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## COMMENT

# COMMERCIAL ARBITRATION AND INFORMATION TECHNOLOGY DISPUTES

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## 1 THE DEVELOPMENT OF COMMERCIAL ARBITRATION

As late as the 1960s there was an old gentleman in once smart, but now shabby, clothes who paraded outside the Royal Courts of Justice in the Strand, carrying a placard which read 'ARBITRATE DON'T LITIGATE'. He was a famous character who had been around since the 1930s and he endeared himself to the judges who referred to him in several judgments.<sup>1</sup> It is fair to say, however, that the old gentleman was usually referred to in order to make the point that, in the case before the court, his advice had been misleading because the arbitration had proved far more difficult and costly than proceeding by way of litigation in the courts.

The Civil Procedure Rules 1998 (CPR), by making litigation more complicated and thus more lengthy and expensive, had the effect (intended or not) of encouraging alternative dispute resolution (ADR). Parties were encouraged to find methods of compromising their quarrels without recourse to the courts. Whilst one might query whether providing massive discouragement to citizens seeking to enforce their legal rights is entirely consistent with the Rule of Law, there is no doubt that the period of twenty years since the CPR came into force has seen a considerable growth in ADR. Mediation, early neutral evaluation and, in certain areas, adjudication have all increasingly been used to resolve disputes. Whether this has any merit beyond saving the parties (and the State) money may be disputed. After all, when a case is compromised, it must in most instances mean that one party has got less than 100% of their legal rights and the other has evaded meeting 100% of their legal obligations.

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\* QC, Hon DL (Buckingham).

<sup>1</sup> See, for example, *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation* [1980] 1 All ER 420 (Lord Denning MR).

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One form of ADR, however, has a long and honourable pedigree – arbitration. Parties have always sought the intervention of a neutral figure who will hear both sides of the dispute and make a ruling as to who is right. One might cite the Biblical case which has given us the phrase ‘the Judgment of Solomon’. Arbitration between commercial firms became formalised in the nineteenth century and was joined in the twentieth by arbitration in disputes within the building and construction industry.

In certain areas of commercial activity, such as shipping, arbitration became and remains the norm for dispute resolution. At first blush this might seem strange, particularly in England, where there has been a highly developed common law of obligations, especially contractual obligations, bolstered by Acts of Parliament. English and Welsh judges have always enjoyed a high reputation for impartiality and integrity and the system of appointing as judges only those who have proved themselves in the practice of litigation means that judges have the weight of experience as well as professional competence. England has had an Admiralty Court for centuries, albeit mainly concerned with mishaps to vessels (collisions, foundering, scuttling and so forth) and the reorganisation of the court system by the Judicature Acts 1873-1875 led to the new Queen’s Bench Division creating its own offshoot, the Commercial Court, with judges chosen from those whose practice at the Bar had lain in that field.

English law has also always been the most popular system of law for international contracts. Where the parties are able to choose the legal system governing their contract, they will choose a system which provides two key elements. The first is a developed body of law governing the type of commercial transaction involved. This was particularly the case with England and international trade. Britain was primarily a trading nation. The supremacy of the British merchant marine from the 17th century onwards, backed up, as it was, by the world’s premier navy, pushed British commerce to the four corners of the globe and, as a by-product, gave birth to an empire than encompassed about a quarter of the planet’s land surface. It also helped that Britain had pioneered the industrial revolution. It was thus a commercial imperative for the courts to develop a workable corpus of contractual law, geared to international traffic, and to create the contractual and financial forms needed, such as charterparties, bills of lading, letters of credit and the like. With international shipping came the growth of insurance, in particular Lloyds of London, and the bulk of the world’s insurance was placed in London. Naturally London insurers would write their policies under English law and expect the contracts they were covering to be subject to English law as well.

The one fed off the other. The explosion of international trade following the end of the Napoleonic War in 1815 required legal institutions and contractual forms to regulate it and the development of those institutions and forms encouraged the expansion of business abroad. If both sides of a transaction know that their rights and obligations are subject to a settled system of law, they are more likely to embark on the venture and, incidentally, more likely to find bankers to finance them and insurers to cover them when they do. Thus English law met the needs of international traders. This factor remained potent in contractual choice of law clauses and became commonplace even when neither party to the contract was British and the contract had no connection with the UK. Thus a Greek shipowner chartering a vessel to a Venezuelan oil company would tend to make the charterparty subject to English law and jurisdiction even though the vessel itself might never sight British shores. This remains true today and it is thought that half or more of international contracts are still made subject to English law and jurisdiction clauses.

The second element was trust. The English judiciary was famously upright and independent. This meant that judges would not accept bribes but try cases on their merits. Being independent meant that judges were not (and, importantly, were seen not to be) functionaries of the state. At a time when states were wishing to control trade for economic or fiscal reasons, an independent judiciary was a considerable asset.

Thus the background to the question is that, certainly by 1900 and probably much earlier, English law was the dominant law in matters of international trade and it has remained so to this day. With English law came English jurisdiction where the contractually agreed forum for resolving contractual disputes would be England - usually London.

## **2 REASONS FOR THE GROWTH OF COMMERCIAL ARBITRATION**

All this explains the popularity of English law and the English Commercial Court but one has to go further and ask why it should also lead to the growth of arbitration. In an era (sadly long since passed) when court fees were modest, litigation was, from the standpoint of logistics, a very cheap exercise. After all, the State paid the judges and provided the court buildings and staff. With arbitration on the other hand, the parties had to pay the arbitrator or arbitrators and to provide all the logistics out of their own pockets. On the face of it, therefore, arbitration was the more costly option. So why choose it?

The three advantages of arbitration were (and still are) speed, expertise and privacy. As regards speed, in the fast-moving world of

commerce, there was no time to go through the stately minuet of court proceedings. A hungry man would prefer a third-rate burger delivered instantly to a Michelin-starred meal in 24 hours' time. This was true in the late 19th century when the courts were less clogged and the procedure under the original Rules of the Supreme Court relatively straightforward. Today, when the courts are even more clogged (though, it must be said, not with commercial companies trying to get their disputes resolved) and we have the CPR, the old rubric about 'the law's delays' is even more to the point. It is not as if the judges were not trying to make things better but, as is so often the case, well-meaning attempts to streamline procedures simply make them more complicated and time-consuming. The CPR has spawned a sub-set of rules, the Admiralty and Commercial Court Guide, which is highly prescriptive and technical. The individual rules themselves may well be sensible but, in aggregate, they add layers of complication to what ought to be a relatively simple process.

Furthermore, once a highly prescriptive set of rules is established setting out the precise steps that litigants must follow with, naturally, fixed and often unrealistic deadlines, then the door is opened to what is sometimes called 'satellite litigation' in which the parties battle endlessly about points of procedure rather than getting down to trying the action on its merits. This patently works to the benefit of the party who has a weak case and can use procedural wrangles to delay the dreaded day when it has actually to pay its debts or, better still, drives the other party into such a state of despair and frustration that it is prepared to settle out of court. Indeed the real jackpot comes when the party likely to be found at fault, were the matter to come to trial, succeeds in getting the other party's case struck out for failing to meet some arbitrary deadline.

Most of this can be avoided by resorting to arbitration, which is why so many domestic and international contracts specify dispute resolution by arbitration, frequently to exclusion of the courts. In commercial matters this has always been encouraged both by Parliament and by the courts. The principal current statute is the Arbitration Act 1996 (the 1996 Act) which is a very well-drafted piece of legislation. Both the 1996 Act (section 9) and the CPR provide for a party to litigation to apply to the court for a stay of court proceedings on the ground that there is a valid arbitration agreement in force in relation to the dispute. Section 9(4) provides that 'on an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.' An arbitration agreement, therefore, cannot be circumvented by issuing a claim in the courts.

The absence of the CPR does not mean, of course, that there are no rules of procedure in arbitrations. The parties can, either by the arbitration

agreement itself or by subsequent agreement, adopt some or all of the CPR or the Commercial Court Guide but more often they adopt one of the various arbitral codes such as those of the London Court of Arbitration, the International Chamber of Commerce or the London Maritime Arbitrators Association. These tend to have the merit of being less prescriptive and more flexible and discourage satellite litigation.

The one area where arbitration falls behind litigation is that, being a consensual process, the awards of the arbitrators are not per se enforceable: the successful party has to go to the courts to give the award teeth and actually to extract the money from the losing party. The courts are happy to back this up and will normally rubber stamp the award and put in motion the court enforcement procedures. Only if the losing party has a valid challenge to the award will enforcement not be automatic.

From the outset the courts (and Parliament) were astute to avoid the situation whereby an arbitration was simply a preliminary skirmish on the road to litigation leaving the whole dispute to be re-tried by a court if one party disliked the arbitral award. The grounds on which an award can be challenged are very limited. The 1996 Act gives a party the right to challenge an arbitral decision on the ground that the arbitral tribunal had no jurisdiction (section 67), on the ground that there has been a serious irregularity in one of nine listed categories (section 68) or (though in very limited terms) on the ground that there has been an error of law (section 69). Otherwise the award of the arbitrators is final and unchallengeable.

All these factors mean that an arbitration has the potential to produce a much speedier result than litigation and this has led to the increased popularity of arbitration in all fields (not just commercial transactions and construction) over the twenty years since the appearance of the CPR.

The second major factor is that of expertise. Judges are (or should be) experts in the law and may have wide experience in contractual disputes in the relevant field both when in practice and on the bench. Only rarely, however, do they possess training and experience in what might be called the technical aspects of that field. This is not, of course, confined to judges sitting in commercial or construction cases. Many cases in all areas of the law require judgments to be made of technical matters which are outside the qualifications of any judge. This problem is usually solved by the employment of expert witnesses who present their findings and opinions to the court and the judge then decides which to accept.

In an arbitration, however, it is not compulsory to engage lawyers as arbitrators and in a panel of, say, three arbitrators it is relatively common for the parties to select one or more arbitrators who are not lawyers but experts in the relevant field. Many of those engaged as arbitrators in shipping matters have gained their experience as seafarers or ship-brokers

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or the like and it is not unusual for building arbitrations to be undertaken before arbitrators who are surveyors or engineers by profession. This does not obviate the need for expert evidence but, in commercial matters, much may turn on trade practice or usages which might be alien to a commercial judge but are immediately grasped by arbitrators who have spent a lifetime in the trade. This is true of other technical areas of law as discussed in the next section on IT disputes.

Perhaps the strongest card in the hand of arbitration is the fact that the arbitrators are chosen by the parties, unless they fail to reach agreement when the appointment can be made under some contractually agreed nomination scheme (e.g. the president of some professional body such as the Law Society or the Royal Institute of Chartered Surveyors). In the final resort sections 15-27 of the 1996 Act provide a series of mechanisms for the appointment and removal of arbitrators by the court, if necessary. Many arbitration agreements provide for each side to nominate an arbitrator with a third arbitrator or umpire being selected either by the parties jointly or by the two nominated arbitrators. Technically the difference between the two is that a third arbitrator has the same powers and obligations as the other two (s/he may, but does not have to, act as presider or chairman) whereas an umpire is there largely to step in if the other arbitrators cannot agree but otherwise does not take part in the decision making.

The ability to choose is a strong selling point. To be brutal, the quality of Her Majesty's judges is, how shall one put it, variable and litigants have no say in who is appointed to try their cases. In the recent past, some disastrously bad appointments to the bench of the Technology and Construction Court in London drove some litigants out into the provinces but many others into seeking arbitration. This is not to say that arbitrators do not get things wrong but at least they are the parties' choice of arbitrators and not foisted on them by the court listing office.

The third attraction of arbitration is privacy. Court proceedings are, with very few exceptions, held in public and open to the media. Not all parties in dispute are keen for their dirty linen to be washed in public and the issues in the arbitration might well involve highly confidential information which both sides would want to keep from competitors. Arbitrations are able to ensure this degree of confidentiality. For obvious reasons, government departments are quite enthusiastic about arbitrations as a means of circumventing media attention when public contracts go awry.

Consequently, although arbitration does carry extra expense – the arbitrators' fees, hiring premises for the hearing etc – the advantages discussed above can lead to cost savings over litigation, even if only

because the preliminary and interlocutory elements can be kept to a minimum. Many arbitrations are entirely case-managed online and the parties and the arbitrators only come face to face at the actual hearing. Thus, while the expense of witnesses, experts, documentation and so forth will be similar as between arbitration and litigation, the costs savings at the procedural stages may go a long way to offsetting the additional costs of fees and premises.

### 3 ARBITRATION AND IT DISPUTES

In recent years there has been a move towards referring information technology (IT) disputes to arbitration. These involve contractual disputes between employers and contractors arising out of contracts to create and install computer systems into businesses and into national and local government. Many of these disputes have involved very large and complex systems and the claims have amounted to many millions of pounds (and occasionally over a billion). There is thus an incentive for the parties to get it right first time rather than go through the entire gamut of litigation with possible satellite litigation and subsequent appeals up the line.

Computer litigation is, necessarily, a recent innovation. Much of it stems from *St Albans City and District Council v International Computers Ltd.*<sup>2</sup> The case arose from a contract between the Council and ICL whereby ICL was to create and install a computer system to handle the Council's community charge (poll tax). In carrying out the logistics necessary to process the poll tax it was vital to compile a list of all those living in the district who were liable to pay the tax and to assess who paid the full tax, who paid the reduced tax and who were exempt. On those figures would be calculated, *inter alia*, the amount of funding the Council would receive from central government. Owing to what was (after a vast amount of hassle) eventually admitted to be a glitch in the software, the totals were out by roughly 3% which although not large enough for the error to be spotted by the Council was large enough to involve the Council in losses of well over £1 million – a significant amount of money at that time for a small council.

At first instance, ICL had mainly relied on a contractual clause limiting liability to the lesser of £100,000 or the cost of the software. This failed as being an unreasonable clause and therefore void under section 3 of the Unfair Contract Terms Act 1977 (UCTA), largely because ICL had

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<sup>2</sup> [1996] EWCA Civ 1296; [1996] 4 All ER 481.

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had to admit that it carried insurance well in excess of any possible liability to the Council and the availability of insurance is a key factor in assessing reasonableness of an exclusion clause (UCTA section 11).

The key argument for the Council was that contracts for the supply of computer systems were subject either to the implied terms of fitness for purpose and satisfactory quality imposed by (what was then) the Sale of Goods Act 1979 section 14 or to identical terms implied at common law. This was not heavily contested at first instance but in the Court of Appeal ICL put forward the argument that computer science was so new and so advanced that any contract was in the nature of a joint development between customer and supplier in a rapidly changing field where both parties accepted the risk that the software might not work. Accordingly one could not imply any term as to quality or fitness, at least until the system was delivered in its final form (even if it was being used in the interim).

This argument was roundly rejected. Nourse LJ said:

“The basic submission of [counsel for ICL] as to the construction of the contract, advanced for the first time in this court, was that the defendant agreed to supply a system which was to be fully operative by the end of February 1990, when the amount of the community charge would have to be set. It was a system, as the contractual provisions recognised, which until then would still be in course of development. Thus, except where the defendant had acted negligently, the plaintiffs had impliedly agreed to accept the software supplied, bugs and all. ... Specifically, he submitted that the defendant was not contractually bound to provide software which would enable the correct figure to be extracted from the computer on 4 December 1989.

These submissions must be rejected. Parties who respectively agree to supply and acquire a system recognising that it is still in the course of development cannot be taken, merely by virtue of that recognition, to intend that the supplier shall be at liberty to supply software which cannot perform the function expected of it at the stage of the development at which it is supplied.”<sup>3</sup>

In a powerful judgment agreeing with the rest of the court, Sir Iain Glidewell<sup>4</sup> analysed the question whether software was ‘goods’ for the

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<sup>3</sup> Ibid 487.

<sup>4</sup> Ibid 492.



purposes of the Sale of Goods Act or the Supply of Goods and Services Act 1982 and he came to the conclusion that it was, at least when the software was supplied on a physical medium (such as a disc). This judgment that has stood the test of time, being affirmed on this issue, by the Court of Appeal as recently as *Computer Associates UK Ltd v Software Incubator Ltd*.<sup>5</sup> Sir Iain held that the statutory implied terms as to reasonable fitness and satisfactory quality did apply to the contract but, as a backup, would be implied by the common law by analogy. For consumer contracts, this problem has been resolved by the Consumer Rights Act 2015 which distinguishes between goods and ‘digital content’ but affords the same measure of statutory protection to the consumer’s rights in each case.

What the *St Albans* case also established is that substantial damages can be awarded where the failure of the software system had led to financial loss, even consequential loss. In *Horace Holman Group Ltd v Sherwood International Group Ltd*,<sup>6</sup> for example, the claimant recovered the cost of the wasted time of directors and staff in trying to sort out the problems caused by the negligent software and the losses sustained by reason of the fact that the failure to deliver a workable system prevented the claimant from making substantial cost savings through staff reductions. By the Millennium, therefore, computer litigation was an established genre of action.

As time progressed and computer systems became larger and more sophisticated, the possibilities for things to go wrong multiplied. Computer litigation thus became much more convoluted and the weaknesses of the court system more marked. IT disputes were (and are) assigned to the Technology and Construction Courts (TCC) in London and the few court centres with this jurisdiction. Initially, few, if any, of the judges of those courts had any experience of computer litigation whether from their former practices as advocates or from sitting as judges. Most, indeed, had been specialists in building and construction cases and while there are similarities between the two types of action (for example assessing responsibility for delays in performance and their associated costs), the differences are also very marked. Most computer contracts require the creation of new software to meet the client’s business needs and even when proprietary software is incorporated (such as Microsoft Office), it will have to be customised to those needs. Building, on the other hand, usually involves the employment of established techniques

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<sup>5</sup> [2018] EWCA Civ 518; [2018] 2 All ER (Comm) 398.

<sup>6</sup> [2001] All ER (D) 3.

and materials and there is little element of modular or user acceptance testing.

In addition, it must be said that before the reform of the TCC which brought High Court judges into the court for the first time, judicial standards were not high. There were ‘rogue’ judges whose conduct appalled even the Court of Appeal – see, for example *Co-Operative Group (CWS) Ltd v International Computers Ltd*.<sup>7</sup> Even when the judges were up to the task (H. H. Judge Bowsher QC was a highly competent judge of IT disputes) the procedural niceties of the CPR tended to get in the way. A complex computer dispute requires a horrendous amount of case management and a system whereby case management involves an *inter-partes* hearing in open court, preceded by formal skeleton arguments and the like, is both cumbersome and very expensive.

Then there was the question of privacy. Very few businesses like it to be known that their new computer system has proved a failure and the giants of the computer industry are equally not keen on their inadequacies being exposed to public gaze. With government departments, the desire for privacy is particularly acute: after all, they are spending the taxpayer’s money and the press will be only too happy to denounce waste and mismanagement. *In camera* is better than the cameras of the paparazzi.

Consequently the trend has been to refer IT disputes to arbitration. This enables a much greater flexibility, particularly in the preparation and presentation of material. Although some courts are, so to speak, ‘wired-up’, there is a shortage of technologically advanced courtrooms, whereas arbitration centres can provide a wide range of electronic and other facilities (some even have simultaneous translation booths, obviating the need for an interpreter standing next to the witness in the witness box).

IT disputes normally (and counter-intuitively) tend to generate huge quantities of paperwork. This is particularly the case if the client is a large corporation or, even more, a government department. Decisions will have been endlessly discussed at meetings or by correspondence and there will be reams of material logging everything that went (or appeared to go) wrong with the system. Electronics are also useful in demonstrating to an arbitral tribunal what the software was intended to achieve and the extent to which it met or did not meet the contractual specification.

What modern technology is particularly helpful for is in reducing the amount of physical paper needed for the arbitral tribunal, the lawyers and the witnesses. The existence of the Cloud means that, literally, millions of paper pages can be stored in the ether and summoned on-screen by simply

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<sup>7</sup> [2003] EWCA Civ 1955.

typing in a reference. The use of hyperlinks is vital, especially with witness statements. In the ‘old days’ and still today in many court trials, there is a paper witness statement in which the witness says ‘I now refer to my letter of 6 June 2017 [Bundle 46/tab 8/1056] which answers the criticisms made by Mr Smith in his email of 4 June [Bundle 43/tab 27/804]’ etc, necessitating anyone reading the statement having numerous lever-arch files open on their desk or, worse, in the witness box (a limited space in most courts). On the Cloud the statement reads ‘I now refer to my letter of 6 June 2017 [G7/16.32] which answers the criticisms made by Mr Smith in his email of 4 June [G6/5/54]’ and clicking on the linked references will call up all the documents on screen (or better still two or more screens) and much time and effort is saved not having to fiddle with unwieldy lever-arch files.

Time is a product of complexity and IT disputes are usually of a complexity that necessitates a lengthy hearing. Although court management has improved hugely in recent years, courts are still unwilling to sit in the (often long) legal vacations. Some courts (even the TCC) are reluctant to hold trials on Fridays (reserving Fridays for interlocutory applications in other matters). Because arbitration is a consensual process, the parties agree the sitting days in advance and have to keep to them. This leads to careful time-management. It is not uncommon for arbitrations to operate on the ‘chess-clock’ principle. The parties agree to split the time available into so many hours for one side and so many for the other (usually 50/50 but not always if there is a disparity in the number of witnesses per side) and each party can decide how best to use the time allotted to it.

IT disputes almost always involve expert witnesses, often of several disciplines: software experts, hardware experts, experts in the business processes of the client and forensic accountants to quantify the losses claimed. Both courts and arbitrators tend to be ruthless with experts, insisting that they hold meetings and do their best to narrow the issues and agree as much as can be agreed. Arbitrations can also be much firmer with imposing deadlines and limiting the time taken by experts at the hearing itself.

When contemplating computer and other IT disputes, therefore, the lawyer is not simply concerned with the law of contract or with the understanding of complicated technology. In most cases, the legal principles are the usual contractual principles and the usual questions are asked: what was the contract and what were its terms; was the contract varied and, if so, to what effect; what was the contractual specification for the system and has the supplier met that specification; was the system delivered on time and, if not, whose fault was it and how does that impact

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on price or damages; is the supplier entitled to money for extras or is the customer entitled to damages for non-performance?

### 4 CONCLUSION

In IT cases, the lawyer is concerned with the *mechanics* of the case in order to maximise the chances of a fair outcome while minimising as far as possible the time and money expended in reaching that outcome. Experience has shown that in commercial disputes and disputes involving areas of technical expertise, such as construction and IT, the greater flexibility of the arbitral process and the fact that it is a collaborative effort between the parties and the arbitrators gives arbitration the edge over court litigation. Obviously for the majority of ordinary civil cases, court litigation will be the only viable or affordable option and, at the end of the day, the existence of courts to provide the enforcement backup is essential to the survival of arbitrations themselves. For this relatively small corpus of disputes, however, arbitration is usually the most sensible solution.