Fast Track Re/insurance Arbitration for the 21st Century

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Introduction

As the Chairman of BILA noted when opening proceedings on 17th May, there has been a dramatic reduction over the past 15 years in the proportion of the Commercial Court's activity devoted to insurance and reinsurance disputes. That fall has been mirrored in London market arbitration which ARIAS UK was established to promote.

One of the reasons for that development appears to be the increased professionalism of the London market reflected in matters as diverse as heightened regulation and the market's embrace of contract certainty. Also, in recent years a great deal of ingenuity has been shown devising means to bring about negotiated settlements, mediation probably proving the most popular. Where these various techniques have their intended effect the number of disputes litigated or arbitrated to a conclusion must fall.
However, a proportion of all disputes will not be negotiable. The reasons are well-known. The parties (or more often the advice that they have each received) may be so far apart that compromise cannot be reached.
One or other party may be stubborn for economic or internal reasons. One or other may have collateral issues with reinsurers, third parties or even with the broker which make bi-lateral compromise an unsatisfactory solution. Therefore there will always be a proportion of cases where no matter how much ingenuity is brought to bear, a neutral third party will have to decide the matter. The dispute resolution industry does not seem, over the past fifteen years, to have applied the same degree of ingenuity to that more formal end of the dispute resolution process. That, one might suggest, is a deficiency. To what extent has formal dispute resolution evolved in the period to which David Kendal referred?

Taking the High Court first, opinions on this may vary but as the continuing efforts to reform the costs position show, the Civil Procedure Rules introduced in 1999 remain a work in progress. In the interests of uniformity these sacrificed the Commercial Court practice which appears by comparison to have permitted litigation to be progressed more speedily and efficiently. There is a continuing concern that under CPR High Court proceedings can prove unduly bureaucratic which in turn inflates the cost of litigation such that, if one is looking for drivers behind the growth of the settlement-driven mechanisms referred to above, disenchantment with C.P.R. represents a credible candidate. Whether *Mitchell v News Group*[1] will add or detract to the attractiveness of the High Court as a venue remains far from clear.

What about arbitration? In 1996, the new Arbitration Act came into force. We can hope, after nearly twenty years of very expensive satellite litigation about the meaning of its provisions, that its effect is now fairly clear. But what of arbitral process? ARIAS UK has discussed this at its last two annual conferences and it is fair to say that opinions on the efficiency of London arbitration have been divided. There are some lawyers who, perhaps through crocodile tears, bemoan the fact that in their experience arbitrations simply follow CPR. If so, they might serve find appointing more proactive arbitrators and inviting a greater degree of procedural creativity a constructive response. My personal experience of several references in the decade up to 2012 was that arbitration provided the most cost efficient process for the unsettlable market dispute. Talking to experienced arbitrators there is now a recognition that active and imaginative case management is what parties want. And it is hard to dispute that one of the respects in which arbitration trumps litigation is in its potential for procedural flexibility.

But that said, the format of a traditional London market arbitration can import inefficiencies. 99% of market arbitration clauses require a three person panel. While the three person panel is invaluable for disputes with a significant market dimension or heavily contested evidence that format may introduce three drawbacks:

- First, not every issue arising between two parties will necessarily need three arbitrators. The clause in the treaty or policy will have provided for three because that is the norm but three may be an unnecessary luxury.
- Second, a final hearing date fixed for the convenience for three means the reference will only proceed the when the busiest member of the tribunal has time to accommodate it.

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[1] [2013] EWCA Civ 1537.

- The third drawback is cost not only in paying three arbitrators' fees but also in consequence of delay. If a matter could be fit for hearing in four months but the busiest arbitrator can't sit for twelve months then allowing the matter to run on for another eight months is simply to invite eight more monthly bills from the lawyers. Work expands to fill the time available for it – Parkinson's Law undoubtedly holds good in dispute resolution.

Against that background, the question which ARIAS UK's Committee posed itself is whether we could usefully fashion a variant to the conventional London arbitration model so as to provide something which, for the right case, might avoid these pitfalls of the three person panel? When I say the ARIAS UK committee, I should qualify that immediately – we made use of market claims professionals as sounding boards on issues of principle. What has emerged is a set of rules known as the ARIAS Fast Track Arbitration Rules, AFTAR for short, which may be found on the website at arias.org.uk.

The parties' adoption of AFTAR

AFTAR was not, we anticipated, a procedure likely to be adopted in a contract at inception although we hear one innovative international insurer has already done so. Primarily we see it as a tool to be adopted by the parties once a dispute has become apparent, either as an alternative or supplement to a policy's existing dispute resolution process. The label "something new for the toolbox" covers the concept quite well.
It is not a process which we see as being confined to reinsurance. As the growth in Bermuda Form arbitration has shown, arbitration can be used effectively in direct liability insurance. There is no overarching reason for saying that it can never be used in other direct classes. Whatever the class of business, we envisage the parties looking at the matters that separate them and agreeing that a fast and confidential process such as AFTAR is appropriate for some or all of those questions. That may be because

- The issues are limited in scope (or the ones inhibiting settlement are)
- There is an urgency in resolving them
- The amount at stake makes AFTAR a proportionate choice
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With regard to the last of these, AFTAR is deliberately 'uncapped'. Views as to what constitutes a large claim will vary and the Committee saw no reason to exclude disputes simply because the amount at stake exceeded an arbitrarily-chosen limit.

Whatever it is that makes the matter suitable for a prompt one-arbitrator solution, we envisage the parties or their lawyers discussing at the outset whether AFTAR, as it stands or judiciously tweaked, is suitable. In short, would a swift binding ruling on Question X be of value to both parties?

Choice of Arbitrator

If the answer is that AFTAR does provide a useful tool for the job then the parties will need to choose an arbitrator. The membership of ARIAS UK has recently expanded and become more defined. It now includes a significant number of barristers, both silks and Juniors, skilled in insurance or reinsurance. And each of ARIAS UK's original members has been asked if he or she is prepared to sit as a sole arbitrator. As a result about half the ARIAS UK panel are ready to accept AFTAR appointments and are so shown on the website. But there is nothing in the AFTAR Rules requiring parties to appoint a member of ARIAS UK; if there is someone both parties would instruct or consult about this issue then he or she sounds like an ideal candidate.
Since speed is of the essence, and since AFTAR sets a cradle-to-grave running time of four and a half months, it is practicable (and we suggest good practice) to check when making an appointment that the appointee will indeed be free four months hence to write an Award. If he or she is likely to be distracted by some other heavy commitment, the parties might want to look elsewhere.

Procedure

One of the devices which has proved most effective in ensuring arbitration references progress promptly is the early procedural hearing. AFTAR contemplates that one will be arranged at the outset. The purpose is to get everyone together and map out the procedural timetable up to the closing date. There is no reason to await close of pleadings; if the parties have chosen this set of Rules then they will be well-advanced in their understanding

of what the issue is and how it can best be resolved. Settling a procedural timetable should not await the formalised pleading of their positions.
The AFTAR rules emphasise the arbitrator's complete discretion on procedural matters. The breadth of that discretion should be seen in the context of a set of rules where everyone has bought into the four month timescale; AFTAR is not, we consider, a set of rules likely to appeal to the mechanistically-minded litigator. What orders the exercise of the arbitrator's discretion will lead to will vary case-by-case but we believe there is, for example, a clear opportunity for imaginative English litigators to depart from the expensive and time-consuming practice of sequential pleading. Indeed, in a bespoke single arbitrator reference a few years back, that is what the parties did; it saved both time and expense.

Hearing and Award

There is no assumption under AFTAR that there will be a hearing. Instead the Rules anticipate a closing date being set by which point they should have said all that is required of them. Whether there is then a hearing will then be up to the arbitrator unless the parties have agreed otherwise.
The Award itself ought to be published within 14 days of the closing date. The sharp-eyed reader will note that the Committee has resisted any temptation to meddle with the position on appeal. That remains as set out in the 1996 Act unless the parties agree to vary it. Therefore AFTAR arbitrators will, in their Awards, have to apply the law. In short, there seemed no market support for importing the US model under which the certainty provided by the requirement to apply the law is supplanted by other considerations.

Summary

In summary, AFTAR offers a swift, single arbitrator framework for dispute resolution. It is one which can be easily adopted and adapted. The Committee is under no illusion that it will be a panacea for every insoluble dispute but hope, by reason of its greater procedural flexibility and focus on speed, that it provides an attractive solution in appropriate cases for the market and its customers. As the Notes on the website make clear, the Committee would very much welcome feedback from users on this initiative.