THE SMALLER COMMERCIAL DISPUTE: LOOKING FORWARD TO THE NEXT 100 YEARS

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Introduction

Large and complex disputes are of great professional interest to dispute resolution practitioners. Papers presented at conferences tend to focus on these. It is important, however, that we also have regard to disputes arising out of modest transactions which are of interest only to the parties directly involved. For every $1bn transaction there will be several hundred $1m transactions; and for every $1m transaction there will be several hundred $20k deals. Even though, dollar for dollar, it may be more likely for intractable disputes to arise in larger transactions, it is clear that the vast majority of disputes involve relatively small sums – often perhaps just $10-20k or so.

The internationalization of trade also adds a new dynamic. A higher proportion of transactions than ever before, and hence the disputes which may arise from them, have an international element. Although national legislative codes may impose quick and inexpensive interim solutions (e.g. the Construction Act\textsuperscript{1}), final and general dispute resolution means that the international context must be taken into account and this in turn means that dispute resolution may take longer and be more expensive.

All will agree that it is appropriate that we seek an alternative dispute resolution (“ADR”) solution. It might be argued that for smaller disputes, mediation is more suitable than, say, arbitration. Unfortunately the dynamic of mediation tends to be driven less by the parties’ desire to do the right thing and more by an appreciation of the consequences of not settling. Where however there are no consequences because the deal in question is a one-off with no long-term relationship to maintain, there is no market visibility (although Trip Advisor-type sites might begin to play a role) and it is disproportionately expensive to arbitrate so that a small claimant cannot afford the risks, then justice is denied. I shall therefore assume that even in a world where the vast majority of disputes are resolved by negotiation, including facilitated negotiation through mediation, we need to establish a dispute resolution process of last resort.

The primary question asked in this paper is: what does arbitration need to look like for the smaller participants both to create the right environment for mediation and to provide a system of dispute resolution of last resort?

\textsuperscript{1} Housing Grants, Construction and Regeneration Act 1996 Part II Construction Contracts as amended by the Local Democracy, Economic Development and Construction Act 2009 (“the 2009 Act”)
I will propose that we need to develop the commercial will to drive this forward, by setting up relevant schemes, involving a wide variety of agencies, incentivizing businesses to offer appropriate arbitration and ensuring that the process is transparent. I will propose that the arbitration scheme itself needs to have a four-strand approach dealing with:

- Technology – we need to exploit the advantages offered by modern technology
- Mediation – we need to incentivize parties to resolve their disputes informally before they commence arbitration
- Procedure – we need to lighten procedures so that they are proportionate to the sums involved; and
- Costs – we need to develop costs rules which both allow access and promote settlement

Documents-only arbitrations

Many of us present today may think of arbitration as something that commences when a major international arbitral institution receives a request from a high-powered international law firm, attached to which is a hefty commencement fee. A three-person tribunal is constituted – a process that may take several months – and a preliminary hearing is held in one of the major international centres for arbitration, perhaps London, Geneva, Singapore, New York etc., with arbitrators, parties and counsel flying in to participate. By this stage more has been spent on fees and costs than the total value of a typical dispute in international commerce.

This is clearly a type of arbitration which is wholly unattractive to smaller participants in commerce. All governments wish more of their small and medium sized enterprises to export and many businesses are responding to this challenge; but there is always a concern that things will go wrong and no redress will be available.

There are, of course, simple solutions and many writers have pointed to these over decades. The obvious place to start is: documents only arbitration, with a light-touch secretariat. We could, for example, stipulate a documents-only procedure for disputes falling below or limited to a specified value – say $25k – and a hybrid procedure with a telephone hearing for disputes valued $25k+ to $100k. Of course a number of complications may arise, e.g. where there is a claim for $12k and a counterclaim for $120k. But if we believe that the principle is sound, we can iron out these potential difficulties.

With today's technology, a documents only arbitration is simple, even if the parties are located in different countries. But we should do more than use e-mail. We should exploit technology so that we develop a central "arbitration room" where all communications, submissions and evidence are posted. Claims, responses and supporting materials can be submitted and be accessible in electronic format. The format can be regulated by rules – so that each party's submissions are limited in volume and content (e.g. limiting the number of witness words etc). There will be no disclosure of documents held by the other side, except where a party identifies a precise document, shows why it is essential, all backed by clear costs consequences for inappropriate requests or refusals – and this can be dealt with in the first instance by the secretariat – this is because this type
of arbitration should be limited to commercial matters where the agreement of the parties and the facts accessible to the parties are the most material factors.

We can see daily a parallel to this type of situation daily – construction adjudication. When it was initially introduced, many traditional lawyers saw it as wholly inappropriate. But in the main it works – witness the take up of the idea in other jurisdictions\(^2\) – and it gives a voice to those parties who could not afford to instruct the lawyers who took the view that it was inappropriate.

It might be objected that one of the key concerns about short-form procedures in a document-only process is that witnesses can say what they like without being challenged. In practice this is less of a problem than it sounds: experience in adjudication shows that whilst parties may over-emphasise elements of the matter or omit relevant factors, this is often counter-demonstrated immediately by the other side and becomes a weakness for the party seeking to put a partial or skewed account. Since arbitration leads to a final decision it is important that a party who does not agree with his opponent’s evidence has an opportunity to challenge it – and this can be done by permitting a party to ask written questions and hence receive written replies. If, following these exchanges, the arbitrator feels that she or he needs to explore further, this can be done in a telephone discussion. The touchstone is proportionality.

**Transparency**

Key concerns are often expressed over arbitration including about quality, timeliness and the care taken by arbitrators in assessing the evidence.

There is a simple solution based on transparency. The secretariat should publish the award with all relevant actors listed as A–Z. The parties and any enforcing court will see the code. The encoded award will be uploaded onto the hosting institute’s open website so that the public can see the award and be able to evaluate at least one aspect of the judgment process; if they are impressed with the care taken and the clarity of expression they will gain confidence in the system so that this form of arbitration will be seen as credible and appropriate.

**Mediation**

The arbitration scheme will be designed somewhat paradoxically to avoid arbitration. A solution in which the parties are unable to control their settlement – even if it is handed over to the best arbitrator – cannot be seen as a good outcome.

For cases exceeding a specified limit, say $25k, being prepared to engage in a telephone mediation should be a prerequisite to commencing proceedings and a failure to participate should cause the reference to be struck out.

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By mediation I do not of course mean a traditional mediation in which the participants descend on the venue from different parts of the world and spend a day or two with a mediator shuttling between rooms, the overall costs of which might amount to $100k or more.\(^3\) I mean an exchange of position papers, a 120-minute telephone call with a brief opening, using technology so that the mediator can speak alone with each party as necessary, exploring the issues. One of the advantages of mediation, even where it does not appear to succeed, is that it permits the parties to appreciate how their counterparts see the situation and requires them to explain to the mediator – and to themselves – where they see their strengths weaknesses and interests.\(^4\) This opportunity creates the motivation for settlement and may make it likely that only a small proportion of claims actually reach arbitration.

Some people consider that the mediator should become the arbitrator. I am personally not one of these, because I think this undermines the mediator’s ability to challenge parties effectively in private session. But that is a personal view and a detail.

Costs

Costs are central to any significant shift in approach. Reducing costs risks increases accessibility. In UK employment tribunals, for example, costs are rarely ordered against the losing party. I suggest that we should consider putting aside the concept of the winner recovering costs in minor commercial arbitrations.

If this were done, there would **ordinarily** only be three elements of costs within the arbitrator’s award – collectively the central costs:

- the registration fee for mediation
- the arbitrator’s fee
- the secretariat’s fees

There may be **exceptional costs**, as where there has been an inappropriate request e.g. for disclosure and which would act as counter-measure against abuse of the process.

The arbitrator’s fee should be set on a scale commensurate with the sums claimed and should be set out in stages so that early settlement attracts a lower fee. The fee should only be increased with permission of the secretariat in exceptional cases and in line with tight criteria. In terms of game theory these fees represent the external risk and incentive to settle.

The arbitrator will allocate liability for these fees by reference to the relative success of the parties. A simple approach to be incorporated into rules is for both parties to file an offer in a read-protected file stating the sum for which they would be prepared to settle. If neither offer is accepted by the other party the matter goes to a contest and an award. When ready, the offers are opened and costs awarded. Imagine $23k is claimed and the respondent denies the claim, but in

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\(^3\) Consider, for example, the recent case of Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No 2) [2014] EWHC 3148 (TCC) (03 October 2014), where it was somewhat nonchalantly mentioned that the costs of a mediation in a dispute valued at c. £3m was likely to be £40k.

\(^4\) In Northrop Grumman Mission Systems supra the learned judge expressed a number of benefits of mediation e.g. at para 59 “a mediator can bring a new independent perspective to the parties if using evaluative techniques...”and 69 “the ability of the mediator to find middle ground by analysing with each party its expressed position and making it reflect on that and the other parties’ position” etc.
the offer C indicates he will settle for $18k and the respondent offers $7k and the award comes in at $12k, how would the central costs be awarded? A sliding scale is used: if C recovers more than $18k then R pays all the central costs; if C recovers less than $5k then C pays all the central costs; in between there is a shift from C paying 0% to 100% of the central costs as the award transitions from $5k to $18k. So, if award gives C $12k, then C will pay $(7/13) \times 100\% = 54\%$ of the central costs and R will pay 46% of them. We can immediately see that there is an incentive to make one’s offer fair and, indeed, generous.

Who should host these disputes?

Dispute platforms may be hosted by trade bodies etc. The Chartered Institute of Arbitrators might want to consider extending its activities in this area also.

One of the concerns about construction adjudication in the UK has been that the qualifications of people acting as adjudicators are not as well-controlled as some think appropriate. Professional institutions often skew membership of panels so that they directly or indirectly favour their members and membership of the panel comes to be seen as a privilege of membership. One advantage of a wider recognized body such as the CIArb offering such a service is that there is an opportunity for the criteria to be published and tested so that the quality of the arbitrator can be assured.

From idea to action

It is the easiest thing in the world to develop a scheme on paper. It is even relatively straightforward for stakeholders to approve it in principle. The real difficulty is getting people to live it. There needs to be a product – i.e. a credible platform with credible processes, staffed by a credible secretariat and supported by credible mediators and arbitrators. There needs to be a commercial benefit for large purchasers and vendors offering to use the service: government departments and trade institutions need to promote the scheme in respect of not only Business to Consumer transactions but Business to Business transactions. And there needs to be an awareness campaign.

All of this requires policy makers to take an interest and make dispute resolution a priority in establishing a safe environment in which to conduct business. In this way, the flexibility of arbitration, combined with the benefits of technology will provide an opportunity not only to resolve disputes, but to assist trade to flourish. This will not, however, happen without action – and investment by thought leaders such as the Chartered Institute of Arbitrators. If we can begin to move in this direction others will also see it as the way to go. Once a critical mass has built up it will begin to have a new dynamic.

But as always a scheme can become a victim of its own success. If it attracts many customers, many people will seek to get work by acting as arbitrator. There is nothing wrong with that. But the customer must remain at the heart of the process. The rules must be designed not to meet the
aspirations of the arbitrators but the needs of the customer. The quality of arbitrators needs to be tested and the quality of their work needs to be reviewed – again, we need to step out of our comfort zone and ask what the customer wants.

Likewise when lawyers get involved, as they will and must, they will have a natural tendency to protect their clients – taking objections, challenging steps and arbitrators, seeking to set aside awards and so on. We need to constrain the parties’ ability to object except when there is a serious issue; but with this power, comes responsibility. Obviously, if we constrain the ability to protest, we need to be confident about the arbitrators and the arbitrators need to be prepared to expose their work to public scrutiny.

Finally, we need to protect the scheme against being used for criminal purposes, including money laundering and tax evasion.

The Next 100 Years

It is of course difficult to predict how things will turn out in the next 10 years, let alone 100 years. But we can probably say that in this area, the future we experience will very much depend on what we make happen. In one future, in which we let matters drift, arbitration becomes a process for disputes involving significant sums only – in short a specialist service for the select few. In the other, where we think radically and act with determination, arbitration becomes an integrated part of the dispute resolution method of choice for all disputes. If we want the latter future, we need to make it happen. Whether or not we have the will to do so is the question.