Is London still ahead of the game?

Khawar Qureshi QC provides an overview of recent trends and issues relating to the arbitral process

Arbitration as a means of dispute resolution has been utilised for more than a thousand years, and is not a new development. The appointment of a person or persons chosen by parties to resolve their differences (instead of a court) has found particular favour in the commercial context, not least because cross-border transactions are likely to engage different legal jurisdictions and cultures.

In most cases, for reasons including lack of knowledge/familiarity/trust of domestic court processes, as well as perceived ease of enforcement of an arbitral award (by virtue of the New York Convention of 1958), a compromise solution in terms of dispute resolution by arbitration is most often identified in the contractual arrangement between parties.

A long time ago...

When I began practice 25 years ago, counsel work for international arbitration was undertaken by a relatively small group of specialist chambers such as my own. There were numerically fewer arbitrations, and a relatively small pool of retired English judges were available to sit as arbitrators, with senior Silks also sitting. Hearings tended to be much less formal than the court process, and information (other than anecdotal) was sparse as to the performance of different arbitral institutions, let alone concerning the reputation of arbitrators.

As and when a challenge to an arbitral process or decision was made, the English courts were reluctant to intervene. Criticisms were nevertheless levelled at the somewhat unwieldy and uncertain legal framework governing arbitration matters (the Arbitration Acts 1950 and 1979). These led to a radical and overwhelmingly welcomed change in the law, brought about by the Arbitration Act 1996. The 1996 Act set the tone for court support/supervision of arbitration matters, with reference to the guiding principles of party autonomy and finality.

... and now

In recent years, international arbitration has seen a huge increase in the range and volume of disputes. Moreover, there is a greater geographical spread of parties, as well as a proliferation of regional centres for arbitration matters to be juridically located and conducted (seats) – there are 90 arbitration centres in the Gulf Cooperation Council (GCC) region alone.

A survey carried out by Queen Mary University of London/White & Case in 2015 ('the survey') gives a very helpful insight into why arbitration is so popular (*2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*). Conducted annually for the past 10 years, 763 individuals responded to the online survey last year, as supplemented by 105 personal interviews with persons considered to have practical and representative experience of the arbitral process.

It appears that 90% of the survey respondents preferred arbitration to court process, citing enforceability of arbitral awards, flexibility, choice of arbitrators and 'avoiding specific legal systems' as the most positive features of the arbitral process.

The five most preferred seats (the juridical location for an arbitration matter) are (in order of preference) London, Paris, Hong Kong, Singapore and Geneva – with an increasing number of new entrants in places such as Mauritius, Mumbai and Istanbul.

The survey also indicates that respondents perceived that Singapore had improved the most in the past five years – and (significantly perhaps), London the least. Improvements cited included better hearing facilities and cost issues.

The most recent statistics indicate that, in the year 2015, 326 new arbitrations were registered by the London Court of International Arbitration (LCIA), (in comparison with 271 by the relatively youthful, but increasingly popular, Singapore International Arbitration Centre (SIAC)). In the same period a total of 801 new arbitrations were registered by the ICC International Court of Arbitration (ICC), which is headquartered in Paris and operates from several regional centres including London and Hong Kong.

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Concerns regarding arbitration

The survey identified significant concerns as to the cost of the arbitral process, as well the inability (or unwillingness) of arbitrators to sanction parties or legal representatives for failures to comply with procedural requirements. Of course, one of the most important safeguards of a well-functioning and reputable court process is the availability of sanctions (including contempt powers) as against a party or its representatives.

In addition, concerns were expressed as to the lack of transparency with regard to evaluating the 'efficiency' of an arbitrator. In that regard, arbitral institutions are become more sensitive to the need for arbitrators to engage in 'proactive case management' and institutional feedback systems are being reviewed with such issues in mind, with a view to reducing delay in the process.

Indeed, almost all of the leading arbitral institutions have embarked upon changes to their procedural rules in the past five years – largely directed at concerns relating to cost and delay in the arbitral process. These concerns have not abated as yet, which would indicate that more needs to be done to change the 'culture' of arbitration in this regard.

The main criticisms of arbitration

Over recent years, the main criticisms include suggestions that arbitrators (still a somewhat small and largely homogenous group in terms of gender, nationality and age) are too busy and take on too many appointments, leading to increasing delay in conclusion of proceedings. In response, some institutions are taking strong steps to enable more gender balance and to widen the pool of arbitrators, as well as to monitor and remind arbitrators of the need to accept new appointments only if they can allocate the necessary time.

A recently developing and increasing concern is arbitrator 'apparent' bias challenges which are said to stem from numerous factors, including a more aggressive approach to arbitration/ litigation, greater availability of information about arbitrators on-line, repeat appointment of certain arbitrators by specific law firms, and links between arbitrators and law firms. As yet, the English law position is that there is no automatic 'bias' type issue if a barrister and arbitrator in a matter are from the same chambers. Some institutions (such as the ICC) take a different view. The obvious advice for prospective arbitrators must be to avoid any conduct which might give rise to any grounds for a bias challenge, not least to always disclose any circumstances which might be used (rightly or wrongly) to suggest a lack of impartiality or independence.

In addition, it is suggested by some that arbitrators may be reluctant to act decisively, for fear of challenge of any award before a court, (or even for fear of a personal bias based challenge). Some cynics go further, and suggest that some arbitrators adopt a somewhat diffuse 'upset no one' Solomonesque approach with an eye to 'repeat business' – which would be very damaging to the integrity of the arbitral process if true.

It is also often suggested that lawyers are more likely to evidence a 'kitchen sink' mentality in an arbitration process than in court, either because of client pressure to miss no potential point, or because arbitrators fail to exert sufficient control in terms of limiting documents and witnesses deployed, or time taken for hearings. Finally, as and when arbitrators are asked to award costs to a winning party, it is said by some that very little scrutiny is applied to the level of costs sought – unlike in a court process.

Arbitration as an impediment to the development of the common law

In a lecture delivered on 8 March 2016, the Lord Chief Justice Lord Thomas of Cwmgiedd triggered a debate by stating that the limited basis upon which English law issues in an arbitration award could be the subject of appeal (on a point of law) to the High Court, (pursuant to s 69 of the 1996 Act), was stifling the development of the law. The response from various persons including Lord Saville (whose report was the foundation for the 1996 Act) has included pointing to numerous surveys, which affirm the desire of commercial parties to avoid any form of appeal so far as possible before the court.

Indeed, given the success of London in positioning itself,(thus far) as the world's pre-eminent arbitral seat is due in very large part to the reputation of the English courts and their 'non-interference' standpoint, it has been compellingly argued that parliament struck a near perfect balance in the 1996 Act which should not be disturbed.

Perhaps the more pressing questions for consideration are as follows: (i) If fewer parties are selecting the English High Court in their contract as the dispute resolution forum, why is that so, and what are they choosing instead? (ii) Can London continue to maintain its pre-eminent position as an arbitral dispute resolution centre – not least given it came last in the survey, in terms of the list of most progressive arbitral centres?

Future challenges

There is no doubt that international arbitration will continue to experience growth as a dispute resolution process – inevitably at the expense of domestic courts generally. The challenge for the arbitral process is to ensure it is in fact cheaper, quicker and (from the perception of the parties') better than court process.

The comments of the Lord Chief Justice may signal the desire of the English courts to increase awareness of the availability and attractiveness of the English Commercial Court, to deal with disputes which are increasingly being dealt with by way of arbitration. In terms of enhancing informed party choice of (what are in reality competing dispute resolution processes), this would be no bad thing. ●

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