39 ESSEX STREET

Judicial Supervision and Support For Arbitration and ADR

Extracts from a presentation[1] given by

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[1] The unabridged paper can be accessed at http://www.39essex.com/docs/articles/KGO_Judicial_Supervision_Sept_2006.pdf.

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SELECTED CONTENTS

1. Introduction and Background

The purpose of this paper is to consider the supervisory and supporting role of the Courts for Arbitration and ADR taking both domestic and international arbitration cases into account. This will be reviewed against the backdrop of an examination of the means by which parties can bring challenges to tribunals and their awards other than by application to the courts and I will illustrate the work of the English courts by the use of examples of recent case law and appeals in arbitration proceedings.

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By way of introduction it is relevant to consider the context in which both domestic and international arbitration is conducted in England and Wales today. Many substantial domestic construction disputes, and most international construction disputes, are habitually resolved by arbitration. Other forms of dispute resolution, particularly litigation, adjudication, mediation and more recently Dispute Review Boards also have a significant role to play in the resolution of construction disputes. These other forms of dispute resolution, notably adjudication, mediation and litigation of claims within the Technology and Construction Court, are dealt with in the papers and presentations of other speakers. This paper and my presentation will focus substantially on arbitration as a means to resolve construction or other commercial disputes and judicial supervision and support for both that process and, to a lesser extent, ADR.

The English modern law of arbitration is codified and is to be found in the provisions of the Arbitration Act 1996 (variously referred to as "the 1996 Act" or "the Act" hereafter) which substantially came into effect on 31 January 1997. The philosophy underpinning it is to be found in

the UNCITRAL[2] Model Law 1985[3] ("the Model Law"). Before the introduction of the Model Law on Arbitration, in 1976 via General Assembly Resolution 31/98, UNCITRAL adopted and published the UNCITRAL Arbitration Rules. The UNCITRAL Model Law on Arbitration in fact forms the basis of the law of arbitration in over 50 nation states. Working Group II of UNCITRAL keeps the Model Law and Rules under continuous review ...

The most important task for every arbitrator is to deliver a final and binding decision to the parties that is enforceable in the jurisdiction in which the award has to be given effect.

In International Arbitration the cooperation of nation states to ensure the recognition and enforcement of foreign arbitration awards is vital and has been secured through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was made in New York in June of 1958. It is commonly referred to by practitioners as "The New York Convention". The New York Convention has been ratified by some 137 countries and as UNCITRAL itself opines:

> *"Although the Convention, adopted by diplomatic conference on 10 June 1958, was prepared by the United Nations prior to the establishment of UNCITRAL, promotion of the Convention is an integral part of the Commission's programme of work. The Convention is widely recognized as a foundation instrument of*

[2] United Nations Commission on International Trade Law

[3] 1985 - UNCITRAL Model Law on International Commercial Arbitration Adopted by UNCITRAL on 21 June 1985, the Model Law is designed to assist States in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

> *international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards make in other States, subject to specific limited exceptions. The Convention entered into force on 7 June 1959."*[4]

The desirability or otherwise of major international venues as centres for the resolution of commercial disputes depends principally on the confidence which it engenders within the international business community. The scope and quality of the judicial machinery which is available to support and where necessary, supervise, the arbitral process is an essential feature of a modern and effective centre for commercial arbitration and ADR.

2. Challenges to arbitral Tribunals or awards in advance of applications to the courts in England and Wales

The most useful tool available to parties to arbitration proceedings is their capacity to deploy the principle of party autonomy enshrined in section 1(b) of the 1996 Act. Section 1(b) provides that: *"the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."*

It follows that if there are clear problems either with the Tribunal or with any award rendered by the Tribunal, the parties always have the capacity to reach an agreement and to put right any procedural difficulties; issues concerning the Tribunal; or obvious errors in the award; without recourse to the Court. The fact is that by virtue of the consensual nature of an arbitration agreement and arbitration

[4] See the UNCITRAL website at www.UNCITRAL.org

proceedings governed by the Act, if the need arose the parties have the power to agree to conduct the arbitration according to a procedure of their choosing[5], to sack the Tribunal, and to set aside or remit its award. Equally the parties may agree to arbitrate pursuant to arbitration rules which provide machinery for such issues to be decided by a third party, for example the ICC. For reasons that are all too obvious, if they have not managed to address these issues when they made their agreement to refer disputes to arbitration, they seldom deal with these issues by agreement once the dispute has crystalised and arbitration proceedings are on foot.

On matters of jurisdiction (and apart from the ability of the parties to agree any issues which arise for decision, or prior agreement directing them to be dealt with by a neutral third party) there is a limited scope within the Act for the parties themselves to deal with challenges and disputes over jurisdictional matters. Sections 30 and 31 provide that unless the parties otherwise agree, the Tribunal may rule on its own substantive jurisdiction.

Another possibility, more likely to be available in the context of scheme arbitrations rather than ad hoc disputes, is that the organisation administering the scheme may well have a process for monitoring the performance of its arbitrators[6] and the quality of their awards. There is also an unfortunate tendency in scheme arbitrations, which are generally undertaken by arbitrators at less than commercial rates of remuneration, for some disaffected parties to use professional conduct complaints procedures as a means to seek to, in effect, appeal the arbitrator's award. Professional associations need to guard against the

[5] Subject always to the risk that if the procedure contravenes the general duty of the Tribunal under section 33 of the Act, the tribunal may have to reconsider its position and possibly to resign.

[6] Albeit they are unlike to intervene in an arbitration which is ongoing, any review would be "after the event"

abuse of their professional regulatory processes in this way.

When it comes to making a challenge against the appointment of a Tribunal, absent agreement between the parties or an agreement between the parties and the arbitrator concerning his resignation, there is generally no other avenue open to a party other than to make an application to the Court. As already observed, appointing and other professional associations, while they may monitor the conduct of their Tribunals, are unlikely to intervene in a "live" arbitration.

The Act itself contains some provisions which enable the parties or the Tribunal to correct errors and omissions in their awards.[7] The provisions of section 57 are however non-mandatory and the parties are free to agree on the powers of the Tribunal to correct an award or to make an additional award.

In section 30 of the Act, the Tribunal has the power to rule on its own jurisdiction. However, section 30 is non-mandatory which means that the parties are free to limit or exclude this power if they so choose, which would mean that the Tribunal would then not have that power and any disputes about jurisdiction would have to be resolved by the Court.

As far as extensions to the Tribunal's jurisdiction are concerned, only the parties to the arbitration agreement have the power to do that. Moreover it is a reasonably common occurrence for parties, particularly when they have reached a settlement on a range of disputes (perhaps arising from the same works, but not all made the subject of a reference to arbitration) to extend the Tribunal's jurisdiction by agreement to enable it to render a consent award embodying the settlement they have made. Where however there are disputes about jurisdiction, particularly concerning the scope of the matters referred, it is equally common for the parties to refuse to agree an extension to the Tribunal's jurisdiction

[7] See section 57, in particular the provisions of section 57(3).

and to insist that the party wishing to introduce new claims, bring them in separate proceedings. Sensibly this should not occur but often it does simply because it makes it more difficult and expensive to arbitrate the further claims and a tactical advantage may be gained in settlement discussions.

Where parties anticipate difficulty in ensuring that the Tribunal has covered all the issues put to it for decision, it is not uncommon for the parties or indeed for the Tribunal of its own motion to proffer a draft award to the parties for comment as to completeness or other matters. By this process it becomes more difficult for the parties subsequently to argue that the award is defective or incomplete in some way.

Failing that, if the award has been delivered by the Tribunal, the parties are free to agree that it contains an omission or is erroneous in some particular respect and may refer it back to the Tribunal by agreement to correct any errors or omissions.

…

Quite clearly, in almost all situations, the cheapest and most effective way to avoid invoking the powers of the Court to supervise or support the arbitral process, is for the parties to act sensibly and to seek to agree all relevant procedural matters necessary for the proper and expeditious resolution of their disputes by arbitration by a Tribunal of their choice.

3. Judicial supervision and support for arbitration … in England and Wales.

There is a very well established policy of non-intervention by the courts into arbitration proceedings both in relation to issues which arise during the arbitration proceedings and also in relation to issues which arise

after the publication of the award. That said, there exists a well established statutory and common law framework of measures by which, if circumstances require, the court may intervene to provide support for, or supervision of, the arbitral process and its outcomes.

In many cases the parties to arbitration have chosen either the arbitrator or the professional body which appoints the arbitrator and therefore, in the view of the courts, the parties will be bound by the choice they have made, both as to the means of the resolution of the dispute, and as to the person or qualifications of the person appointed as arbitrator. *"By submitting their disputes to arbitration the parties consent to run the risk that the chosen tribunal will prove unequal to its task."*[8]

The same is true of the procedure employed by the tribunal to resolve the parties' dispute: *"For at least 60 years judges have emphasised that traders who have chosen arbitration must reconcile themselves to the consequences of their choice and that it is no use for them to complain after the event that the dispute might have been more thoroughly or skilfully investigated by some procedures closer to those adopted in court..."*[9]

Therefore, notwithstanding the apparent breadth of the Courts' powers, the reality is that parties to arbitration are not encouraged to make applications to the court either at whim or at all, even when the going gets tough. In consequence, arbitration applications and appeals against awards are comparatively few, and the attitude of the Court remains very cautious. Even before the advent of the 1996 Act it was well established that the Court would not act unless the subject matter of the complaint had created a real risk of injustice contrary to the basic principles of justice which the parties were entitled to expect under the contract/bargain which the parties had made with the tribunal.

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8 Mustill & Boyd, Commercial Arbitration Second Edition 1989, page 23.

9 Ibid.

In the context of the modern law of arbitration, the DAC Report which informed the drafting of the Arbitration Bill which became the Arbitration Act 1996 is often referred to in this regard. The report stated:

> *"We have every confidence that the Courts will carry through the intent of this part of the Bill, which is that it should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the Court to substitute its own view as to how the arbitral proceedings should be conducted. Thus the choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by clause 33, should on no view justify the removal of an arbitrator, even if the Court would not itself have adopted that procedure. In short this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in the Bill, he is in effect frustrating that object. Only if the Court confines itself in this way can this power of removal, be justified as a measure supporting rather than subverting the arbitral process."*[10]

and

> *"Irregularities stand on a different footing... the test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far*

[10] See DAC Report of February 1996, paragraph 106, referring in particular to the provisions of clause 24 concerning the Court's power to remove an arbitrator from office. It is submitted however that this is a principle which is applicable generally to the Court's supervisory powers in relation to arbitration.

removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action."[11]

What the drafters of the 1996 Act did therefore was to emphasise at the outset the principles of party autonomy and judicial restraint,[12] so that the Court and those involved in arbitration under the aegis of the Act would be clear that the Court would use its powers in relation to the supervision and support of the arbitral process sparingly and only in essential cases.[13] In the decade since the Arbitration Act 1996 was enacted,[14] the Courts charged with dealing with arbitration applications[15] and appeals have substantially adhered to and reinforced these basic and important principles in their decisions.

Karen Gough 7 September 2006

11 See paragraph 280 concerning clause 68: Challenge to the Award: Serious Irregularity, which discusses the provision in the Bill which became section 68 of the 1996 Act.

12 Which principle is also enshrined in the UNCITRAL Model Law 1985, articles 5 and 34 in particular.

13 See section 1 of the Act, in particular section 1(c) which provides: "in matters governed by this Part the court should not intervene except as provided by this Part."

14 See SI 1996 No 3146 (C.96); the bulk of the Act in fact came into force on 31 January 1997.

15 At first instance this is the Commercial Court or, in construction cases, the TCC.