The Advantages of Arbitration of Property Disputes Some valuable insights from International Commercial Arbitration

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London – a world leader in property arbitration

London continues to be a world leader and a world centre for commercial arbitration, as it has been for centuries. The English Courts are particularly expert and experienced in supporting and facilitating commercial arbitration and have a very well-deserved international reputation in this respect. Commercial arbitration in London draws in a very wide variety of disputes, whether between United Kingdom parties, often including with them international parties, or between international parties solely. London also has the advantage of world best practice commercial arbitration legislation in the *Arbitration Act* 1996.

Arbitration of property disputes in London also has a long history. Many of those disputes relate to long-term commercial leases and the ownership of freehold land and interests in land. It is the case that an arbitral tribunal cannot make orders binding statutory regulators or offices, such as a public land registry, whether in the United Kingdom or in another country. Nevertheless, orders may be made that have the same effect as they bind the parties, wherever they are, in jurisdictions where the arbitral award is enforceable - to do or desist from doing some act or thing or to transfer or otherwise deal with the subject property. In other words, the orders of an arbitral tribunal apply *in personam,* much as they do in the general equitable jurisdiction. In that jurisdiction the classic example is *Penn v Lord Baltimore*,[1] a boundary dispute, where the Court of Chancery made orders in this manner with respect to land in North America.

A very considerable overall advantage in utilizing arbitration to resolve commercial disputes – including property disputes – is that challenges to arbitral awards are infrequent as they are constrained by provisions of the *Arbitration Act* 1996 which are designed to avoid anything in the nature of a merits review or appeal process in the court.[2] This significantly distinguishes arbitration from litigation in the courts, where there is always the possibility of appeals with all the delay and cost that entails. Moreover, the possibility or potential for any challenge to an arbitral award may be reduced further by the agreement of the parties to exclude the right of any party to appeal to the court on a question of law arising out of an award.[3] The parties may also agree to dispense with reasons for the award of the arbitral tribunal. Such an agreement has the dual effect of excluding the jurisdiction of the court to entertain an appeal on a point of law[4] or to determine a preliminary point of law.[5]

[1] (1750) 1 Ves Sen 447; and see *R. Griggs Group Limited v Evans* [2005] Ch 153
[2] See *Arbitration Act* 1996, ss. 67 and 68.
[3] *Arbitration Act* 1996, s.69.
[4] *Arbitration Act* 1996, s.69(1).
[5] Arbitration Act 1996, s.45(1).

Arbitration and other ADR processes – can be tailored to the dispute

In considering the relative advantages and disadvantages of arbitration the perspective of the disputing parties is also a factor to consider. If parties are more concerned to achieve a consensual and relatively inexpensive resolution of their dispute then mediation or conciliation may be a more attractive option. Consensus may, however, not be possible for a whole variety of reasons; ranging from the nature of the parties, the nature of the dispute or the personality of the principal protagonists. In this circumstance arbitration provides a binding adjudicative process which may be tailored to meet the nature of the dispute. In this respect the potential advantages of arbitration will only be realized if it is remembered that "arbitration" is, in reality, of a spectrum of possible consensual adjudicative processes ranging from very simple "look and sniff" commodity arbitration right through to a three member tribunal and a procedure that is closely akin to major commercial litigation in the courts.[6] There are many possibilities between these two extremes and the potential advantages of arbitration will only be realized when the particular dispute is matched to the right point on this spectrum.

Ability to choose expert arbitral tribunal

In addition to providing a binding adjudicative process, arbitration also provides the parties with the opportunity of selecting their arbitrator or, in the case of multiple arbitrators such as a three-member arbitral tribunal, the members of that tribunal. This means that an arbitrator or arbitrators may be chosen who bring particular experience and expertise and, in the case of a multi-member tribunal, a mix of experience and expertise. This is a significant distinction as between litigation and arbitration as in the former the parties cannot choose their judge but in the latter they can, or at least have the possibility of so doing, in the form of the arbitral tribunal.

Arbitration can provide expeditious resolution – interlocutory and final

Arbitration also provides the means of achieving expeditious proceedings; proceedings which can be brought on and heard quickly. Many arbitral institutions, both international and in England have provided particular rules or a set of rules for expedited arbitration and, in many cases, for appointment of an emergency arbitrator to deal with urgent preliminary interlocutory matters. These include the London Court of International Arbitration (LCIA)[7], the International Chamber of Commerce (ICC)[8], the Hong Kong International Arbitration Centre (HKIAC)[9], the Singapore International Arbitration Centre (SIAC)[10] and Australian Centre for International Commercial Arbitration (ACICA)[11]. The provisions in these rules are, of course, all well and good but expedition and cost effectiveness of the process also lies with the parties and the arbitral tribunal. A perennial problem with international arbitration which has very much come into focus in more recent times is extensive delays that have been occurring due to arbitrators over committing themselves and so not being able to be available for preliminary, interlocutory and final hearings within a reasonable time and also not being able to

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[6] Though expeditious: cf Guy Fetherstonhaugh QC and Caroline Shea, "The rise and rise of arbitration: An in-depth look at the changing face of litigation", (Falcon Chambers, March 2014).
[7] *LCIA Arbitration Rules* 2014, Art 9A (Expedited formation of Tribunal), Art 9B (Emergency Arbitrator).
[8] *ICC Arbitration Rules* 2017, Art 29 and Appendix V (Emergency Arbitration Provisions) and Art 30 and Appendix VI (Expedited Procedure Provisions).
[9] *HKIAC 2018 Administered Arbitration Rules,* Art 13 (General Provisions), Schedule 4 (Emergency Arbitrator Procedures).
[10] *SIAC Rules* 2016, Art 5 (Expedited Procedure), Art 30 and Schedule 1 (Interim and Emergency Relief).
[11] *ACICA Arbitration Rules* 2016, Art 7 (Expedited Procedures), Schedule 1 (Emergency Arbitrator and Emergency Interim Measures of Protection).

provide awards in a timely fashion. Consequently, it has become common for institutional arbitral institutional rules to specify time limits within which various steps are to be taken and completed. It has also become a practice of arbitrator appointing authorities and parties themselves to enquire of and to seek declarations from potential appointee arbitrators that they do have the time to commit themselves to timely arbitration of the dispute. Nevertheless, the sanctions for failure of arbitrators in this respect are probably only removal and replacement or difficulties with future appointments, none of which will necessarily assist parties with a particular dispute. This serves to emphasise that the choice of the arbitral tribunal is of critical importance.

Flexibility of arbitration proceedings

The availability of flexible procedures in arbitration makes the process very attractive commercially. These might include a documents only procedure, very tight timetabling for statements of claim, defence and reply – and possible counterclaim and defence to counterclaim and, possibly, no "pleadings" at all but, rather, an agreed statement of issues for determination. Additionally, the evidence gathering process may be made very expeditious, with nothing in the nature of anything like general or extensive discovery, and with constraint on the extent of oral evidence. The International Bar Association (IBA) has developed procedures for the taking of evidence, including the discovery of documents, in international arbitration.[12] In any event, it is open to the parties to agree, or the arbitral tribunal to determine, that parties provide something in the nature of a memorial, as it would be termed in the United States, setting out their claims, counterclaims, defences and replies together with a statement of the evidence relied upon and with relevant documents attached or otherwise provided. The process of oral evidence may also be expedited by the parties agreeing or the arbitral tribunal determining that the "chess-clock" process[13] will apply. This involves allocating set time periods to the evidence of each witness and their examination-in-chief, cross-examination and re-examination. This allocation is, subject to agreement, on the basis that each party or parties in common interest, are to have equal time to adduce their evidence. Alternatively, the "chess-clock" might simply involve allocating equal time to the parties or parties in common interest for the conduct of their cases, to use the time as they choose. Difficulties may, however, arise with this process where there is a disparity with the number of witnesses on each side or there is a particular need for more extensive cross-examination of some witnesses. However, these arrangements are structured the guiding light in international arbitration is the requirement in Article 18 of the *UNCITRAL Model Law on International Commercial Arbitration*, a requirement also contained in Section 33 of the English *Arbitration Act* 1996, that parties are treated with equality and are given a reasonable opportunity to present their case.

Cost of arbitration proceedings

A commonly perceived disadvantage of arbitration is its cost. There are, however, a number of aspects of this criticism which need to be considered. Various studies have shown that the cost of arbitration, being arbitrator fees, room hire and any arbitral institutional fees and expenses are actually a relatively minor part of the cost of arbitrating a substantial dispute. The most significant and dominant cost is the legal fees incurred by the parties. Efficient and timely proceedings and close case management by the arbitral tribunal would be expected to have the effect of keeping these costs down as far as possible, but there are limits on how effective the tribunal can be in this respect.

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[12] *IBA Rules on the Taking of Evidence in International Arbitration* 2010.

[13] See, Mark E Appel, "The Chess Clock: A Time-Management Technique for Complex Cases", *ICDR Handbook on International Arbitration Practise* (2nd ed., 2017), Chapter 10.

Of course, this is not an issue confined to arbitration proceedings as the courts also face similar issues and also apply case management techniques designed to keep the scope, duration and cost of litigation under some control. Internationally (and also domestically where their rules are applied), arbitral institutions, such as the LCIA and the ICC, control fees as each determines arbitrator remuneration[14]. *Ad hoc* international arbitration such as arbitration under the *UNCITRAL Arbitration Rules* 2010, on the other hand, may leave parties exposed to excessive fees and expenses save to the extent that there is some control under Article 41 where the Permanent Court of Arbitration is engaged to conduct a review.

Enforceability of awards

Reference should also be made to one very important advantage of arbitration in the determination of international disputes, namely almost complete global enforceability of awards. This is the result of the operation of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 ("the *New York Convention*") which enables recognition and enforcement of foreign arbitral awards, with some few exceptions, world-wide. This is in marked contrast to the difficulty in enforcing court judgments outside the jurisdiction under the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* 1971. This position may be ameliorated to some extent as countries accede to the *Hague Convention on Choice of Court Agreements* 2005 but, even then, will not approach the facility and extent of operation of the *New York Convention* in the foreseeable future. There is not, of course, any difficulty in enforcing domestic arbitral awards within the United Kingdom.

Confidentiality of arbitration proceedings

Finally, an advantage of arbitration which may, depending on the parties and the nature of the dispute, be thought to be very significant is both the privacy and the confidentiality of arbitration proceedings. The former is clear but in more recent times if confidentiality is critical it may need to be addressed by party agreement or selection of arbitration rules providing for confidentiality. In *Dolling-Baker v Merrett*[15]the English Court of Appeal held that a duty of confidentiality between parties to an arbitration agreement was to be implied as a matter of law. Although this proposition has a superficial attractiveness and does appear to accord with a popularly understood view of the nature of arbitration proceedings deeper examination discloses significant problems, which cast doubt on the proposition itself.[16] Indeed the High Court of Australia in *Esso Australia Resources Ltd v Plowman*[17]took this view. In the course of considering the question of confidentiality in this context the High Court concluded that confidentiality was not an "essential characteristic" of a private arbitration. Mason CJ noted that there were no decided cases in Australia or the United States that supported any obligation of confidence; and that had a confidentiality obligation formed part of the law it would be expected that it would have been recognized by the courts by judicial decision well before the decision in *Dolling-Baker*. Moreover, members of the profession with experience in arbitration expressed different views and there were found to be too many exceptions. These included witnesses who were under no such obligation and other circumstances where the obligation could not apply; such as, for example, the entitlement of parties to disclose to

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[14] See *LCIA Arbitration Rules 2014*, Rule 28; and *ICC Rules of Arbitration* (2018), Article 38; and see also, for example, *HKIAC 2018 Administered Arbitration Rules,* Schedules 2 and 3 with respect to the Fees and Expenses of Arbitral Tribunals.

[15] [1991] 2 All ER 890 (CA)

[16] And as the case law indicates: see, for example, N. Blackaby and C. Partasides QC, *Redfern and Hunter on International Arbitration* (OUP, 6th ed., 2015), 124-135, [2.161]-[2.196].

[17] (1995) 185 CLR 448

third parties, such as insurers.[18] At this point it is sufficient to note that confidentiality in both international and domestic, Australian, commercial arbitrations is now able to be achieved by the operation of statutory provisions if that is sought by the parties.[19]

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[18] The decision and reasoning of the High Court is considered in detail by Hockley, Croft, Hickie and Ho in *Australian Commercial Arbitration*, (LexisNexis, 2015), 40-46; and referring to the New Zealand Law Commission Report 83, *Improving the arbitration Act 1996* at [26]-[34] and [37]-[38].
Australian Commercial Arbitration

[19] See, for example, *International Arbitration Act* 1974 (Australia), ss 23C and 23G (opt in) and, for example, the *Commercial Arbitration Act* 2011 (Victoria), ss 27E to 27I (opt out).

Resolving Property Disputes in England and Wales: The case for Arbitration

Derek Wood QC

Professor Clyde Croft gives a comprehensive and authoritative survey of the role which arbitration now plays in the resolution of an increasingly diverse variety of international and domestic disputes. This very diversity, led in many respects by the practice in commercial disputes, and supported by the publication of outstanding textbooks, has created a highly flexible modern system. It is embodied in the Arbitration Act 1996 and can be effectively deployed across a wide spectrum of litigation.

As Professor Croft points out, arbitration has a long history in the resolution of property disputes. In the course of that history there has been a flow and counter-current of ideas between arbitration and statutory tribunals, enriching the procedures and practice of each. The role of the courts has been kept apart from this evolutionary process, handicapped by the rigidity of court procedures. Three well-known examples of effective arbitration in property practice can be cited, and valuable lessons can be learned from them.

Arbitration has always had, and continues to have, an important role to play in the settlement of disputes concerning agricultural property. The centuries-old standard form of agricultural tenancy has been the letting from year to year, running either from the beginning of the growing season (Lady Day) or after harvest (Michaelmas). On the termination of farm tenancies accounts between landlord and tenant have to be settled, for example dilapidations or, on the other side, the value of improvements made to the property or increases in the fertility of the land effected by the tenant. Traditionally these have always been settled by a knowledgeable valuer acting as arbitrator, the procedure lying well along the spectrum of informal process, described by Professor Croft as "look and sniff". (Sometimes informality could be taken to extremes: see *Re Hopper* (1867) L.R.2 Q.B. 367.)

The Agricultural Holdings Act 1948 and its successor Acts have brought and retained farm tenancies, in both the traditional annual and a modern fixed term form, into a rational and regulated regime, preserving arbitration as one of the major agencies for dispute resolution. The Agriculture Bill currently before Parliament reinforces its importance.

When the compulsory acquisition of land for canals, railways and other infrastructure projects began in the 19th Century, in a succession of private Acts of Parliament, compensation became payable to dispossessed landowners. The amount of compensation was assessed by arbitrators. The Acquisition of Land (Assessment of Compensation) Act 1919 established a body of official arbitrators to perform that role. This was maintained until the compulsory purchase of land occurred on a major scale following the Town and Country Planning Act 1947. The role was then taken over by the Lands Tribunal, set up by the Lands Tribunal Act 1949, which retains many of the features of arbitration. Indeed, the Upper

Tribunal (Lands Chamber), as it now is, has jurisdiction to act as arbitrator in references by consent under Lands Tribunal Act 1949 s.1(5).

In more recent times referral to arbitration (or, as a variant, referral to an expert) became standard in rent review clauses in commercial leases, reflecting the desire of tenants to have security of tenure over an appreciable period of years and the counterbalancing desire of landlords to ensure that the rent kept pace with inflation and other market factors.

These three examples amply show the strengths of arbitration as a medium for dispute resolution in the property field. They also provide interesting contrasts with some of the other types of arbitration illustrated by Professor Croft in his article.

Referral to arbitration in property cases is brought about either through the medium of an arbitration clause in a contractual document such as a lease or development agreement; by statute, as in the case of some farm tenancies; or simply as a result of an *ad hoc* agreement between the parties. In each of these cases arbitration holds a number of advantages in property disputes.

First, invariably the dispute is settled by a single arbitrator. Panels of three, which populate commercial and construction disputes, are hardly ever encountered, with an obvious saving in costs and time.
Secondly, property arbitrations are administered straightforwardly by the arbitrator under the guidance of the flexible procedures of the Arbitration Act 1996. The process is not overseen by a trade or professional body with its own set of procedural rules binding the arbitrator. There is no third party which has to approve and issue the award. The relationship between the arbitrator and the parties is immediate and direct. This is the case even if the arbitrator, in default of agreement between the parties, is appointed by the President of an institution such as the Chartered Institute of Arbitrators (CIArb) or the Royal Institution of Chartered Surveyors (RICS).

Thirdly, the parties can ensure that the arbitrator is a property expert – either a property lawyer with experience in the field or a surveyor or valuer. Some arbitration clauses can be highly specific, perhaps over-specific, in the qualifications which the arbitrator must possess.

Fourthly, in most property cases, unless they focus exclusively on a point of law, location is important and a site inspection is of overwhelming value. Arbitrators in property cases have always sat at a place reasonably close to the land which has generated the dispute, in order to make inspection and if necessary re-inspection easy, and to the great convenience of the parties. This practice is followed by the Lands Tribunal when appropriate in the exercise of its various statutory jurisdictions over compensation for compulsory purchase, rating, and the discharge or modification of restrictive covenants under s. 84 of the Law of Property Act 1925.

Experience of this type of case has also exposed some weaknesses which need to be and can be addressed. Property disputes are very adept at producing difficult points of law, notably in the ascertainment of conflicting rights over land, which can have a serious impact on land values; and in the interpretation of property documents. When this kind of problem arises the obvious choice of arbitrator is a property lawyer; but some standard appointment clauses stand in the way. Most notably this arises in the case of a clause requiring the appointment to be made by the President of the RICS who will instinctively look to the RICS' panel of surveyor-arbitrators. The surveyor appointed may then feel impelled to employ a lawyer as a legal assessor, thereby increasing the cost to the parties. Parties should be encouraged to think more deeply about the type of arbitrator they need, according to the circumstances of the case; and an appointor like the President of the RICS should be more astute in ascertaining details of the dispute. Secondly the expansion of the arbitral process over a widening range of disputes appears to be inhibited when title to land comes into play. Professor Croft has referred to the enigma of section 48(5)(b) of the 1996 Act which expressly provides that an arbitrator can exercise the same powers of the court to order specific performance of a contract *"other than a contract relating to land".* A courageous attempt was made to limit the scope of this provision by Etherton J (as he then was) in *Telia Sonera AB v Hilcourt (Docklands) Ltd* [2003] EWHC 3540 (Ch) and it has been more recently discussed in *Sterling v Rand* [2019] EWHC 2560 (Ch).

Does it expose some deeper difficulty in the enforcement of rights to land when determined by an arbitrator rather than by the court, for example in the case of the settlement of a boundary dispute, which in other respects would seem to be a natural candidate for arbitration? Can parties be confident that the Land Registry, accustomed to recognising and upholding judgments in chancery actions, will accord the same respect to an award?

In their commentary on the 1996 Act (6th Edition 2019, p561) Merkin and Flannery make this comment: "*Given the availability of quick registration and enforcement in the High Court of English arbitral awards under section 66, we are not certain that the exclusion of contracts 'relating to land' has any justification anymore.*" It is difficult see why, given the ease of enforcement of awards, this problem should ever arise in any case in which title is in dispute and it should not take a great feat of advocacy to break this apparent barrier.

Models for greater flexibility, refinement of process and reduction in cost in arbitration, compared with court procedures, continue to be developed. The Falcon Chambers model affords one example – see www.falcon-chambersarbitration.com. Remote hearings and the art of remote advocacy are here to stay, rendering arbitration even more attractive. Aside from references which must be made to the courts or tribunals under, for example, the Landlord and Tenant Act 1954 or section 84 of the Law of Property Act 1925 or legislation relating to some agricultural and residential property disputes, the balance of convenience continues to swing in its favour.

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