

London Leading? A mediator's view on mediation in arbitration

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Jonathan Lux, a former partner of Ince & Co, is a well-known mediator of commercial disputes and has been an associate member of Stone Chambers for the last 2 years. In this article, he argues that mediation can, should, indeed must, play a greater role in ongoing arbitration proceedings.

Introduction

London stands at the pinnacle for the resolution of international commercial disputes. English law, thanks to the calibre of English commercial judges, achieves more certainty than any other system of which I am aware. This is indeed a key factor for many business people and disputants – to have a contract which achieves certainty and a legal regime with as much certainty of outcome as can be achieved.

English jurisdiction, whether High Court or Arbitration, is also the most popular internationally – thanks to the highly sophisticated infrastructure including judges, arbitrators, Mediators, barristers, solicitors, insurers, bankers, industry and traders – in short, all of those who may be party to or assisting parties in resolving disputes.

Whether London's dominance in international commercial dispute resolution will continue turns at least partly on its attitude to some of the factors discussed in this article.

The Courts

There is a rich vein of mercantile precedent going back several centuries to be found in English law. Was it ever thus? No. We started with trial by combat. Then, 'justice' administered by the King or Queen personally, followed by 'justice' administered by the King's or Queen's Justices.

The propensity of lawyers to complicate had the result that in Charles Dickens' England a litigant would be lucky to live long enough to see the final outcome of Court proceedings.

The English Commercial Court was brought into existence in 1895 to enable disputes to be determined "justly, expeditiously and efficiently and without unnecessary formality" - indeed a radical departure from the practice and procedure which prevailed at the time.

In more recent years there has been further radical overhaul of Court practice and procedure at the hands of Lord Woolf,



former Lord Chief Justice, whose work will come in for mention more than once in this article.

Suffice for now to say that the Lord Woolf inspired new Civil Procedure Rules (CPR) came into force in April 1999. There is express endorsement and encouragement of mediation. Two of the key Woolf inspired innovations are the 'pre-action protocols' and the 'case management conference'. Both serve to encourage early settlement. At the case management conference parties will face questions from the Judge on whether ADR should be tried. Indeed, if either party so applies or the Judge considers it worthwhile, the Judge may order a stay of Court proceedings. Whilst Judges in England stop short of ordering mediation in practice it makes sense to go along with a mediation proposal (as to which, see below).

Arbitration

Arbitration has a long history as the preferred means of dispute resolution in some industries (for example, shipping).

Arbitrators can be chosen for their industry knowledge or expertise. The proceedings are private to the parties. Historically, there were said to be advantages also of cost and speed although at least one High Court Judge has described London Arbitration as akin to "unwiggled Court proceedings". Indeed arbitration may be more costly in that you pay for the Arbitrator and the arbitration room whereas the parties make only a limited contribution to the cost of Judge and Court facilities.

Also, when it comes to speed. In Court, the CPR lays down a timetable which the Court will enforce. The CPR doesn't automatically apply in arbitration and it is for the Arbitrators to set the timetable. Some arbitrators are disinclined to make

robust orders for the progress of the reference and therefore arbitrations can drag on.

One particular ‘abuse’ was the possibility for either party to request the arbitrators to state their Award in the form of a special case –with the almost guaranteed right of an appeal to the Court. Needless to say, this had the consequence that arbitration was neither less costly nor any speedier than Court proceedings.

The same winds of change which were blowing through Court procedure also affected Arbitration. The Government’s Departmental Advisory Committee (DAC) under the chairmanship of Saville J published its report in February 1996 and this resulted in the Arbitration Act 1996 which applies to all arbitrations commenced after 31 January 1997. This served to replace in a single statute the plethora of provisions which had been littered around a number of statutes referred to collectively as “The Arbitration Acts 1950 - 1979”. The thinking appears to be very similar to that behind the CPR. Thus, Sec 1 (a) of the 1996 Act provides: –

“the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense”.

Subject only to the overriding duty of the Tribunal as set out in S. 33 of the Act to act fairly and impartially and to adopt procedures suitable to the circumstances of the case and avoiding unnecessary delay or expense, so as to provide a fair means for resolution of the matters in dispute, the Act is silent regarding the precise procedure for an arbitration and party autonomy applies.

So, the ‘overriding objective’ of the CPR is to deal with cases ‘justly’ and the ‘overriding duty’ of the Arbitration Tribunal is to act ‘fairly and impartially’. It may be thought that Court and Arbitration Tribunal are starting from the same or a similar place.

Mediation in Court

Mediation started life as the leading type of ADR procedure and ADR was said to stand for alternative dispute resolution – i.e. mediation as an alternative to Court or Arbitration proceedings. In that context it looks odd for me to be discussing mediation linked to Court/Arbitration proceedings, respectively. Having mediated now for some 15 years I can say that it is very rare to hold a mediation before court or arbitration proceedings have been commenced. Perhaps the philosophy is: “ administer a little pain to enjoy the benefits of gain “. In any event, as most mediations take place against the backdrop of court or arbitration proceedings it is relevant to examine how mediation ties in with Court and Arbitration, respectively.

As I have said earlier, since the Woolf Reforms there is clear Court encouragement for mediation. The key cases include: *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576; *PGF II SA v OMFS Company Ltd* (2013) EWCA Civ 1288; & *Northrop Grumman Missions Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd (No2)* (2014) EWHC 3148 (TCC).

The position now reached is that a failure to engage with your opposite number’s mediation proposal (as in *PGF*) or a refusal to mediate (as in *Northrop*) may well lead to the successful party in Court being deprived of some or all of his costs entitlement from winning.

This is a powerful incentive to parties to mediate in all but the rarest of cases – *Northrop* being an example.

Mediation in Arbitration

Does an Arbitration Tribunal have the same power as the Court – namely, to stay proceedings so as to enable Mediation to take place where one party so applies or where the Tribunal considers it just and reasonable to do so – for example, where the costs of the arbitration are likely to become disproportionate to the amount in issue?

Further, if the Arbitrators can direct a stay, can they also impose costs sanctions on a party who fails to engage or refuses to mediate? Finally, if there is such a power, might the Tribunal have a duty to order a stay where the interests of justice clearly point in that direction?

The starting point is the Arbitration Act 1996, S. 33:-

“(1)The tribunal shall –

- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.”

There are of course powerful arguments which have been raised against there being such a power (let alone duty). It is pointed out that the Arbitration Tribunal’s jurisdiction derives from the arbitration agreement between the parties and the arbitrators’ duty is to proceed to an Award. “Delegatus non potest delegare”. If the Arbitrator is mandated to proceed to an Arbitration Award then he has no right to shirk that

responsibility and in effect sub-delegate to someone new, the mediator, the task of resolving the dispute.

A case cited for the proposition that the Arbitrators' duty is to proceed to an Award and that he has no power to stay the arbitration to enable Mediation to take place is *Hussman (Europe) Ltd v Pharaon (formerly trading as Al Ameen Development & Trade Establishment)* (2003) EWCA Civ 266. However, is this case really authority for this proposition? I suggest not. The facts of the case are somewhat involved. The Claimant in the arbitration was Hussman and the Respondent was either Pharaon or Al Ameen (a limited liability Company). The Respondent's counterclaim considerably exceeded Hussman's claim. The arbitrators made a first Award in favour of Al Ameen.

The Court held that Al Ameen was not a party and set the Award aside. The arbitrators then made a second Award in favour of Pharaon. Hussman challenged the second Award. There were two issues – namely:

- 1) was Pharaon a respondent to the arbitration which Hussman had commenced;
- and
- 2) was the Arbitration Tribunal functus officio after the first Award – therefore having no jurisdiction to make the second Award?

On the second issue, Counsel for Pharaon submitted:-

“A tribunal cannot be deprived of jurisdiction by making an award which is declared by the court to be of no effect. On the contrary, such a tribunal remains under a duty, both statutory (see sec 33 of the Act) and contractual to proceed to a valid award. The same may be said of a situation where an award has been set aside. It is only a valid final award, and not a mere nullity, which deprives a tribunal of its jurisdiction.”

The Court of Appeal didn't deal expressly with the issue of the arbitrators' duty to proceed to an Award. The Court said: –

“A valid final award on the merits will of course exhaust the arbitrators jurisdiction, subject to any remission from the courts: but we can see no good reason in principle why an invalid final award, in excess of jurisdiction, should lead to the same result, when once that award has been declared to be of no effect by the courts.”

Therefore the court didn't deal expressly with the scope or nature of the arbitrators' duty to proceed to an award or whether there might be exceptions to that duty.

The judge's duty is to proceed to judgement and the arbitrator's duty is to proceed to an award. The judge's powers, so it is said, are statutory and so the Judge in discharging the

'overriding objective' of dealing with a particular case 'justly' may order a stay to give Mediation a chance. The Arbitrator, on the other hand, derives his powers from the contract and his duty is to proceed straight to and only to an award. But, is this right? The arbitration reference may owe its life to the arbitration agreement but the arbitrators' powers, duties and obligations derive largely from the Arbitration Act.

The 'overriding objective' of the CPR is the 'overriding duty' of the Arbitration Act – a duty which is to include that to: “adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.”

This talks in terms of a fair means for the resolution of the matters falling to be determined and resolution can of course encompass settlement between the parties, a mediated settlement as well as an arbitration award.

The courts have regularly upheld ADR (Mediation) clauses and, very recently, have upheld the section of a multi-tier dispute resolution clause calling for 'friendly discussions' - in other words, the court held that 'friendly discussions' were a precondition to either party's right to refer the dispute to arbitration. In so doing the courts have stressed the public good in encouraging parties to talk and/or mediate.

In many fields of international commercial law (and shipping is a key example) disputes are often referred to arbitration rather than court. It would be perverse if the acknowledged public good ceases to apply when arbitration rather than court is the chosen forum.

The Future

I submit that arbitrators in England have the power and duty to stay arbitration to enable Mediation to take place either when both parties agree or where one party applies or it appears to the arbitrators to be in the interests of justice to do so. Further, if one party fails to engage with a mediation proposal or unreasonably refuses to mediate then the Arbitration Tribunal should have the same power as the court to make an adverse costs order.

It may be said that even without such a power it is open to the parties to agree a hybrid or multi-tier dispute resolution clause providing for: –

- Friendly discussions between the parties;
- Mediation
- Arbitration or court proceedings.

It is perfectly correct that, on the latest authorities, the provisions calling for friendly discussions and/or Mediation

are enforceable. The problem is that such clauses deal with matters in a sequential manner – i.e.

- Firstly, friendly discussions within a specified timescale.
- Secondly, Mediation within a specified timescale.
- Thirdly, arbitration or court.

However, as I indicated earlier, there may well be advantages in holding Mediation sometime after court or arbitration proceedings have been commenced and this is simply not catered for by such a hybrid or multi-tier dispute resolution clause.

So, what is really called for is a Court / Mediation / Court or Arbitration / Mediation / Arbitration procedure. We know that the courts offer this and I have suggested that arbitrators also have the power to do so. If I am wrong in this then what about the arbitration rules of the major arbitration bodies. I have reviewed the rules of the ICC, LCIA, SIAC, HKIAC and LMAA. So far as I can see, only the ICC and SIAC have anything express to say on this subject.

The new ICC Mediation Rules (2014) are designed to work in conjunction with the ICC Arbitration Rules. The Mediation Guidance Notes issued in conjunction with the new Rules actively encourage arbitrators to consider the use of ‘mediation windows’ – staying the arbitration to allow Mediation to take place.

Secondly, there is Singapore which has been very innovative in the area of dispute resolution. There is a brand-new Singapore International Mediation Centre launched in November 2014. The SIAC, working in conjunction with the SIMC, proposes the ‘Singapore Arb-Med-Arb Clause’ whereby SIAC arbitration is started and the parties then commit to SIMC mediation and the resulting mediation settlement agreement then goes back to SIAC and forms the subject of a consent award (which can then be enforced if necessary in upwards of 150 States parties to the New York Convention).

I raised the question at the beginning of this article: will London stay at the pinnacle of international dispute resolution? The answer when it comes to arbitration is largely in the hands of the LMAA. Certainly it would be open to the LMAA to amend its rules so as to provide expressly for the power which I have suggested arbitrators anyway have under the 1996 Act. The new rule need only stipulate that at any time after commencement of the arbitration either party could apply or the Tribunal itself could direct that proceedings be stayed to

enable mediation to take place and that the Tribunal should be entitled to take into account a party’s refusal to mediate when dealing with the costs of the arbitration.

If the LMAA ignores this then it may henceforth be operating at a disadvantage to Singapore which is now offering a joined up dispute resolution system embracing both arbitration and mediation.

I said at the outset that I would be making further reference to Lord Woolf. In 2009 Lord Woolf gave a talk to the Chartered Institute of Arbitrators entitled: “Mediation in arbitration in the pursuit of justice”. He said this: –

“My thesis tonight is that litigation in the courts is very similar to litigation through the process of arbitration. They both have the same objective of obtaining a decision which resolves a dispute and brings it to an end. It is an imposed decision but, whereas now judges will regularly consider whether they can assist parties by suggesting some form of ADR, that just does not happen in arbitration. My argument is that it should, and it is indeed my belief that it will, and that arbitrators will have to recognise the importance of their matching the courts by offering the same sort of services.”

Conclusion

On the view I take, Arbitrators have the power (and indeed the duty in appropriate cases) to stay the arbitration so as to offer a ‘mediation window’. It follows that, in exercising their discretion on costs, the Arbitrators should be entitled to ‘sanction’ the successful party & deprive him of some or all of his costs by reason of his failure to engage with a mediation proposal and/ or refusal to mediate.

Of course, to put the matter beyond doubt, it would be preferable for the LMAA to amend its Rules so as to provide expressly for such powers.

If I am correct in the proposition I have advanced and/or the LMAA makes the Rule change suggested then London may continue as a leading international dispute resolution centre for many years to come. In the meantime, there is nothing to prevent parties from putting the matter to the test by applying to their Arbitration Tribunal for an appropriate Order. Please do let me know the fate of any such applications!

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