KEYNOTE SPEECH AT UCL COMMERCIAL MARITIME LAW CONFERENCE

By Clive Aston, London May 2016

Ladies and Gentlemen,

It is a privilege to be invited here to give one of the keynote speeches today.

The topic on which I would like to speak this afternoon is one that is particularly close to my heart as a maritime arbitrator and arises from questions raised recently as to whether the confidentiality of arbitration awards coupled with the relatively restrictive rights of appeal under the Arbitration Act 1996 are stifling the development of English common law. While I shall focus primarily on the position under common law, many of the observations made apply also to leading civil law jurisdictions with a tradition of maritime arbitration.

While these issues have been the subject of debate for some time they have come to the fore most recently following the Bailli Lecture 2006 delivered by the Lord Chief Justice of England and Wales, Lord Thomas.

I propose to give some time to a consideration of the comments made by Lord Thomas as these provide the clearest (and most forceful) submission of the arguments raised against the confidentiality of awards and, more particularly, the restrictive rights of appeal under the Arbitration Act 1996.

In his speech, Lord Thomas described how the common law has played a very significant role in the development of a framework for international commerce through its strength, vitality and agility in applying and adapting its principles to changes in trade, commerce and the relevant markets. Clarity and predictability in the law, as well as its ability to develop in a principled manner, is, he said, the bedrock upon which businesses, just as much as individuals, order their affairs and enter into binding agreements. As a result of the Arbitration Act

Lord Thomas said that there have been fewer developments of the law in areas where cases begin in arbitration. The consequence of this has been to undermine the development of the common law.

To recap briefly, under Section 69 of the Arbitration Act 1996, leave to appeal can only be given in respect of the determination of questions of law that substantially affect the rights of one of the parties and on which the tribunal was asked to make a determination. Even then, leave may only be given if the decision of the tribunal on the question is obviously wrong, or, if the question is one of general public importance, if the decision of the tribunal on the question is open to serious doubt.

In exercising its discretion to grant leave to appeal the court must also consider whether it is just and proper in all the circumstances for the Court to determine the question.

A consequence of the imposition of this test by the Act is, Lord Thomas said, that far fewer appeals from arbitral awards come before the Courts as only a small number satisfy the tests for the grant of permission to appeal. In the years before 1979 (the year of the Arbitration Act preceding that of 1996) 300 special cases had been referred to the Court each year for consideration on appeal. Figures for the last three years show an average of about 70 applications per year with leave being given in under 20 cases each year (i.e. about 30%) and appeals being granted in about six cases. Interestingly, it is estimated that 75% of these applications concern shipping cases. To put these figures in context they should be compared with an average of approximately 520 awards issued each year by the LMAA alone.

It is, therefore, only the very tip of the iceberg of cases that is considered by the Courts, something that Lord Thomas said reduced the potential for the courts to develop and explain the law.

Lord Thomas also pointed to another issue that arose from this situation, namely the fact that because disputes in

arbitration are resolved behind closed doors, this limits the public understanding of the law and scope for public debate over its application. This lack of openness, Lord Thomas suggested, denudes the ability of individuals and lawyers (apart from the few who are instructed in arbitrations) to access the law to understand how it has been interpreted and applied. It reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the Courts and so reduces companies' abilities to understand their rights and obligations and to properly plan their affairs accordingly.

Lord Thomas's solution to this was for more disputes to be referred to the Courts or, failing this, at least to apply a more flexible test for permission to appeal so that the Courts could more readily develop the law whilst leaving arbitration as an important means of dispute resolution. He also suggested a greater use of Section 45 of the Arbitration Act which enables the Court to give decisions on points of law which arise after the commencement of an arbitration but before the publication of the award (a procedure that I have yet to see used in practice).

Lord Thomas went on to consider the question of confidentiality of awards which, he said, is often cited as one of the most valued components of international commercial arbitration. The strength of this perceived benefit is not, he said, as clear cut as it might seem and was "overrated" because, in his words, the market tends to know which parties are involved in which arbitrations and what the arbitration is about.

Lord Thomas's comments have prompted a number of critical responses from fellow members, or former members, of the judiciary. In an article in *The Times*, Lord Saville (who it must be said has something of a vested interest having been closely involved in the drafting of the Arbitration Act 1996) criticised the comments of Lord Thomas quoting from Lord Devlin who at an earlier stage of the debate on rights of appeal had said "So there must be an annual tribute of disputes to feed the minotaur. The next step

would, I suppose, be a prohibition placed on the settlement of cases concerning interesting points of law".

In the key note address to the AGM of the Chartered Institute of Arbitrators in April, Sir Bernard Eder also expressed support for the regime of the 1996 Act and expressed surprise at the critical comments of Lord Thomas, particularly because England is the only country in the world which allows an appeal on a question of law in the case of an international arbitration, the UNCITRAL model law not permitting any such rights of appeal.

I appreciate of course that, as a maritime arbitrator, I have a vested interest in preserving a status quo that sees more than 2000 new arbitrations commenced in London under LMAA Terms each year. Nevertheless, I see no reason to believe that the facts that (i) the vast majority of maritime disputes are referred to arbitration in London and (ii) rights of appeal are limited, has in any way stifled the development of the common law, and in particular maritime law.

To the contrary, there seem to have been as many decisions of primary importance in recent years as at any time before the 1979 and 1996 Acts. Examples of this are the "Golden Victory" the "Achilleas", the "New Flamenco", most recently, the "MTM Hong Kong" and of course the OW Bunkers cases. These are all cases whose relevance extends far beyond the maritime field and into general contract law.

I see no reason, either, to believe that any greater certainty would be promoted by the wider involvement of the Courts in arbitration cases.

One merely has to consider the directly contradictory decisions of the cases of the "Astra" and Spar Shipping on the issue of repudiation to appreciate that there is no inherent consistency in the decisions of judges any more than those of arbitrators.

Clearly, it is an advantage of arbitration under English law that the Courts do exercise some supervisory role and

this is often cited to us by users of maritime arbitration as an advantage that arbitration in London enjoys over that in other venues where there is no such right of appeal.

I believe it is right, though, that the appeal process should only be applied sparingly and not in the way it once was as an almost automatic second, and perhaps third and fourth, round of dispute resolution in any dispute. Commercial parties in my experience seek finality as much as anything else and any process that promotes the prolongation of the dispute resolution process to periods of two or three years and increases costs substantially cannot serve those needs.

It should not be forgotten either that arbitration is a consensual process by which the parties have chosen their preferred method of dispute resolution. It is wrong, in my view, to interfere with that preference. Equally, the parties have in making that their choice of arbitration expressed a preference for confidentiality.

In a market like the shipping market I think it is clearly wrong for Lord Thomas to suggest that arbitral confidentiality is overrated. The market is simply too big in most cases for parties to know who may be involved in arbitral disputes at any time.

Would Lord Thomas's comments be addressed by the wider publication of arbitral decisions? I believe that there is something in this point but in a limited manner only.

In New York, arbitral awards are published as a matter of course but naming the parties as well as the arbitrators. An effect of this has been to encourage parties to appoint arbitrators for their known views and, hence, to encourage dissent on the tribunal from the very outset. This cannot be desirable. The practice of the LMAA, together with some other arbitral institutions, is to publish, with the parties' consent, reports of the more interesting arbitral awards on an anonymous basis, with no reference to the names of the parties, the vessel or the arbitrators. Most cases, of course, are of very little interest to outsiders as they either concern mere

debt collection exercises or facts unlikely to arise on any future occasion.

Personally, I see a need for no more than approximately 10% of the awards issued in each year (about 50) to be published in this form as I believe that by doing so we should be able to provide an adequate but invaluable guide to the market of possible changes of approach by tribunals on existing issues and as well as insights to decisions new and emerging issues of general interest.

I agree with Lord Thomas that it is important for parties in the industry to know about such matters when entering into their contracts. We at the LMAA strive to achieve this objective and consider ways of overcoming the occasional reluctance of the parties to agree to any publication in any form of their awards.

I mentioned earlier that my comments were directed primarily to the position under common law in the UK. Elsewhere, rights of appeal on questions of law are excluded. To compare the position to that in London, I have raised the concerns expressed by Lord Thomas with a colleague in Germany. There, under the German Maritime Arbitration Association Rules, the arbitral tribunal is entitled to publish the award under the name of the vessel but without the names of the parties or other identifying details, *unless a party objects*. The problem is, however, that in most cases either or both parties object to the award being published. This is apparently because the maritime world in Germany *is* relatively small so that even if awards were published on this basis the market would be able to understand quite easily which parties were actually involved.

My colleague wrote that "as a result there is practically no case law in way of an established arbitration practice that could be referred to in the context of Germany shipping law." Because the Courts are also very restrictive when it comes to applications for leave to appeal there is no substantive case law based on appeals from arbitration proceedings in Germany. As a result, German arbitration tribunals often look to English case

law for guidance (something I have found in France and many other jurisdictions). German maritime case law has, therefore, my colleague wrote, stopped developing and is a "pretty dead duck".

In many civil law jurisdictions the adoption of the UNCITRAL Model Law has precluded rights for appeal from arbitration awards and in most cases effectively stifled the development of case law. We are fortunate that in the UK parties still enjoy certain, albeit limited rights of appeal. Although the criteria that appears to have been applied in considering such application may have changed in emphasis from time to time, the result has been a continued development of the maritime law. Inevitably, though, cases take time to reach the courts and, as I have noted earlier, it is important for the parties to know as soon as possible of any wind change in the application of the law or of the position when new types of problem arise.

The solution for this is not, however in my opinion, to be found in abandoning arbitration in favour of the Courts or in opening the floodgates for appeals, but rather in the more frequent and timely publication of awards in the more interesting cases: a question of fine tuning rather than radical overhaul.

Thank you.