The 2019 Roebuck Lecture

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I am both delighted and honoured to have been asked to give the Roebuck Lecture this year. I am delighted because, as the Editor of the Institute's Academic Journal, I have witnessed all these years the Institute's remarkable work in educating new generations of arbitration lawyers around the world, as well as the Institute's important contribution to the public discourse and scholarship of international arbitration. I very much hope that the Lecture tonight will further contribute to the educational and academic legacy of the Institute.

And I am honoured because the lecture I was asked to give tonight is named after a man who I deeply admire for his outstanding work as a former Editor of the Institute's Journal and as the single most important legal historian in the field of English arbitration.

It is thus mainly in an homage to Professor Roebuck's work that I have chosen to talk tonight about the historical development of the policy in English law favouring arbitration.

Today, it is generally accepted that English law and courts favour arbitration as a matter of policy. However, the prevailing narrative in legal literature suggests that this pro-arbitration policy of English law only developed as recently as in the last 40 years, and especially after the introduction of the 1996 Act.

It is thus argued that English courts in the 17th, 18th and 19th centuries were generally suspicious, if hostile, to arbitration. Relying on a limited number of cases and Lord Campbell's observation in Scott v Avery (1856) that English judges traditionally 'had great jealousy of arbitrators', a number of commentators have argued that the rise of the common law during the 17th and the 18th centuries entailed that common law courts felt empowered to curtail the scope and powers of arbitration, which was largely seen as a threat to their authority and an unwarranted substitution of court litigation.

Tonight, will argue, contrary to the common belief, that English judicial attitudes in the 18th and 19th centuries never reflected a hostility, or a broader ideological opposition, to the idea of arbitration. And I will offer, arguably for the first time, an account of English arbitration as a dispute resolution system which originally emerged *as being part of, rather than antagonistic to*, the English courts system. To

highlight the unique and privileged treatment of arbitration by English courts and English law, I will conclude by comparing the English approach to contrasting historical experiences from other jurisdictions, notably France, the United States and Germany.

One may ask, why does it matter tonight to look back at the history of arbitration law in England. Well, understanding the history of arbitration's development in England is important not only for historical purposes and to honour Professor Roebuck's work. It is also important because it provides helpful insights into current debates surrounding the legitimacy and potential reform of English arbitration law. More importantly, understanding the unique historical treatment of arbitration can bring about a strong positive message about the future of English arbitration law and practice in the post-Brexit era.

Let me first start by offering the broader historical picture of arbitration practice at the end of 17th century, and at the time that the first arbitration statute was introduced in England. To understand how a statutory policy for arbitration was developed, it is important to first understand how arbitration was perceived and practiced by merchants at the time. Indeed, already from the 17th and the 18th centuries, the majority of merchants were typically agreeing both in writing and orally to submit their disputes to arbitration under the common law prior to a court lawsuit. Historical records show that standard forms of contract in certain lines of trade, notably in the field of construction and insurance, included arbitration agreements as the default option. 90 surviving building agreements between 1720 and 1730 for the Grosvenor Estate in Mayfair required that any dispute between builders be submitted to three arbitrators, who were typically architects, surveyors and craftsmen.

Further, there are numerous historical accounts of individuals working as busy arbitrators and mediators, commissioned not only by private parties but also by the courts, the government and even the Palace, throughout the 17th and 18th centuries. Nathaniel Bacon, for example, the older half-brother of the more famous Francis was a very popular arbitrator, sitting in two or three arbitrations every month (and I am saying that with some degree of envy).

There are several reasons that explain the preference of arbitration to common law courts. First, arbitration was favoured by merchants for being cheaper and quicker than litigation. We all know that and often claim that arbitration is still cheap and quick today, but if we look at the practice of arbitration in the Early Modern Era, we may want to consider what we claim for today. For a start, parties usually dealt with the arbitration without legal counsel, who was required only for complex disputes referred to arbitration by equity courts. Also, arbitrators, at least before the 18th century, were not paid for their services, which were considered akin to public service.

Indeed, the role of arbitrator was considered an honourable distinction for prominent men known for their sense of fairness and justice (and they were invariably men, as few historical examples of women acting as arbitrators exist). Popular arbitrators only decided to make arbitration part of their business when the number of arbitration references significantly increased at the end of the 18th century, and even then, they were charging modestly. As regards speed, in an observation that would probably embarrass many arbitrators today, arbitrators generally delivered their decisions on the same day of the hearing, with the longest hearings lasting no more than a few days.

Secondly, arbitration had a broader jurisdictional scope than courts and was therefore more suitable for cross-regional and international disputes. Because of their consensual nature, arbitration tribunals could assume jurisdiction over disputes between merchants from different regions and or even different states, including foreign merchants who were not subject to the jurisdiction of common law courts. The idea of private international law that would allow a national court to assume jurisdiction over a dispute involving a foreigner was alien at the time. Tribunals had no such problem.

Further, and more decisively, arbitration was trusted more than English courts because it operated as a community-based dispute settlement process. Unresolved disagreements were perceived as a threat to the social structure of a community and could potentially lead men to abandon reason and resort to violence. Thus, there was a strong sense of duty within the community, underpinned by ethical Christian values at the time, to assist their members to settle their disputes outside courts in an amicable way. Individuals who were frequently requested to act as arbitrators were prominent members of the local community, often including friends, neighbours and kinsmen, who had the advantage of knowing the disputing parties and often the history of the dispute.

The concept of arbitration as a means to promote peace explains why arbitrators in the 17th and 18th century, were inclined not to declare a clear winner and leave a demoralised loser, but to arrive at a compromise which would be acceptable to all stakeholders in the dispute. Honour was traditionally of great importance to dispute resolution in England. A compromise would permit the losing party to save face and engage again with the winning party in a commercial relationship. While today arbitrators are often criticised when they reach a compromise decision on the ground that 'splitting the baby' is essentially a questionable attempt on the part of the arbitrators to appease both parties because they are paying their fees, arriving at a compromised decision that could bring about broad consensus was originally considered a distinct advantage of arbitration and a manifestation of justice.

Even further, merchants were keen to have their disputes resolved by arbitrators because they tended to apply the laws and practices of the market, which were familiar to the merchants, rather than to apply the common law which was generally alien to them (remember merchants would typically appear before tribunals without a legal expert or counsel). Relatedly, arbitrators were also willing to consider the broader context of disputes. Unlike courts, which tended to focus on a single legal point of dispute, which might merely be symptomatic of a deeper conflict between the disputing merchants, arbitration allowed parties to ventilate all their grievances. This broader approach to dispute resolution offered better prospects for arbitration to achieve an overall and lasting settlement of disputes compared with court judgments.

Overall, already since the 17th century there was a broad realization among English merchants of the time that arbitration could achieve more than the law. This observation can explain why, by the end of the 17th century, the Parliament was keen to enact for the first time in the history legislation on arbitration and turn this commercial practice into statutory policy.

I will now turn to discuss this statutory policy in more detail.

Until late in the 17th century, there were two main types of arbitration. First, parties would agree, orally or in writing, to submit an existing dispute to arbitration under the common law before they could bring a lawsuit in court. This type of arbitration was called 'submission' under the common law. Secondly, there were disputes that were referred to arbitration by English courts or other judicial authorities. Often, when a party was bringing a mercantile dispute to common law courts, English courts would issue a rule referring the dispute to arbitration, on the basis that arbitrators were better equipped to decide complex commercial disputes. This type of arbitration was called 'reference'.

However, both submissions and references exhibited important limitations.

Submissions, despite their great popularity, offered weak legal protection in two important respects: first, agreements to submit to arbitration were revocable at will by either party at any time until the issuance of the award. Indeed, there are historical accounts of parties who issued a self-executing deed of revocation of an arbitration agreement after the hearing and just a couple of days before arbitrators were about to render their award.

Second, the decisions of arbitrators were not enforceable. The losing party could simply elect not to comply with them. To address these two problems, parties in the 17th and 18th century would usually enter into an arbitration bond, which allowed a party to bring a lawsuit before courts and secure compliance with an arbitration

agreement in the event of revocation, and to enforce the decision of arbitrators in the event of non-compliance. These remedies, however, meant that the aggrieved party had to sustain all the expenses and delays associated with litigation to achieve enforcement of arbitration agreements and awards.

By contrast, in references, the compliance of the parties with both the reference to arbitration and the arbitrators' decision was secured through the courts' power to punish for contempt because the final award was eventually filed as a court judgement. However, even with references, parties were wasting considerable time and expense in initially submitting their dispute to the courts hoping that they we will end up in a tribunal. Decisively too, the parties could never be certain whether a judge would indeed agree to refer their dispute to arbitration, as such a decision remained at the discretion of the courts.

Overall, at the time, neither submissions nor references were offering commercial parties an effective means to go to arbitration.

In response, Parliament enacted in 1698, the first Arbitration statute in the world, marking a significant moment of evolution for English arbitration. The Act is often referred to as the Locke Act, because it was single-handedly drafted by John Locke, after the London Board of Trade commissioned him to "*draw up a scheme of some method of determining differences between merchants by referees, that might be decisive without appeal*". Locke, who was familiar with arbitration, drafted a bill which introduced a policy favouring arbitration by expressly stating that a legal mechanism for the protection of arbitration agreements was necessary "*for promoting Trade and rendering the Awards of Arbitrators the more effectual in all Cases*". Under the Act, private parties could use the Court's contempt powers to enforce their submissions, without having to commence court litigation in the first place. The Act was a masterstroke which introduced a third type of arbitration (statutory arbitration) which combined the good parts of both references and submissions, without their limitations. The Act lent significant impetus to statutory arbitration, so that the number of cases being conducted under it increased tenfold between 1715 and 1785.

A statutory policy favouring arbitration was thus introduced in English law there and then. A series of subsequent arbitration acts further developed the policy with a number of significant advancements. For example, the 1854 Act set out, for the first time, statutory powers to refer the parties to arbitration for any dispute falling under an arbitration agreement. The 1889 Act made arbitration agreements irrevocable and offered statutory protection to arbitration agreements for both existing and, crucially, future disputes. In the 20th century, the 1950 Act accorded arbitrators the power to grant interim relief, while the 1979 Act gave parties the significant power to agree, if they wished, to exclude arbitration awards from judicial review for errors of law. And,

of course, the current 1996 Act made it even harder for parties to challenge an arbitration award before English courts.

Overall, since 17th century, the Parliament has been consistently enacting legislation that has given effect to a clear policy favouring arbitration as a means of promoting business.

Having discussed the position of English statutory law towards arbitration, I will now turn to discuss the position of the English Courts under the common law towards arbitration.

Admittedly here, under the common law, the policy favouring arbitration matured much later than that under statutory law. Even after the introduction of the Locke Act, many merchants continued to submit their disputes to arbitration under the common Law rather than under the Act. However, an arbitration agreement that was outside the protective scope of the Act was still revocable at will under the common law because of the legal principle that a private agreement 'could never oust' the jurisdiction of English courts. It was not until 1856 and the House of Lords' decision in *Scott v Avery* that the attitude of English common law courts towards enforceability of arbitration agreements would change.

But while a policy favouring the enforcement of arbitration agreement developed much later under the common law, this does not entail that common law courts in early modern England and until mid-20th century were collectively and as a matter of general approach antagonistic to arbitration as the prevailing narrative in literature suggests. Claims for judicial hostility of common law courts towards arbitration are exaggerated, if not altogether inaccurate.

Indeed, arbitration, in 17th and 18th century, was not conceived as an extrajudicial mode that was substitute to English courts, as the prevailing narrative assumes. In fact, arbitration was often operating as part of the English judicial system. Indeed, English courts or other judicial authorities, including the Chancellor and the Council, were habitually referring a great number of disputes, both mercantile and non-mercantile, to arbitration throughout the 17th and 18th. While Lord Mansfield, the Chief Justice at the time, had a strong reputation as a skilled judge of complex commercial disputes, he actively encouraged settlement of disputes by arbitration and typically referred cases to be decided by distinguished commercial lawyers of the time, such as James Burrow and Thomas Lowten. The fact that English courts frequently made use of the commercial expertise of arbitrators suggests that in the eyes of the judiciary, arbitration was not perceived as an outsider or a potential competitor. Rather, arbitration traditionally was seen as an ancillary to the judiciary in England.

So, if claims for judicial hostility are mistaken, what then describes the attitude of English common law Courts towards arbitration? To answer this question, I will now turn to the next and final part of the lecture where I will offer a general appraisal of the historical treatment of arbitration in England and compare this with historical experiences from other jurisdictions.

In my view the historical attitude of English courts towards arbitration can be more accurately described as one of cautious trust.

The trust part was informed by two considerations.

First, the traditional respect of English courts and the common law for party autonomy. Valuing the idea that merchants should be presumed to know best how to organise their affairs and resolve their disputes, English courts were historically keen to give effect to private dispute resolution arrangements by commercial parties.

The second consideration is English courts' typical pragmatism which meant that they viewed arbitration as a potentially useful dispute resolution method that could alleviate the burden of their own heavy caseload. It is estimated, for example, that in early modern England an average of about 60,000 lawsuits were brought every year before the central courts of King's Bench, Common Pleas, Chancery and Exchequer. In addition, around 400,000 lawsuits were brought annually in urban courts, and another 500,000 in the small courts in the countryside. This is close to a million of annual lawsuits for a population which at the time was estimated between 4-5 million. English courts, in the 16th and 17th centuries found it difficult to cope with the litigious culture of the time, and references to arbitration were seen as a helpful and welcome development.

The cautious part was explained by the fact that arbitration agreements were freely revocable by the Parties at will, and this legal principle remained part of the common law until the 19th century. But how can we explain the persisting appeal of the rule of revocability until so late? As I suggested above for English courts at the time, arbitration was seen as a dispute resolution method that was ancillary to but could never be a *substitute* of the courts of law. Thus, an arbitration agreement could never be valid, as a private agreement that purports to substitute English courts and confer judicial powers to a panel of arbitrators. Rather, arbitration agreements at the time were seen more as *agency agreements* conferring powers to arbitrators who were acting as agents for the disputing parties and with a mandate to determine their rights and liabilities. Such agency agreements were valid under the common law, however, like any agency agreement, it had to be freely revocable upon notice.

It can be thus understood that the main objection of the English courts to the binding force of arbitration agreements was essentially a doctrinal one which was eventually addressed by the House of Lords in *Scott v Avery*; it was not an ideological objection against arbitration or an objection as a matter of legal policy.

The judicial and legislative treatment of arbitration in England should be contrasted, for example, with the position in other countries where judicial attitudes in certain times in the 18th, 19th and (even in) 20th century reflected a fundamental, often ideological, opposition to arbitration which was largely seen as a private, and therefore suspicious, mode of dispute resolution that was lacking the necessary safeguards for the protection of the public interest.

In France, for example, after the French Revolution, arbitration was considered a threat to the rule of law and the authority of the revolutionary state. Napoleon was also apparently suspicious of the idea of arbitration and his Procedure Code imposed a number of important restrictions on arbitration agreements and the arbitration process, which as one commentator notes, "reflected a hatred of arbitration agreements and provided evidence of a secret desire to eliminate their existence". French courts often considered arbitration as necessarily inferior, with the French Cour de cassation (the highest court in France) observing in mid-19th Century that "*one does not find with an arbitrator the same qualities that it is assured to find with a judge, namely the probity, the impartiality, the skillfulness, [and] the sensitivity of feelings necessary to render a decision*".

A similar opposition to the main idea of arbitration was exhibited by the US courts during the 18th and 19th centuries. The mistrust of arbitration and arbitrators was summarised by Joseph Story (the celebrated US Supreme Court Justice) who observed that

"*We all know that arbitrators at common law . . . are not ordinarily well enough acquainted with the principles of law or equity to administer complicated cases; At all events courts of justice are presumed to be better capable of administering and enforcing the rights of the parties and have superior knowledge than any mere private arbitrators*"

Because of this ideological opposition to arbitration, arbitration agreements for future disputes were considered in the 19th century and at the beginning of the 20th century as being against US public policy and arbitrators' authority was largely curtailed.

In one of my favourite quotes, the US Second Circuit as recently as in the 1960s noted that as

Issues of war and peace are too important to be vested in the generals . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators.

Equally, while historically commercial arbitration was commonly used by merchants in what today is Germany, German courts and commentary developed an acute mistrust for arbitration after the rise of the National Socialists in 1930s, systematically curtailing the use of arbitration as a matter of policy, so that no municipal authority was allowed to submit to arbitration. As commentators have observed '*to the regime of the time, with its doctrine of the all-encompassing power of the state, arbitration was seen as a suspicious attempt of private individuals to free an important part of their activities from the dominating force of the government.*

To a large extent, of course, hostile attitudes to arbitration in these jurisdictions can be explained by some exceptional historical and constitutional circumstances, particularly in France and in Germany, which had a profound effect on the role of the state under Napoleon and the National Socialists.

By contrast, parliamentary sovereignty in England was largely established in the 18th century and, as a result, English courts had fewer reasons to perceive arbitration as a challenge to the authority of the state law and courts. Thus, the largely doctrinal objection of the English courts against arbitration agreements was very different than the broad concern that arbitration, as a private mode of dispute resolution, is a potential threat to the state and the public interest, as is suggested by the French, American and German experience.

So, why does it matter to challenge the prevailing narrative about the traditional hostility of English courts and law to arbitration?

As I mentioned at the outset, it matters for several reasons. First, it matters because it provides helpful insights into current debates surrounding the legitimacy of arbitration and calls for a potential reform of English arbitration law.

A wide range of scholars currently criticise arbitration as being part of a broader project of neoliberalism to serve private interests, and in particular the interests of powerful corporations. It is thus argued that the legal policy favouring arbitration, which means that arbitral awards cannot generally be reviewed by national courts on a question of law, should be curtailed, or altogether abolished, because it is "*part of a corporate strategy to enable private parties to operate in the shadow of the law*".

To support this view, some commentators argue that historically arbitration was largely curtailed rather than supported by national courts in England. According to this account, it is only recently, when the rise of capitalism in the second part of the

20th century challenged the authority of states to regulate their affairs, that a policy favouring arbitration was developed to further erode the power of the state and state judiciaries.

However, such suggestions are premised on two questionable ideas. First, that arbitration is and has always been antagonistic to national courts and state institutions, and, second that a policy favouring arbitration is a recent development of the 20th century. As this lecture hopefully demonstrated, associating support for arbitration with the rise of capitalism in the second part of the 20th century is historically questionable, at least in England. The preference for arbitration was not the result of a sudden change in the policy of English law and courts that occurred at in the last 50 years. As explained, a clear policy favouring arbitration has been embedded in statutory law from as early as the end of the 17th century, and was subsequently adopted by the common law in the 19th century. Importantly, the pro-arbitration policy in English law was not driven by the ideological forces of capitalism aiming to erode the powers and interests of the state; rather, the policy favouring arbitration was implemented in the 17th century simply to protect a sound commercial practice which was widely shared by merchants for its distinct advantages over litigation.

Further, success of arbitration is not symptomatic of weak state authority and state institutions. Arbitration in England did not historically emerge to challenge the state courts. Rather, as explained, arbitration in England developed as part of the court system and was largely viewed as a trusted supplement, rather than a substitute, to the courts. While some concerns about the boundaries of private justice are sound and must be addressed when it comes to the field of investment treaty arbitration, calls for an indiscriminate abolition of the policy favouring arbitration represent a split from a long tradition in English law and are premised on a crude and historically unsupported account of arbitration as antagonistic to the judiciary and the state. Such views are erroneous and should be challenged.

But an accurate historical account of the legal treatment of arbitration matters today beyond the debate about the legitimacy of private justice. This is because the positive account I offered brings about the realization that the policy favouring arbitration is historically embedded in English law and English courts. And, at least for me, as we are all painfully entering the unknown and possibly uncertain times of the Post-Brexit era, this realization gives me great cause for optimism about the future of arbitration in England.

Incidentally a vote of some political substance took place earlier this morning, and the outcome of that vote gave us all a good indication of who might be the next prime minister in the UK. While I may not necessarily look forward to such a prospect, I

truly look forward to the continuing success of English arbitration in the years to come.

Thank you for your attention.