Federation of Defense & Corporate Counsel
I-3 Insurance Industry Institute, October 2-4, 2013
New York, NY

Window on the World – What is Different in Arbitration

by

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Arbitration is a contractually agreed process designed to produce binding decisions in disputes outside of the constraints of a national Court system. Some 148 countries have signed up to the 1958 New York Convention on international commercial arbitration, thereby ensuring truly international recognition and enforcement of arbitral awards. Indeed, an arbitration award is now generally more readily enforceable across borders than a Court judgment. Indeed, Lord Mustill, an English Lord of Appeal, and author of "Mustill & Boyd"[1], the leading treatise on arbitration, has opined that:

> *"This convention has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law."*

Likewise, the UNCITRAL[2] Model Law has been adopted by many countries into their own arbitration legislation. International arbitration institutions have emerged in the major commercial centres of the

[1] Lord Mustill, Arbitration: History and Background (1989) 6:2 J. Int'l arb. 43
[2] UNCITRAL is the United Nations Commission on International Trade Law

world, often basing their administration and procedures on the UNCITRAL Model Rules. Arbitration legislation based on the UNCITRAL Model Law has been adopted in both civil and common law jurisdictions. In Australia, for example, an arbitration act based on the old English Arbitration Act was replaced in 2010 by an International Arbitration Act based on the UNCITRAL Model Law. Yet despite this internationalisation and apparent harmonisation, there remain many important differences in the arbitral process as practised in different jurisdictions, which can catch the unwary by surprise – not only between civil and common law systems, but also between two of the most developed common law systems in the world, USA and England.

It so happens that USA and England are probably also the two most usual venues for insurance and reinsurance arbitration, certainly when involving insurers/reinsurers from those two countries, or indeed Bermuda. In broad terms, the venue of an arbitration constitutes its *"seat"* (subject to very rare exceptions), and the seat determines the procedural law (also known as the *"curial law"*) of the arbitration. It is the procedural law which determines how the arbitration will proceed. It is usually, but not always, the same as the substantive law applicable to the insurance/reinsurance contract concerned. A notable exception to this is the Bermuda form contract, in which the policy is expressly subject to New York law, but arbitration takes place in London, in accordance with English procedural law.

Each seat has its own arbitral history, sometimes longstanding, others more recent. That history inevitably affects a jurisdiction's current law and practice, even where legislation is premised on the Model Law . It is therefore interesting before dealing with the main differences in the arbitration process between the UK and the USA, to look at a broad picture of arbitral history. It is, of course, a complex story involving many countries, so the following will do little more than scratch the surface and will almost inevitably include some outrageous generalisations!

Historical background

Arbitration in one form or another has featured in many cultures for a long time. The reasons for the growth of an arbitral process in diverse locations and at different times, were often broadly similar. Official legal systems had a tendency to be slow. Access to Courts tended to be an expensive and inflexible, formulaic process applying laws unsuited to a new and developing world of commerce. Indeed, the Judges probably were not drawn from the newly growing merchant classes and were not qualified to understand disputes involving technicalities of trade. As long ago as 1st December 1663, the famous London diarist,

Samuel Pepys, visited the Court of King's Bench to watch a marine insurance case being tried. His diary entry includes the following comment:

> *"To hear how Counsel and the Judge would speak as to the terms necessary in the matter would make one laugh".*

The merchantmen of the City of London at that time were not happy that the Courts really serviced their needs or understood their business. Trade was growing and disenchantment was growing with it, but it was not until a century later that the then Lord Chief Justice, Lord Mansfield, took a direct interest in the efficient resolution of mercantile disputes. He adopted the practice of sitting regularly at the Guildhall in London during his 32 years as Lord Chancellor, between 1756 and 1788. Under his influence, consistent principles of mercantile law, especially in relation to bills of exchange, insurance and shipping, were developed. Incorporation of mercantile usages into English law was achieved by his practice of empanelling a body of jurors, who were experienced merchants from the City, to hear cases with him. Their decisions would not be binding, but he would incorporate their verdicts on questions of mercantile usage into his judgment.

However, these procedures were simply practices of Lord Mansfield, and were not enshrined in the law or the rules of Court. With his passing, the practice gradually fell away to be replaced by a return to the more rigid and formulaic Court rules and procedures. Nevertheless, what it had done was to introduce the concept of a court supported system involving merchantmen in the resolution of their commercial legal disputes.

The return to the old strict legal processes coincided with a period of exceptional commercial and trading activities. During this time, in 1871, the first Lloyd's Act was passed. This could be seen as a barometer of the increase in commerce and the resultant need for the growth of insurance. Business and the British Empire were booming. In America, heading for its first centenary since the Declaration of Independence, business was also thriving. It was at this time that Levi Strauss patented the still ever-present blue jeans with copper rivets!

In 1869, in London, a Judicature Commission was set up to look into the Court system generally. The City made great efforts to persuade the Commission to recommend the establishment of tribunals of commerce, or judicial arbitration. Here are two snippets from witnesses who gave evidence to the commission:

"To guard myself against the possibility of litigation, this is the clause which I have inserted in my form of charter parties:

> *'Should any difference arise between the owners and the charterers as to the meaning and intention of the charter party, the same shall be referred to three parties in London, one to be appointed by each of the parties hereto and the third by the two so chosen, and their decision, or any two of them, shall be final and binding …'"*

This sort of phraseology still has a familiar ring today. Another submission stated:

> *"The number of arbitrations that take place daily in London is extremely numerous, and there is both in the Baltic Coffee House and in other large centres of trade, a regular system of arbitration. At Mark Lane there is a system of the kind".*

These locations remain the centres of business in the City of London. The Baltic Coffee House became the Baltic Exchange, which is now right next to the Gherkin – the Swiss Re building. The London Underwriting Centre is now in Mark Lane.

Disenchantment with the law was causing business to take its dispute resolution into its own hands by way of arbitration. The report of the Judicature Commission noted that the judiciary lacked technical knowledge of commerce. It recommended that commercial actions be tried by a Judge assisted by two business assessors – thereby borrowing from concepts of arbitration. This did not, in fact, happen, but the ensuing interaction between commercial arbitration and the judicial system led to the development of the Commercial Court. Supervision and promotion of arbitration by the Commercial Court was to become a theme over the years.

It may, indeed, be that this coexistent development of the English Commercial Courts and the arbitration process influenced the development of *"ad hoc"* arbitration in London, rather than institutional arbitrations. Even the more recently formed arbitration bodies in London, such as the London Court of International Arbitration and, in insurance and reinsurance, ARIAS (UK), provide only a very basic framework for arbitration, rather than the much fuller and more formulaic provisions contained in, for example, the rules of the Paris based ICC.

It was in continental Europe that institutional arbitration came to flourish, beginning in Italy, which had developed a very advanced and organised commercial and trading community at an early stage. Exclusive power over such activities was often exercised by Guild tribunals. Whilst they may not have enjoyed the full force of legal support and enforcement now enjoyed by the arbitral process, the social and business consequences of falling foul of your Guild were usually potentially serious enough to ensure compliance with its arbitral awards. Accordingly, the systems of mainland Europe, and those which are derived from them, tended to favour institutional arbitration, whereas the English system had few such institutions.

In America, as in Europe and the UK, mercantile and commercial dispute resolution was in the early stages of an important period of development when, on 4th July 1776, the American Declaration of Independence was signed. Accordingly, whilst the US system of arbitration has its roots in the English common law system, most of its development has been independent of that system, but growing from the shared background. As in England, there was no tradition of institutional arbitration in the USA, but it was also a long time before statutory reinforcement of the arbitral system and consequent Court support (which had been adopted in the English and Commonwealth jurisdictions for some time) was adopted in the USA. The more hostile relationship between the Courts and the arbitral process therefore seems to have remained for longer in the USA than the other common law systems, and it even appears that some vestiges of this still remain, notwithstanding the primacy of arbitration as provided for in the Federal Arbitration Act. In any event, the US system of arbitration developed on a separate course from either continental Europe or the other common law countries, alongside a Court system that was also developing separately but from common law roots.

In all of these cases, it is inevitable that features of the respective jurisdiction's Court processes found their way into the respective arbitral processes. It is a tendency amongst arbitrators to adopt and adapt procedures with which they are familiar and therefore comfortable.

Before turning to the major differences that have emerged between arbitrating in the USA and in England in particular, I should acknowledge Lord Mustill's article *"Arbitration: History and Background"*, written for the Journal of International Arbitration in 1989, and upon which I have drawn heavily, but not exclusively, in the above tour through arbitral history. Lord Mustill's article is far more learned than my brief excursion!

The differences

Some of the differences between arbitrating in the USA and England are based on their respective Arbitration Acts, and others simply on practices that have developed in the different jurisdictions, although the development of the law and practice are, of course, seldom unrelated. Equally, arbitration clauses and practice can vary between different fields of commerce concerned. In this paper, my focus is on insurance and reinsurance arbitrations. I also propose to restrict myself to some of the more striking differences that may take the unwary by surprise when arbitrating in the other's jurisdiction.

1. The *"Tribunal"* and the *"Panel"*

The different words used in England ("tribunal") and in the USA ("panel") describe bodies of arbitrators with very different dynamics. In both countries, the arbitration clause in an insurance/reinsurance contract will generally provide for a three man panel or tribunal providing for the parties to appoint a member each, with an appointment mechanism for the third member.

Focusing for the moment on the two party appointed arbitrators, it should be noted that, in England, they have to be impartial and act entirely independently of the parties[3]. Accordingly, the party appointed arbitrators should not have private conversations with their appointing party about matters in dispute in the arbitration. This applies both before and after they are appointed, although it is possible prior to appointment to discuss availability, conflicts of interest, qualifications and terms, with a proposed party appointee. What one cannot do is discuss his views on the merits of the actual dispute in question.

In the case of institutional arbitrations, such as the ICC, the arbitrators' remuneration and terms will probably be in accordance with the institution's rules and, accordingly, these should not be discussed either. The ICC has to approve arbitral appointments and, if there is any hint of inappropriate discussion between the arbitrator and an appointing party, the ICC will not give its approval.

As a result, a party will normally appoint an arbitrator who it believes will understand the issues and decide them fairly, but who it also believes will appreciate the appointing party's arguments. After appointment, there is no ex parte contact between the arbitrator and its appointor concerning the substance of the arbitration. All communications between the appointor and its arbitrator must be copied to the whole tribunal and the other party. Hence, there are no reports between arbitrator or appointor of what the tribunal may be thinking and the parties have to rely on indications given by the tribunal during the course of the arbitration, just as they would in a Court process. This is equally true in arbitrations in civil law

[3] Sections 24 and 55, the Arbitration Act 1996.

countries, in former Commonwealth common law countries and, indeed, in the rules of all major international arbitral institutions of which I am aware.

The process of allowing ex parte contact between an arbitrator and its appointing party up until that contact is cut off by the panel (very often immediately prior to the pre-hearing briefs) is, to the best of my knowledge, exclusively American. The American arbitrator can therefore, in essence, be an advocate for its party's case within the panel discussions and is tasked with ensuring that the other panel members understand its appointing party's arguments. That is not to say that he is a *"hired gun"* (although this is not unknown). He is supposed to, and no doubt in the vast majority of cases does, vote his conscience when it comes to making decisions in the arbitration.

However, these different rules obviously create very different dynamics within the panel or tribunal and, in turn, give rise to different considerations being applied when choosing one's arbitrator.

Very often, a US arbitration clause sets out a process for appointment of the third arbitrator which is very different from that in the typical London market clause. Again, England is more allied with the Commonwealth common law countries, civil law countries and institutional arbitration bodies in this respect. The common process contained in many US arbitration clauses, whereby each party's arbitrator nominates three potential panel chairmen, after which the opponent strikes two and lots are drawn between the remaining two nominees (often implemented by reference to the Dow Jones closing odd or even), is very rarely encountered in a London market insurance or reinsurance contract, or in continental European contracts. It is perhaps fair to say that, even in the USA, there has been a move towards reference to an appointor, possibly ARIAS, in the absence of agreement on the identity of a third arbitrator. Again, the process that is adopted will have an effect on the parties' consideration of potential third arbitrator nominees.

The usual London market clause will provide for the arbitrators to agree on a chairman between them. They may consult with their appointors on this (and the ARIAS (UK) rules expressly allow for such consultation), but do not have to. They may just get together and agree a third arbitrator, a process which is probably rendered simpler by the fact that they are both truly independent of the parties in their deliberations and decisions. In the absence of agreement between the arbitrators, a London market clause will normally provide for a default appointor, which may be the Chairman of Lloyd's or another insurance industry body, with ARIAS (UK) being increasingly popular in more recent clauses.

However, a major difference arises between the English and other arbitral systems where the arbitration clause provides for the appointment of an Umpire, rather than a third arbitrator or chairman. Historically, in England, an Umpire only enters into the reference as a decision-maker if, and when, the two party arbitrators disagree on something. At that point, he takes over from the two party arbitrators and the arbitration, henceforth, is heard by him as sole arbitrator. This process is recognised in Section 21 of the 1996 Arbitration Act and also in Rule 2.16 of the ARIAS (UK) Arbitration Rules. It is a process that has rather fallen out of favour in practice, such that very often, even if the Arbitration Clause provides for an Umpire, the parties agree to a third arbitrator/chairman instead, so that all decisions will be decided by the three man tribunal. As the arbitration is a creature of their contract, it is open to the parties by agreement to vary the provisions of the arbitration clause. Most modern London market arbitration clauses provide for a three arbitrator tribunal with a Chairman, not an Umpire.

2. **The Award**

I will move straight from the formation of tribunal or panel at the outset of an arbitration, to their duties in making the award at its end, as these duties also have an effect on the dynamics of the tribunal and on the considerations that go into arbitrator appointment.

Under Section 52(4) of the Arbitration Act 1996, English tribunals have to give a reasoned award, absent agreement of the parties to the contrary (which is very unusual)[4]. Like a Court judgment, a reasoned award, sets out the award made and the reasoning behind it. A dissenting arbitrator will also set out his reasoning. Although it is well established that arbitration awards are confidential in England, the reasoning is, nevertheless, useful to the parties in that it explains the decision made and delineates the position as between them for future reference. It follows that an award made by a tribunal must be capable of reasoned support, which militates against purely compromise awards that are incapable of support by reasoned argument. The reasoning is also necessary for the parties to consider whether it is appropriate to invoke the very limited rights, which exist in England, to appeal on points of law.

As in the USA, an English award may be challenged on the basis of what may broadly be described as arbitrator misconduct or lack of jurisdiction. Indeed, this is true of most jurisdictions, albeit that there are differences between them as to the detail of the grounds available. However, the major difference between (in this case) England on the one hand and most other jurisdictions on the other, is that the 1996 Arbitration Act provides for appeals of awards in arbitrations which have their seat in England and Wales, on questions of law[5]. Appeals on questions of law are not contemplated by the UNCITRAL Model Law. Hence, for example, when Australia replaced its arbitral legislation, which had been based on English legislation, with the Australian International Arbitration Act in 2010, based on the UNCITRAL Model Law, the right to appeal on points of law was lost, unless the parties agreed otherwise (and even then leave of the Court would be required). This change was challenged as unconstitutional in that it delegated to tribunals the Courts' powers of deciding issues of law, with the result that an award which was wrong in law would still be enforceable by the Court[6]. The Court upheld the constitutionality of the Australian International Arbitration Act, its reasoning including the following:

[4] An agreement to dispense with reasons will constitute an agreement to exclude the Court's appellate jurisdiction under the 1996 Arbitration Act Section 69(1).

[5] It should be noted that English Courts view questions of foreign law as questions of fact. The foreign law has to be proved by expert evidence. Accordingly, the right to appeal on a point of law does not apply to the decision on foreign law of a tribunal with its seat in England.

[6] Air-Conditioner (Zhongshan) Co Limited v The Judges of the Federal Court of Australia [2013] HCA5

"The inability of the federal court, as a competent court under articles 35 and 36 of the Model Law, to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award does nothing to undermine the institutional integrity of the Federal Court. Enforcement of an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration. The making of an appropriate order for enforcement of an arbitral award does not signify the federal court's endorsement of the legal content of the award any more than it signifies its endorsement of the factual content of the award".

The Australian Court also noted that:

"… The common law jurisdiction to set aside an award for error of law apparent on the face of the award was an exception to the general rule that parties must abide by their agreement to accept an arbitrator's determination".

That common law exception to the rule was retained by English law in its 1996 Arbitration Act, even though that Act incorporated many others of the UNCITRAL Model Law concepts. Section 69 of the 1996 Arbitration Act sets out the basis on which an award can be appealed on a point of law:

"(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except –

(a) With the agreement of all the other parties to the proceedings, or

(b) With the leave of the court."

These are high hurdles to jump, particularly as the Court takes a very restrictive view, so few awards actually make it to appeal. It is therefore very unlikely that you will end up in a Court on appeal from an English arbitration award.

If these hurdles are cleared and the Court takes the appeal, it has wide powers[7]. Section 69(7) of the Arbitration Act 1996 provides:

> *On appeal under this section the court may by order –*
>
> *(a) Confirm the award*
>
> *(b) Vary the award*
>
> *(c) Remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or*
>
> *(d) Set aside the award in whole or in part."*

However, two recent decisions served to illustrate the limitations of the appeal process in setting legal precedent. One case related to the recoverability under reinsurance contracts of various claims, including accelerated claims for future losses arising out of inwards policy buy-backs and commutations (IRB Brasil Resseguros S.A v CX Reinsurance Co[8]). The other related to whether the 9/11 attack on the Twin Towers constituted one loss or two losses under the reinsurance in question (Aiowi Nissan Dowa Insurance Company v Heraldglen Limited and ANR[9]). In both cases, the Court found that the tribunals had applied the correct law in reaching their respective decisions. This meant that the tribunals were entitled to reach the decisions that they did. However, it would also have been possible in both cases that by application of the same correct law to the facts, the tribunal could have reached a different conclusion. Accordingly, it did not necessarily follow that, had the matter been heard in Court from the outset instead of arbitration, the outcome of the case as to coverage in CX Re and the number of claims in the WTC case, would have been the same.

3. **"Disclosure" and "Discovery"**

Again, different words used in England and the USA to describe similar, yet very different, processes. I do not intend here to go into detail on this topic, as it is covered in the paper entitled *"Window on the World –*

[7] Although arbitration awards are confidential, they may be referred to in Court on appeal and in that way can therefore become public.
[8] [2010} EWHC 974 (Comm)
[9] [2013}EWHC 154 (Comm)

What is Different in Europe and Australia", in relation to litigation. In both England and the USA, arbitrators tend to adopt discovery processes similar to those in the Courts of the seat – which, in the case of England, means the Commercial Court in London. One point to underline is the difficulty of obtaining third party discovery in England. There are no depositions for discovery purposes. Nevertheless, a third party documentary disclosure request has to be specific as to what is sought, must be proportional and necessary and will require a Court Order in support, pursuant to s43 -44 of the 1996 Arbitration Act. An arbitrators' authority only extends to the parties to the Arbitration Agreement (the arbitration being a creature of contract) so he has no authority to order third party discovery. Third party discovery is regarded very much as the exception, not the rule.

In continental Europe, third party discovery is not generally possible at all. As a result, a third party discovery order made by a US Panel against a continental European national or company may prove impossible to enforce in the jurisdiction concerned. It may even prove impossible to enforce in England if it does not comply with English law.

In reinsurance disputes or coverholder disputes, for example, there may often be substantial volumes of underwriting and accounting records involved. In dealing with party discovery, an English tribunal will look at the proportionality of any disclosure suggested and may well incorporate inspection provisions (reinsurance treaties and coverholder agreements, for example, will often include such a right anyway), and include sampling techniques in order not to create over-burdensome disclosure requirements and to keep a control on costs.

International arbitral institutions' rules tend to follow a different route, more akin to the civil law positions in litigation. Generally, in institutional arbitrations, the parties produce the documents upon which they intend to rely at the same as they serve their pleadings, as annexures. If one party requires production of documents from another, it specifies the documents required in a request served on that party and the tribunal. The other party then gives its views on the request and, to the extent that any documents or categories of documents are declined, the tribunal will make a ruling. In this respect, a tribunal will not countenance a *"fishing expedition"*. The documents have to be shown to exist, or at least to be documents that should exist, and their relevance to the issues pleaded will have to be established. If a party fails to produce documents which it has been ordered by the tribunal to produce, the sanction generally is that the tribunal will draw adverse inferences from that failure (unless, of course, there is a compelling explanation for it).

4. **Witnesses**

Whilst witness evidence may fall under the general ambit of *"discovery"* in the USA, in England it is an entirely separate matter from *"disclosure"* (which relates only to documents, electronic or otherwise). As in English Court proceedings, there is no process of depositions in English arbitration. The English procedure is to exchange written Witness Statements (mirrored in most international arbitrations and indeed in English litigation).

In summary, in England, written Witness Statements are exchanged and stand as the witness' evidence in chief, so that at the hearing he goes straight into cross-examination. The Witness Statement is, therefore, a detailed document, which cross refers to the documentation and must be accurate to the witness' best recollection. If the Witness Statement is incorrect or exaggerates points, it is highly likely that the witness will be tripped up on cross-examination with the risk that other parts of his evidence may also be considered tainted. He will have had a considerable amount of time to consider his evidence and reduce it accurately to writing, with the assistance of lawyers, to ensure that it says what he means it to say.

An English arbitration adopts the same procedure of exchange of written Witness Statements in respect of any expert evidence that the tribunal may allow (in which respect a tribunal comprising experts may be more difficult than a Court to persuade that yet further expert evidence is needed). A common procedure in English arbitration, which often can strike trepidation into the hearts of overseas clients and lawyers who are not accustomed to it, is the meeting of the expert witnesses without clients or lawyers present, with a view to identifying areas of agreement and defining their differences[10]. At the end of the meeting, the experts usually produce a joint memorandum which sets out points on which they have agreed and explains points on which they differ. Although the meeting itself is generally held on a without prejudice basis, this concluding memorandum usually forms part of the record of the arbitration and is filed with the tribunal. This procedure may be included in an English tribunal's procedural directions. It is, therefore, an important constituent of the expert evidence. To this extent, neither the instructing solicitors nor the appointing client has control over the experts' evidence, which in any event should be his independently held expert opinions.

[10] This is also a standard process when dealing with expert witnesses in English Court proceedings.

5. **Costs**

The position on costs again tends to mirror the litigation practice of the seat of the arbitration. In England, costs are dealt with in Section 61(2) of the 1996 Arbitration Act, which confirms this treatment:

> *"Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs".*

Hence, in England, as indeed in Europe and in institutional arbitrations generally, the usual rule is that the loser pays the winner's costs (i.e tribunal fees, reasonable lawyers' fees[11] and disbursements), whereas, in the USA, it is rare for a losing party to be ordered to pay such costs, unless that is specifically contemplated in the wording of the arbitration clause.

Common Ethos

Of course, these differences are really only different ways of achieving the same end, the fair and just resolution of disputes applying whatever law and practices the parties have agreed upon. England, USA, continental Europe and Australia are all serious legal and commercial centres (and, of course, are not the only ones). Their domestic laws embrace and promote arbitration and ensure that its results are enforceable. As a result of the New York Convention, arbitration is the most internationally acceptable and enforceable form of dispute resolution. There is a strong common ethos with a common goal, but it is important to know and understand the route to that goal which the seat of arbitration adopts, and indeed to realise that when designating the seat in the arbitration agreement.

[11] If the reasonable costs cannot be agreed between the parties, the tribunal can assess the costs and make an order or the issue can be referred to a costs judge, utilising the court procedures for assessment of costs (see S63 Arbitration Act 1996)