Kluwer Arbitration Blog

Comments on Lord Chief Justice Thomas' 2016 Bailii Lecture which promotes a greater role for the courts in international arbitration

Harris Bor (Wilberforce Chambers) · Monday, April 11th, 2016

Harris Bor, Barrister, Wilberforce Chambers, London

On 9 March 2016, Lord Thomas, the Lord Chief Justice of England and Wales, delivered the Bailii lecture on "Rebalancing the Relationship between the Courts and Arbitration". In it he claims that arbitration is hindering the development of the common law by taking cases away from national courts and allowing commercial claims to be decided behind closed doors without any right of appeal on the law, and hence higher judicial scrutiny.

Lord Thomas has a point. As he explains, the common law relies on precedent developed over generations, and has the great advantage of offering certainty as to the state of the law and being able to adapt its principles to changes in trade, commerce and the markets. Crucially it is also open to public scrutiny, which exposes the law to public debate and allows market and market actors to organise their affairs and business arrangements in a legally compliant way.

Lord Thomas forcefully argues that arbitration threatens to undermine the development of the common law. In particular, by taking place behind closed doors, arbitration undermines the "*means through which much of the common law's strength – its excellence was developed…*" It also "*retards public understanding of the law*" and "*public debate over its application*".

Part of the problem, as Lord Thomas sees it, is the way in which arbitration regulation, in particular in the UK, has changed over time. He reminds us that, in the past, courts in England were ready to intervene in arbitrations to foster the law's development, but then the 1979 Arbitration Act was introduced which replaced a special right to intervene with a right of appeal with leave of the court. Lords Denning and Diplock in *The Nema* [1982] AC 724 provided a further development by interpreting the provisions of the 1979 Act as applying only in limited circumstances. Parties could also contract out of a right to appeal in various situations.

Section 69 of the Arbitration Act 1996, containing the current arbitration law in the UK, effectively codified the guidelines set out in The *Nema*. The sense at the time that the 1996 Act was introduced was that since parties had chosen arbitration, the courts should not interfere. And so we have it, the parting of the ways, arbitration retreating into its lair, dragging with it into the darkness the very cases that should be used to develop the common law as it applies to modern commerce. These last words are mine, not Lord Thomas'.

Lord Thomas suggests that a rebalancing of the court's role in arbitration might be in order. One suggestion he makes is for the law to adopt a more flexible test for permission to appeal on a point of law. Another is that parties be encouraged to bring applications under s45 of the 1996 Act which allows the Court to make a determination of a preliminary point of law. It commences: "*Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.*"

But Lord Thomas' final suggestion, and perhaps the one which he would like most to be implemented, is for there to be greater use made of the courts. On this he firmly yet elegantly challenges the perceived benefits of arbitration: the perceived benefit of confidentiality is overrated because there is leakage and "*the market tends to know which parties are involved in which arbitrations and what the arbitration is about*"; the enforcement regime is problematic because it provides the losing party with "*one more opportunity to stave off what might have been thought to be the inevitable*", and the supposed time and cost benefits of arbitration are illusory.

Lord Thomas concludes that the UK went too far in curtailing the right of courts to intervene on points of law in 1979 and 1996 and wonders whether parties might "*waive arbitration in cases where there are significant points of general interest*" and come to appreciate that issues in their cases may have wider import or relevance. It is must always be remembered, he warns, that courts develop the law, articulate and define rights, and make definitive rulings. Arbitration does not.

Lord Thomas' points are well made, and worth ruminating on, but is he whistling in the wind? I think so. Lord Thomas refers to the need for commerciality, but ignores the fact that commercial parties tend (unfortunately) to care about one thing – namely, their own commercial advantage. Few commercial parties will be interested in, or even capable of, acting altruistically in the interest of the wider industry or the development of the common law as a whole, as Lord Thomas would like. Companies after all are designed to make money, and their staff educated to focus almost exclusively on the bottom line. Even those companies with a social conscience are most unlikely to allow a case to enter a court room and go public in order to assist in development of the law, especially if a judicial determination is unlikely to go their way. These kinds of gestures do not make headlines, and can make shareholders angry.

It is, I am afraid, also a sad reality, that for most business people and even lawyers, the correctness of a legal decision is less important and interesting, than winning. I also suspect that few engaged in arbitration expect from arbitrators a dazzling display of legal virtuosity, or purity or clarity of reasoning. Provided the decision falls their way, they will be happy.

This leads to an interesting question. Has it always been this way, or does the rise in the popularity of arbitration reflect a shift in social mores and our modern perceptions of truth more generally. Does our willingness to countenance the quick and dirty or pragmatic in the context of dispute resolution, reflect our modern secular loss of faith in absolutes and objective truth?

Perhaps, and if so, Lord Thomas' warning must be taken very seriously indeed because what he is reminding us of is of something we have lost, namely a sense that we are part of a collective. As Aristotle observed in his Politics: "*Man is by nature a social animal… Society is something that precedes the individual. Anyone who either cannot lead the common life or is so self-sufficient as not to need to, and therefore does not partake of society, is either a beast or a god*". Arbitration is

to shirk the common life, take our affairs out of the public gaze, and to retreat into ourselves. Lord Thomas is right to encourage us to think less selfishly and to focus on the wider implications of what we set in motion, but I do not think the answer is to put back the clock or simply to abandon arbitration in favour of courts that fail to come up to modern standards.

Instead, there needs to be a recognition that there is a battle out there and it's raging between national courts trying to attract international work or the new international courts and arbitration, with each engaged in trying to adopt the advantages of the other, while enhancing their own. It is a battle for the heart and soul of the commercial and legal worlds which will define the international legal landscape for some time to come. This is no bad thing. Competition is good, and healthy, and it is anyone's guess who will win, or whether both arbitration and the courts will thrive.

One danger of such competition is that courts might be tempted to take decisions which themselves impede the development of the common law in order to retain business, for example by exercising exorbitant jurisdiction, or making findings based on what pleases the market. We are probably far off such a situation, but the potential impact on the law is worth noting.

In the meantime, there can be no doubt as to what the courts must do. They need to make themselves better; better run, better managed, more commercial, more efficient, more open to diversity, more fun to be in, and at the same time they need to win us over on an ideological level, as Lord Thomas has tried to do, by persuading us of the importance of preserving the common law, and by reminding us that there was a time that we considered law to have relevance beyond our immediate selfish commercial interests.

The full lecture is available at https://www.bailii.org/bailii/lecture/04.pdf

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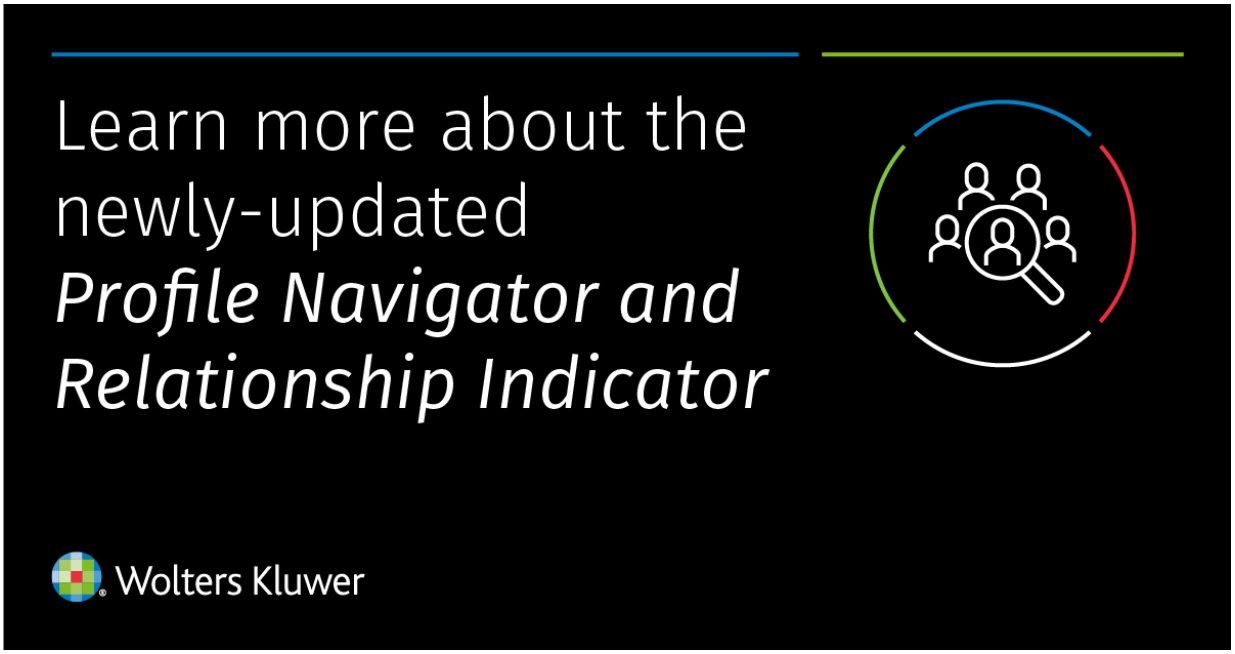

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