary arbitration acts, arbitration agreements still lacked protection, whereas private agreements could not overshadow the jurisdiction of English courts. Therefore, the theoretical mechanisms to refer disputes to arbitration existed, however the tools were not yet in harmony. The matter of enforceability of arbitration agreements, for example, was first delved into in the *Scott v Avery (1856).*

Even though arbitration in 17-18th centuries could not be perceived as a pure alternative to courts' jurisdiction, allegations regarding hostility to arbitration are not grounded, since the latter already operated as a part of English judiciary system.

Professor Brekoulakis brought the attention of the audience to the courts' perception of arbitration in previous centuries, describing it as "cautious trust". The incentive was the respect of English courts to party autonomy and overpressure by hundreds of thousands of cases brought for litigation annually. This, however, did not strengthen hand of arbitration as a mechanism, since arbitration agreement were not irrevocable until the 19th century: private agreements could not be a substitute for judicial power.

Comparative Analysis

Everything is relative, however, and boundaries put on arbitration in England pale by comparison to those presented in some other jurisdictions. Here the authority of a state, restrictions of private arrangements, historical circumstances and governing constitutions are inextricably connected with the reluctant acceptance of the usefulness of arbitration. This was due to, in particular, to political and judicial instability in young, developing governments.

For instance, in the French Code of Civil Procedure, created after the French Revolution, arbitration posed a threat to the rule of law and was widely restricted. One could not imagine a possibility for arbitration to thrive in those circumstances. Professor Brekoulakis here cited French Cour de Cassation, whose position was that efficiency of arbitrators cannot be compared to that of judges in terms of impartiality and skills.

The US jumped on the same bandwagon in the 18-19th centuries. The ability of arbitrators to handle complex cases where significant experience and knowledge was required to give parties a valuable advice was questioned. Throughout 19-20th

centuries arbitration agreements were considered as non-conforming to US public policy.

Likewise, in 1930s in Germany, one of the aims of national socialists' regime was to limit use of arbitration. An attempt to resolve a dispute outside a court proceeding was viewed as an attempt to circumvent the ruling government.

Conclusion

"So, why does it matter to challenge the prevailing narrative about the traditional hostility of English courts and law to arbitration?" Professor Brekoulakis asked the audience. The discussion is foundational for examinations of the legitimacy of arbitration or possible arbitration reforms. Some also argue that arbitration is one of the wheels in the neoliberalism vehicle. The latter statement implies that the initial idea of arbitration was to outweigh the power of state courts and governments.

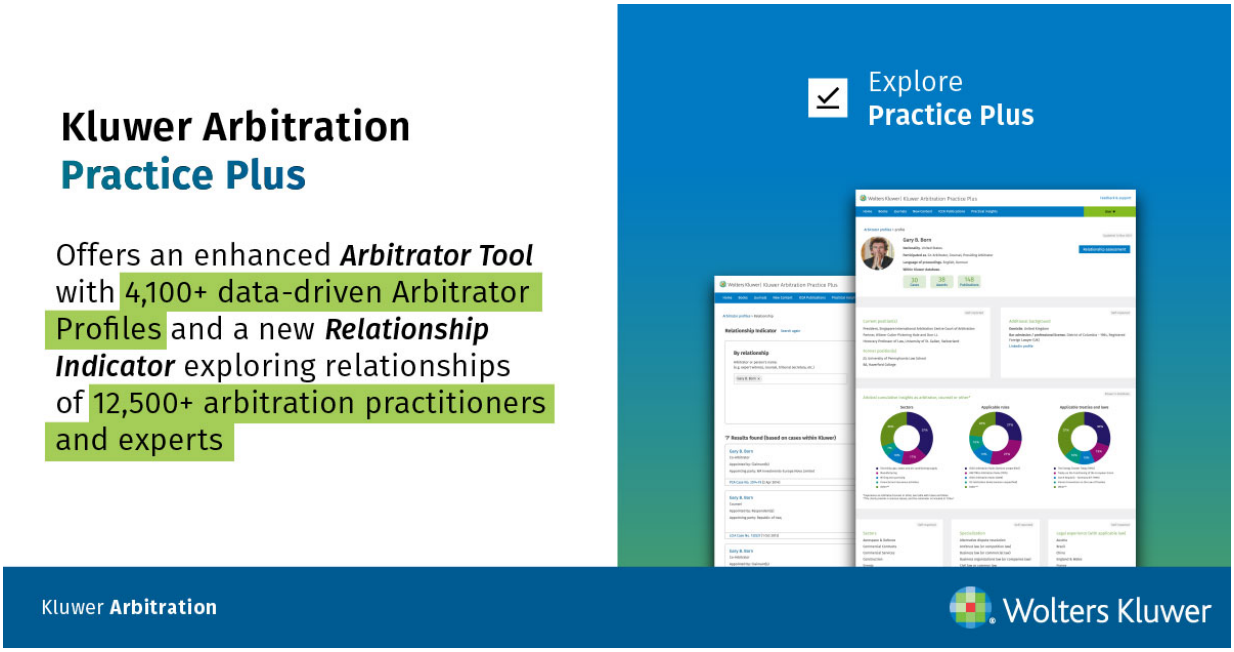
Considering legislative developments and historical circumstances, arbitration in England, on the contrary, was not a project originally kept tightly reined from 17th century, though not restricted or abolished by courts and the government themselves. Rather, it developed as an ancillary part of the judicial system. Only with the passing of a long period of time did arbitration gain momentum and became an independent alternative to litigation, by means of gradual adjustments of legislation.

This conclusion gives us an opportunity to brighten dark predictions of a possible Brexit future and believe that absence of antagonism between English courts and arbitration, even far back in the past, might secure the position of arbitration in the future.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Kluwer Arbitration Practice Plus now offers an enhanced Arbitrator Tool with 4,100+ data-driven Arbitrator Profiles and a new Relationship Indicator exploring relationships of 12,500+ arbitration practitioners and experts.

Learn how **Kluwer Arbitration Practice Plus** can support you.



This entry was posted on Thursday, July 11th, 2019 at 8:54 am and is filed under England, English Arbitration Act, English courts, English Law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.