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Collected works from students of Aston Law School at Aston University
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Editorial

It gives me pleasure to edit this collection of essays. The collection is a product of the work of students on Aston University’s Commercial Law module in 2017-18. The essays take a pragmatic and critical look at the important concept of alternative dispute resolution. Some essays consider the importance and relevance of different forms of alternative dispute resolution, while others focus on a specific form of alternative dispute resolution, namely arbitration.

Within the essays, two important themes can be identified. The first theme is the significance of alternative dispute resolution as a means through which to settle disputes. This particular significance is revealed not only through the Civil Procedure Rules and various judicial statements to that effect, but also through many of the characteristics of alternative dispute resolution which make it so important to parties. The second theme identified within the essays concerns the effect alternative dispute resolution, and in particular, arbitration, has on the development of English commercial law and its competitiveness. Within this theme, a particular tension is unlocked, namely the tension between the desirability, on the one hand, of arbitration to commercial parties in the light of its private nature and the need, on the other hand, to ensure English courts continue to have the opportunity to develop a healthy body of case law addressing commercial issues. Such a tension assumes particular importance in the light of the increasing level of competition faced by the English Commercial Court from other jurisdictions.

Much has been said about the issues arising from this second theme, including by the then Lord Chief Justice, Lord Thomas, when delivering the inaugural Professor Jill Poole Memorial Lecture at Aston University in March 2017. The enthusiasm and interest of the students contributing to this collection owes much to that lecture. Aston University is grateful to Lord Thomas for writing the Foreword to this collection.

I do hope you enjoy reading the essays.

Adam Shaw-Mellors
Commercial Law Module Leader
Aston Law School, Aston University
Foreword

In giving the inaugural Jill Poole Memorial Lecture, I outlined that my lecture would cover judicial expertise, the use of assessors and procedural innovation. I added:¹

I know the last, to an English law school, will almost immediately find people fleeing for the exit. However, procedure is what you ought to be taught, as I was taught when I was at Chicago, as a first-year course, because it is central to the way in which any legal system operates and develops……. It is a fundamental problem in the development of legal education and quite a lot of the development of our law is that people do not understand the significance of procedure. They are not therefore prepared to be innovative.

It is therefore a particular pleasure for me to commend Adam Shaw-Mellors and the students who enrolled in his module in commercial law for including within the module issues of procedure. They have studied some difficult and controversial questions of procedural law in relation to litigation and arbitration and have written an excellent collection of essays. This is an admirable example of innovation which I hope will be followed by others and will greatly advantage the students in their future careers.

Each essay is well researched with an extensive, yet not over-burdensome, review of case law and the literature; it is welcome to see the references not only to US Law Reviews, but also to specialist arbitration journals. It was particularly gratifying to see the diligence reflected in observations recorded in As far as I Remember, the memoir of Sir Michael Kerr, who was successively one of the great commercial advocates, judges and arbitrators of the last century. His observations were made in relation to his fable of an arbitration – the Macao Sardine Case on which some commentators bestowed underserved authenticity by citing it in learned periodicals – an error into which none of these students fell.

Each essay was written with an evident understanding of the context, particularly the needs of trade and commerce and globalisation. Taken as a whole the students examined many of the main issues which arise when contrasting the advantages of litigation and arbitration – enforceability, confidentiality, speed, cost and the ability of the tribunal to reach the correct result through a proper understanding of the commercial context. Some essays tackled very

¹ Published in Essays in Memory of Professor Jill Poole, Informa, 2018, at pages 3 and 10.
specific subjects such as the use of penalties through the award of costs to force parties to engage in ADR and the likely impact of Brexit on arbitration and litigation in London. The fact that views differed was commendable – lawyers and businessmen have argued about the subject for as long as can be remembered and memories in this field are long.

In short all are warmly to be congratulated – Adam Shaw-Mellors in devising the course and for organising publication of these essays in the Aston University Student Law Review and each of the students for their outstanding essays and providing such an interesting read. May I wish each success in their future careers.

Lord Thomas of Cwmgiedd
The effectiveness of arbitration as a method of ADR

Parminder Dyal

1. Introduction

It has been noted that one of the most significant changes in arbitration recently has been the development of arbitration into an increasingly global practice, with recent changes allowing it to be used in countries where it was previously not used and where it was likely that parties would litigate. Notably, the rise of arbitration in Asia has been described as ‘meteoric’: the Singapore International Arbitration Centre reported an increase of 60 percent in the number of cases it dealt with from 2008 to 2009. These changes have allowed arbitration to become a more accessible form of ADR globally. This has been particularly valuable for businesses as, in the increasingly globalised world we live in, the number of international contracts, and consequently disputes, is higher than ever, demonstrating the increased need for arbitration around the world and the importance of continuing to ensure that arbitration remains an effective process.

In O’Callaghan v Coral Racing, Hirst LJ described arbitration as ‘a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law.’ Although there is no statutory definition of arbitration, the courts have developed tests to determine parties’ intentions regarding whether they agreed to arbitrate and whether the intention is reflected in the procedure adopted in reaching a decision.

This article will first consider key provisions from the Arbitration Act 1996 (hereafter ‘the Act’) and will assess the impact these provisions have had on arbitration and the effectiveness of the arbitration process. Secondly, it will analyse arbitral awards and the extent to which the provisions covering this area fulfil their purpose. It will then consider practical evidence of the

3 ibid 113.
4 ibid.
5 [1998] EWCA Civ 1801.
6 ibid 7.
effectiveness of arbitration, with a focus on the proclivity of businesses to use arbitration as their preferred method of dispute resolution. Subsequently, it will assess the shortcomings of arbitration which may lead to parties, in some circumstances, favouring litigation. Finally, the article will conclude by considering the success of arbitration and will examine how the factors elucidated in the article make arbitration a more favourable choice to resolve a dispute in comparison to any other method of doing so.

2. Key principles of arbitration

Many of the underlying principles of arbitration can be found in section 1 of the Act. The key principles which can be drawn from this provision are those of fairness, party autonomy, limited intervention by the courts, impartiality of arbitrators and avoidance of unnecessary delays and expense. The importance of section 1, despite it not providing any substantial legal provisions regarding arbitration, cannot be understated: ‘It is an exceedingly important and useful provision in that it makes clear both the regulatory objectives of the statute and the policy of promoting…adjudication through arbitration.’ Having such a provision, from the outset, makes clear the focus of the Act and provides statutory backing to arbitration, further increasing its credibility as a form of ADR and, therefore, its effectiveness.

Section 9 of the Act refers to the granting of a stay of legal proceedings. This section provides a party against whom legal proceedings have been brought, when the parties had earlier agreed

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8 Section 1 of the Arbitration Act 1996 states the following:
The provisions of this Part are founded on the following principles, and shall be construed accordingly –
(a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
(b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
(c) In matters governed by this Part the court should not intervene except as provided by this Part.
10 Section 9 of the Arbitration Act 1996 states the following:
(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaust of other dispute resolution procedures.
(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
(4) 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.
(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
to resolve disputes by arbitration, the power to apply to the court to stay the proceedings. This provision is vital in underscoring belief in the arbitration process: if parties are aware that, regardless of whether they commit to seeking a resolution to their dispute through arbitration, they could have potential litigation proceedings brought against them, they are unlikely to take part in the arbitration in an effective manner and this will lead to an undermining of the arbitration process as a form of ADR.

Awards

Under section 58 of the Act, the award of an arbitral tribunal is final and binding on both parties. In *Associated Electric and Gas Insurance v European Reinsurance Co of Zurich*, the court established that not only is the award final and binding upon the parties, they are also obliged to perform in accordance with the terms. It has been said that ‘one of the advantages of arbitration is that awards are easier to enforce internationally than judgments given by a court.’ Having the ability to enforce the award is of the utmost importance to the parties; were this not to be the case, it is likely parties would not engage in the process in the manner they should do and this could lead to both wasted time and costs for the parties and also would lead to the parties having future misgivings about the effectiveness of arbitration, were they to be involved in another dispute. This could have a consequential effect of parties instead only choosing to use litigation and there being too great a strain placed upon the courts of the United Kingdom, thus demonstrating the importance of parties trusting the effectiveness of the arbitration process and its ability to produce a binding award. The relationship between arbitration and the courts has been described as a ‘mutually supportive relationship.’

Sections 67-69 of the Act govern the challenging of an arbitral award and the various grounds on which a challenge can be made. In *Petroleum Company of Trinidad and Tobago Ltd v Samsung Engineering Trinidad Co Ltd*, using the power granted in section 67, the claimant

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11 Section 58 of the Arbitration Act 1996 states the following:
(1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.
(2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part.
13 Lord Thomas, ‘The Jill Poole Memorial Lecture: Keeping Commercial Law Up To Date’ (Aston University, Birmingham, 8th March 2017).
15 [2017] EWHC 3055 (TCC).
16 Section 67 of the Arbitration Act 1996 states the following:
sought to set aside a partial award issued after arbitration. The court held that, as the issue raised by the claimant was not one pertaining to the substantive jurisdiction of the panel, the appeal was not allowed. These sections of the Act are effective at providing parties with, albeit limited, grounds of appeal and ensure that, should a decision be made either incorrectly or if any procedural requirements are not met, there is recourse for a party to ensure that they can appeal against this decision. However, the strictness of these provisions has meant that only a limited number of appeals are being brought before the courts. Therefore, in order to safeguard the effectiveness of these provisions in the future, it may be necessary for the law to be changed slightly to ensure that parties are not bound by the stringency of these provisions.

**Practical evidence**

One of the ways in which the effectiveness of arbitration can be seen is in the preference of businesses, in particular, to use it as a method to resolve disputes. In the 2018 International Arbitration Survey, 97 percent of respondents indicated that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (48 percent) or together with other forms of ADR (49 percent). The enforceability of awards and flexibility of the process were cited as two of the main reasons for arbitration being the most popular choice of dispute resolution. This survey provides practical evidence of the effectiveness of arbitration, as it demonstrates how businesses are inclined to choose arbitration as their preferred method.

A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –
(a) Challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
(b) For an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order –
(a) confirm the award,
(b) vary the award, or
(c) set aside the award in whole or in part.
(4) The leave of the court is required for any appeal from a decision of the court under this section.

17 Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (London, 9th March 2016).
of ADR; this would not be true if they did not believe arbitration to be the easiest and most effective solution to resolving a dispute.

The privacy and flexibility offered by arbitration, in comparison to litigation, makes it a more attractive prospect for the parties involved in the dispute: arbitration hearings are usually confidential, which is likely to be of particular benefit to large corporations who may not want the public to be aware of any legal issues the firm is facing, and the process of arbitration can be suited to fit the needs of the parties, rather than the parties having to follow standard court procedures. The benefits of confidentiality and flexibility are significant and can make arbitration considerably more effective than litigation, as the parties are free to deal with the dispute as swiftly as possible and in whatever manner they wish to, whether that be through written submissions only or through examining witnesses, thereby making the resolution of the dispute a more efficient and effective process with only the necessary steps being taken to determine the outcome. This would not be possible with litigation, where there is a more formal procedure to follow which cannot be adapted to suit different cases.

As mentioned earlier, it is clear to see that, particularly in international disputes, arbitration is the method of choice for businesses to resolve their issues. This is due to the details and cross-border issues in such cases being more suited to a specialist in the area, rather than an ordinary judge; as put forward by Chuah, ‘[a]n arbitrator who has substantial industry in the trade or industry in question will make a splendid umpire.’ Having the ability to use specialist arbitrators, rather than having a judge who may not have experience or specialise in a particular area, increases the effectiveness of the arbitration process as it not only reduces the length, and therefore cost, of the arbitration in comparison to litigation, it also means that the dispute will be determined by a person who has an understanding of the industry and can resolve the dispute in a manner which may otherwise not have been apparent, whilst taking into consideration the particular needs of the businesses in certain industries. This is one of the reasons why arbitration is particularly prevalent in the construction industry; this is a specialist area in which it is unlikely that people who have not worked or been involved in the industry will have a sufficiently deep understanding to deal with disputes that may arise between parties.

21 ibid para 1-024.
Limitations

Although the arbitration process is generally perceived as a favourable way for parties to resolve their disputes, there are limitations inherent in the arbitration process itself which reduce its effectiveness. One such limitation is the appropriateness of arbitration for resolving certain disputes.\textsuperscript{23} For example, in instances where there is a need for a precedent from the courts, so that there is a binding legal authority, or where the facts of a case are complex, or where there is a significant level of animosity between the parties, it is likely that the parties would be better served by going to court, rather than using arbitration, or indeed any form of ADR, to resolve their dispute.\textsuperscript{24} If there was great animosity between the parties, for instance, a more satisfactory outcome is likely to be achieved by allowing them to go to court; their differences will not allow them to achieve a fruitful outcome from whichever form of ADR they choose and it would only incur unnecessary expense if they were to first conduct arbitration, and pay all the associated costs, whilst later to having to go to court to resolve the dispute anyway.

3. Conclusion

It is submitted that the characteristics of arbitration ensure that it is one of the most effective forms of ADR: it is unique in providing the combined benefits of confidentiality, flexibility, speed, and enforceability of awards.\textsuperscript{25} Although arbitration has been ‘extraordinarily successful’\textsuperscript{26} and effective, this has not been without considerable support from the English courts: Lord Thomas has said ‘[i]t is not always appreciated that arbitral centres need strong Commercial Courts to ensure that arbitration can function effectively.’\textsuperscript{27} This view has also been echoed by Lord Justice Gross: ‘I see the strength of Legal UK augmented by a strong court reinforcing thriving London arbitration…in turn increasing the attractions of English Law and thus, ultimately, the English Courts.’\textsuperscript{28}

\textsuperscript{23} Susan Blake, Julie Browne and Stuart Sime, \textit{A Practical Approach to Alternative Dispute Resolution} (3rd edn, OUP 2014) 41.
\textsuperscript{24} ibid.
\textsuperscript{25} Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (London, 9th March 2016).
\textsuperscript{27} Lord Thomas, ‘Commercial Dispute Resolution: Courts and Arbitration’ (National Judges College, Beijing, 6th April 2017).
Although arbitration can be a useful tool on its own, its effectiveness may be increased when it is used in combination with other methods of dispute resolution; particularly mediation. The effectiveness of mediation, in its own right, is clear to see in the results of the 2018 CEDR Mediation Audit: the size of the mediation market has grown by 20 percent since 2016 and the process has an aggregate settlement rate of 89 percent.\(^{29}\) The combined process can either take the form of arbitration-mediation, where the parties arbitrate and seal the award and then conduct mediation in order to resolve the dispute without having to unseal the award, or mediation-arbitration, where a neutral party acts as a mediator and, if the parties fail to reach an agreement, the neutral party will become an arbitrator and make a binding decision.\(^{30}\) Both of these combined processes are likely to have considerable success in settling a dispute as the parties are provided with both an opportunity and an incentive to come to an agreement: if both parties compromise and come to an agreement which is beneficial for both sides, they will not have to use the result from arbitration and risk losing more than they otherwise would have done.

Although the growth of arbitration is undoubtedly encouraging and a positive for the future of alternative dispute resolution, the expense at which this growth has come at must also be considered. It has been said that the increase in the use of arbitration clauses has been a ‘serious impediment to the development of the common law by the courts in the UK.’\(^{31}\) The popularity of arbitration in recent times has been such that, if it were to continue at such a trajectory in the coming years, there would be a significant impact on the development of English commercial law in the future, due to cases which would otherwise have been litigated instead being resolved through arbitration. Furthermore, the potential decrease in the number of cases that come before the UK courts may threaten English law’s (and the English legal system’s) global status in the areas of contract and commercial law, due to its lack of development. This is particularly relevant currently due to the rise of technology such as blockchain and bitcoin, which will require significant regulation and, therefore, it is imperative that the courts can keep abreast of such technology by having the cases, and therefore ability, to develop the law accordingly.


\(^{31}\) Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (London, 9th March 2016).
To arbitrate or to litigate? A critical analysis on the desirability of arbitration compared to litigation for commercial parties

Simran Ubhi

1. Introduction

Arbitration is a way of settling disputes other than through litigation. It is a private process which is especially useful to commercial parties as damage to their reputation can be prevented. As a form of adjudicative alternative dispute resolution, with arbitration a binding decision is imposed by an arbitrator. The process is regulated by the Arbitration Act 1996. Sections 1(a) to (c) specifically allow for ‘considerable flexibility’ as party autonomy is respected and court intervention is limited.¹ In O’Callaghan v Coral Racing,² Hirst LJ notes how the process is similar to litigation but offers the benefit of privacy.³ Furthermore, the desirability for international arbitration is evident as, in a survey, 56 percent of respondents said that arbitration was their preferred method of dispute resolution.⁴

This article argues that arbitration is highly desirable for commercial parties. English law is premised on party autonomy as it leads to commercial certainty and arbitration seeks to reinforce this. As Lord Salmon rightly points out, ‘certainty is of primary importance in all commercial transactions’.⁵ The article starts by analysing arbitration generally in terms of privacy, flexibility, and time and cost. It then discusses the enforceability of arbitration awards as this is crucial to the desirability of arbitration. Specific areas of statute, which have merit for the commercial certainty they provide, are also mentioned, followed by a critical look at the development of commercial law as a result of the private nature of arbitration.

¹ H Beale, Chitty on Contracts, vol 1 (32nd edn, Sweet & Maxwell 2015) para 32.003.
² O’Callaghan v Coral Racing Ltd [1998] ALL ER (D) 607 EWCA Civ.
³ ibid.
⁵ Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (The Laconia) [1977] 2 WLR 286 (HL) 878.
2. General analysis

Unlike the general position with litigation, arbitration is a private process. This is advantageous to commercial parties as it protects their reputation whereas litigation can often result in a tarnished reputation alongside a loss of profits and reduction in share prices. This is supported by Goode, in stating that businessmen prefer arbitration whereas lawyers prefer litigation. Due to the private nature of arbitration, commercial parties can, to a certain extent, prevent strain on their commercial relationships, as litigation can cause more damage to relationships. This is down to various factors like adverse publicity and high costs. Indeed, in *Pennock v Hodgson*, Mummery LJ points out that litigation ‘generates a lot of ill-feeling’.

Bello notes how there is a debate as to whether arbitration is actually quicker and cheaper than litigation. This is due to factors such as venue costs and arbitrator fees but as mentioned in the same article, technology is used to effectively increase the efficiency of these processes. Cruz expands on this, finding that arbitration was much more effective and commercially desirable than litigation through the study of two similar cases. Litigation is clearly much more time-consuming due to the nature of court proceedings which can frustrate commercial certainty due to the unpredictability that arises. Baskind notes how litigation ‘is often seen as potentially the most disruptive factor a business is likely to encounter’. This demonstrates how arbitration is more desirable as it allows for more control and certainty.

The flexibility in the choice of an expert arbitrator is vital to arbitration’s success, in particularly because parties’ ability to choose arbitrators means arbitrators can be selected based on their knowledge of the particular subject area or industry to which the arbitration relates. This is in contrast to the position with judgments given by the courts, with it being recognised that judges are not always best arbiters of commercial common sense as their view

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7 ibid para 39.04.
9 ibid [46].
11 ibid 162.
13 ibid 16.
15 ibid 1.
is tainted by the legal lens through which they generally see disputes. It is therefore clear how arbitration promotes commercial certainty as parties can be sure the arbitrator will have understood the issue at hand, in order to produce a suitable award. Lord Denning in *The Nema*\(^{17}\) provides an example of how an arbitrator is sometimes better than a judge as they have a better commercial background.\(^{18}\) Whilst flexible, arbitration does not suit every issue and litigation may be the only option if certain procedures are required; for example, an injunction. However, the same argument could be said about litigation that it is not always suitable. Litigation is most often unnecessary as the issue can be resolved through arbitration whilst sparing time and money for commercial parties.

3. **Areas of certainty within the Arbitration Act 1996**

The most commercially certain element of arbitration is the fact that the outcome is binding and final.\(^{19}\) Parties can be certain that a valuable outcome will be produced which is crucial for them to carry on with commercial relationships. Section 9 of the Act further provides commercial certainty as party autonomy and sanctity of contract are upheld because arbitration agreements will be enforced by the courts. This links closely to the separability principle in section 7. Moreover, the tightly controlled provisions of section 69 (providing the basis on which appeals can be made against arbitrators’ awards on points of law) allows for parties to be certain that the issue will not be re-disputed easily, reinforcing this finality and desirability. However, reducing the scope for appeals does slightly undermine party autonomy and may restrict the development of commercial law.

4. **Enforceability of arbitral awards**

The enforceability of arbitral awards is a fundamental reason for the desirability of arbitration. The New York Convention 1958\(^{20}\) is a foundational instrument for international arbitration as it allows for awards to be enforced in different jurisdictions. This is useful for large businesses who trade internationally as they can be certain that their business needs will remain intact. The private nature coupled with the ease of enforceability is a desirable situation that no other concept achieves. It promotes commercial certainty as parties can be sure that the award will

\(^{17}\) *Pioneer Shipping Ltd. and Another v B.T.P. Tioxide Ltd (The Nema) (No 2)* [1980] QB 547 (CA).

\(^{18}\) ibid 555.

\(^{19}\) Arbitration Act 1996, section 58.

be enforced; this is not apparent with litigation and can sometimes strain commercial relationships. International arbitration is important in the post-Brexit period to protect commercial relationships and to promote economic activity.

5. Development of commercial law

The privacy of arbitration is a major advantage but also poses an obstacle for the general development of commercial law as judicial precedent is not being set. Arbitration appears to have become a victim of its own success as parties use it with the intention of protecting their business reputation.\(^{21}\) In short, it has become a form of privatised justice. Lord Thomas advised that it is necessary for English law to keep up to date with issues like globalisation and technology.\(^{22}\) However, this cannot be done if matters are constantly dealt with privately. This is reinforced by the observation of Sir Bernard Rix\(^{23}\) that ‘our commercial law is going underground’.\(^{24}\) Moreover, Lord Thomas also said that we cannot allow our laws to fall behind others if we wish to keep our presence in the worldwide market.\(^{25}\) It is noteworthy that both Lord Thomas and Sir Bernard Rix are arbitrators themselves, highlighting the pressing importance.

There is a sensible solution to this issue regarding the development of commercial law. Appeal processes in section 69 should be relaxed, which will allow for the necessary and desired development of commercial law.\(^{26}\) Technological advancements are becoming increasingly relevant to commercial parties, for example crypto currencies, so a reform of section 69 would cater to the need for more modern case law. This does though come at the cost of finality as arbitrators’ awards will no longer have the same final value if the scope for appeals is broadened. This has an adverse effect on commercial certainty as parties will not be sure that


the decision made is final even though it is binding. It is suggested that the section 69 is needed but with balance so that commercial certainty is maintained.

6. Conclusion

Regardless of common law development issues, arbitration is still attractive to commercial parties. Whilst these issues are significant, there are solutions and ways to improve them. Arbitration cannot be undermined completely because of its issues, small or large, as it promotes commercial certainty and respects party autonomy which are both paramount to English law. It is necessary in a commercial setting to be able to tailor as many things as possible to business needs: arbitration allows for this with its flexibility and privacy components. Commercial parties will continue to use arbitration because it holds the upper hand compared to litigation as they can be certain they will receive a binding outcome sooner whilst meeting their business needs.
The essence of arbitration and litigation: has confidentiality impeded wider developments within English commercial law?

Samad Kayani

1. Introduction

Arbitration is a ‘form of [alternative] dispute resolution’ in which parties agree to submit evidence to a neutral third party in return for a binding decision. 1 Arbitration has been used ‘in England for centuries’, and also plays a crucial role in international commercial law. 2 Recent developments in technology have enabled easy access to information, and globalisation has led to a stronger need to protect business reputations. 3 Thus, arbitration is popular due to the confidentiality it provides, and international enforcement via the New York Convention (1958) has also contributed towards its success. 4 Within English law, arbitration is governed by the Arbitration Act 1996. 5 Albeit not perfect, the Act provides a ‘clear and coherent’ foundation for arbitration regulation and scope. 6 Great pressure to reform the prior 1950 Arbitration Act 7 due to excessive court intervention symbolises the value attached to confidentiality. Furthermore, the need for flexibility has resulted in a ‘recent boom’ of other alternative dispute methods, often complementing arbitration. 8 Consequently, controversy between arbitration

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5 Arbitration Act 1996.
8 Cruz, ‘Arbitration vs Litigation’ (n 1) 367.
and litigation has arisen, which Reif calls the ‘quasi-litigation complexion’. The binding nature of arbitration, coupled with the need for consent, has led to the favourability of arbitration in relation to litigation. However, despite advantages to arbitration, it is far from perfect. On a wider level, confidentiality is harmful towards advancements in society via the inability to create precedents, which thus restricts the development of English law’s cherished common law. This leads to uncertainty and inadequate guidance.

Nonetheless, this article will argue that arbitration is to be favoured as it ensures commercial flexibility and confidentiality. This theme will be developed, first, by contrasting arbitration directly with litigation and other forms of alternative dispute resolution; secondly, by highlighting the commercial benefits retained from confidentiality; and, finally, via an assessment of cross-border enforcement of arbitral awards.

2. Arbitration: differentiating between other forms of alternative dispute resolution and litigation

Arbitration versus other forms of alternative dispute resolution

Distinctions within ADR are primarily based on the binding nature of arbitration. This closely represents litigation, thus providing more certainty than non-adjudicative forms of ADR. The notion of receiving a binding arbitral award is attractive to commercial parties, as it guarantees an outcome. In the absence of an end decision, commercial parties often feel less motivated to actively contribute, which also carries the risk of inadequate cooperation and wasted expenditure. This is not pragmatic. Non-compliance ironically defeats the purpose of ADR, and according to Larson an early ‘pyrrhic victory’ for one party results in a stronger desire to

12 See Reif, ‘The Use of Conciliation or Mediation’ (n 9) 23-25.
issue proceedings via litigation.\textsuperscript{14} Such a paradox clearly portrays the fragile nature of non-
adjudicative ADR.

Furthermore, Rubins and Kinsella also emphasised the disadvantages of mediation and conciliation. They highlighted the need to favour arbitration over non-adjudicative ADR, as similar benefits are obtained, but with greater certainty.\textsuperscript{15} With non-adjudicative methods of ADR, excess time and money act as a metaphorical deposit: both are lost if the process fails.\textsuperscript{16} However, non-adjudicative methods of ADR can be completed for ‘considerably less expense in shorter periods of time’ in comparison to arbitration.\textsuperscript{17} This is vital in the commercial setting, as conveyed by Ward LJ in \textit{Egan v Motor Services}.\textsuperscript{18} Non-adjudicative methods also provide a more informal environment, which enables the preservation of commercial relations.\textsuperscript{19} Arbitration depletes such relations, as a result of its polar nature and semi-adversarial consequences.\textsuperscript{20} Additionally, due to cultural and political reasons, non-adjudicative forms of ADR have been favoured in Eastern Asian countries. This is particularly true in Japan and China, where notions of social harmony have led to commercial parties opting for mediation. In the west, Canadian legislation has also purported to promote international mediation.\textsuperscript{21}

Nonetheless, parties demand certainty, and ‘the principle of finality is a distinguishing characteristic of arbitration’.\textsuperscript{22} Non-adjudicative ADR is simply not well established, and thus not effectively regulated.\textsuperscript{23}


\textsuperscript{16} cf the advantages of non-adjudicative ADR as conveyed in \textit{Bradley v Heslin} [2014] EWHC 3267 (Ch) [22]; \textit{Oliver v Symons} [2012] EWCA Civ 267, [2012] 2 P & CR 2 [52]-[53].

\textsuperscript{17} See Reif, ‘The Use of Conciliation or Mediation’ (n 9) 23.


\textsuperscript{20} ibid.


\textsuperscript{22} Larson, ‘Substantive Fairness in International Commercial Arbitration’ (n 14) 105.

\textsuperscript{23} Thirgood, ‘A Critique of Foreign Arbitration in China’ (n 21) 93.
**Arbitration versus litigation**

Arbitration is often directly compared to litigation. Kerr J, extra-judicially, highlighted the distinction; and favoured the certainty litigation promotes.24 Contrasting, arbitration is favoured by businesses due to the flexibility it provides.25 This is primarily conveyed via the consensual nature of the procedure, which provides parties with autonomy. Furthermore, section 1 of the Arbitration Act 199626 supports the notion of liberty by allowing parties to freely govern their own disputes. This respects the sanctity of contract doctrine. Freedom also extends to parties’ ability to dictate the arbitral tribunal.27

There is a strong essence of paternalism instilled within litigation. Commercial parties have no control over the procedure, and thus there is a higher risk presented via inadequate ‘judicial expertise’.28 Lord Thomas, with reference to *Rose v Bank of Australia*,29 acknowledged the importance of such expertise. In the absence of adequate judges, many parties favour a commercially aware arbitrator.30 Furthermore, the courts generally adopt a literal method to contractual interpretation. Thus, there is often a failure by the judiciary to consider wider commercial circumstances surrounding certain industries.31 Arbitrators, on the other hand, are better equipped to deal with intricate commercial fields due to specialised expertise. This is particularly attractive in dynamic markets, which are constantly evolving.32 Inadequate exposure to commercial advancements has left the judiciary ‘far behind’; which results in incoherent judgments. This undermines English law, as the judiciary is not able to provide certainty on recent developments.33

Arbitration is also beneficial, as it avoids the detrimental cost and time implications notoriously associated with litigation. The need to ensure ‘unnecessary delay or expense’ within arbitration

27 See Sutton, Gill and Gearing (eds), *Russell on Arbitration* (n 2) ch 1.
28 See Lord Thomas, ‘Keeping Commercial Law up to Date’ (n 11).
29 *Rose v Bank of Australia* (1890) LT News 305.
33 Lord Thomas, ‘Keeping Commercial Law up to Date’ (n 11) 2, 4-6.
is clearly epitomised by section 1(a) of the Arbitration Act.\(^{34}\) Moreover, in a study comparing two similar cases, Cruz confirmed that ‘arbitration led to a resolution in much less time overall’ relative to litigation.\(^{35}\) Within a commercial setting, receiving a quick verdict is paramount. However, cost advantages regarding arbitration are distorted. Despite high court fees in litigation, prices are stable. This creates a paradox whereby parties’ objective of saving costs is ironically hindered by the various charges embodied within arbitration; particularly in cases of institutional arbitration.\(^{36}\)

Irony further extends to cases of arbitral partiality. The notion of fairness underpins arbitration; without it the process is futile. Generally, arbitrators do act in an impartial manner, albeit recently in *Maurice J Bushell v Born*,\(^{37}\) a dispute had arisen regarding an arbitrator’s misconduct. Similarly, in *Sierra Fishing co v Farran*,\(^{38}\) the court granted an application to remove an arbitrator on impartiality grounds. Both cases exemplify the inconsistency with arbitration, however, due to the confidential nature of the procedure many successful cases are not publicly known. The courts are also willing to protect and encourage arbitration. Through the ‘stay of legal proceedings’ doctrine, litigation can be postponed subject to an arbitration agreement.\(^{39}\) In contrast to the US, English courts cannot force parties to arbitrate; however, cost sanctions are imposed where unreasonable refusal has occurred.\(^{40}\) This reflects the importance attached to arbitration.

### 3. Commercial confidentiality and wider development

The most fundamental aspect of the arbitral process is the ability to retain confidentiality. This is due to parties’ reluctance to receive adverse publicity via the disclosure of a dispute.\(^{41}\) The ‘great majority of disputes’ within litigation are decided on the question of fact, and there is a duty on parties to disclose all relevant documents to one another.\(^{42}\) This diminishes the notion of party autonomy. In practice, there is a strong need to maintain a good commercial reputation,
as this subsequently aids future relationships and business transactions.\textsuperscript{43} The disclosure of documents can lead to adverse implications towards parties’ reputation within society. Individuals, within a company, can also be the subject of negative publicity. Thus, the decision to arbitrate is often favoured by directors and other shareholders.\textsuperscript{44}

Recently, great emphasis has been placed on the regulation of trade secret law as a means to protect innovation. The newly adopted EU Directive on Trade Secrets aims to ensure that adequate protection is given to such business secrets.\textsuperscript{45} Furthermore, parties often use confidentiality as a means of obtaining a competitive advantage. Arbitration, as a ‘private mechanism’, acts as a metaphorical shield, where parties’ interests and disputes are protected from the outside world.\textsuperscript{46}

However, despite such benefits, confidentiality is harmful towards English law. Branded by Lord Thomas as a ‘pragmatic compromise’, the popularity of arbitration has resulted in fewer developments within the law.\textsuperscript{47} Confidentiality, albeit attractive, has seriously impeded further advancements as a precedent of significant issues cannot be established. In particular, the technological revolution has resulted in the expansion of new complex fields. For example, the rise of Bitcoin and Blockchain clearly exemplify the rapid rate of global development within the financial sector.\textsuperscript{48} It is thus important for the law to adapt and conform to such changes. Arbitration, although viable, is not suitable for wider developments in the law. A better approach is to ensure the courts deal with complex disputes on recent advancements. This would enhance clarity via the consolidation of the legal position on such issues. As highlighted by Lord Thomas, whereas the judiciary has the authority to develop the law, arbitrators do not, while the courts provide detailed explanations of legal principles, which provides certainty for

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\item See Pennock (n 19) [46] (Mummery LJ); Emirates (n 14); SDI Retail Services Ltd v King [2018] EWHC 1697 (Comm) [42]-[43].
\item For a better insight on the role of shareholders within an organisation see Henry, \textit{Understanding Strategic Management} (n 3) pt 3.
\item ibid; Kevin FK Low, ‘Bitcoins and Other Cryptocurrencies as Property?’ [2017] LIT 235, 248-59.
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commercial parties. The notion of open court proceedings also invites discussion and debate on decisions; allowing the law to reform in line with societal expectations. In comparison, the covert characteristics of arbitration are detrimental in this regard, as it depletes the common law. Commercial parties often seek an effective solution at a fast rate, thus concerns about developments in the law are of little importance to them. The role of arbitral appeals has helped to a certain extent. This is conveyed via Schuler v Wickman where adequate guidance was given on contractual conditions. The decision added a degree of certainty, which aided contract drafting and further disputes.

Nonetheless, flexibility underpins arbitration, and confidentiality as a means of protection is pragmatic. Furthermore, the suggestion that judges should sit as arbitrators is one of great merit. It would enable arbitration to operate alongside litigation, with judges acting as a medium for further developments.

4. Cross-border enforcement of arbitral awards

The arbitral award is an important element of arbitration. It embodies the notion of finality, and gives commercial parties confidence in the procedure. In relation to international commercial law, enforcement across numerous jurisdictions is highly beneficial. The New York Convention has enabled such recognition and enforcement of arbitral awards. Although the imposition of awards is not guaranteed, existence of the Convention has provided an effective foundation. It is more difficult to enforce foreign judgments, and thus arbitration proves more effective than litigation.

Furthermore, with uncertainties arising from Brexit, it is difficult to predict the autonomy of English courts in regards to enforceability within the EU. Parties are thus more likely to opt for arbitration, as enforceability under the New York Convention is likely to remain intact. Uncertainty is harmful towards London’s commercial reputation. The law in other jurisdictions

49 For further evaluation on how arbitrators are limited within their capacity to develop the law see Lord Thomas, ‘Developing Commercial Law through the Courts’ (n 47) 5-6.
50 ibid.
52 See also Lord Thomas, ‘Developing Commercial Law through the Courts’ (n 47) 6.
53 As highlighted by Lord Thomas in Lord Thomas, ‘Commercial Dispute Resolution’ (n 47) 6.
55 ibid.
57 McKendrick (ed), Goode on Commercial Law (n 1) ch 38.
is going through significant evolution. France, in particular, has revised its civil code in the aim of enhancing the accessibility of French arbitration law for international practitioners.\(^{58}\) Additionally, with the ‘potential exodus’ of businesses from London following Brexit there is a real threat of transition away from London as the primary seat of arbitration.\(^{59}\) The need for certainty and predictability in the law is paramount for businesses, thus it is essential for the judiciary to keep English law up to date with recent advancements.\(^{60}\)

Although the arbitral award is binding, it can be challenged. Appeals are generally based on the tribunal’s substantive jurisdiction. It is not uncommon for arbitrators to make an error, and their jurisdiction is limited to the arbitration agreement.\(^{61}\) Berg, with reference to the New York Convention, also conveys the lack of stability associated with the arbitral award. However, enforcement is rarely challenged due to fear of public attention. The confidentiality associated with the arbitral award is attractive, albeit impeding on wider developments.\(^{62}\) A solution, as advocated by Lord Thomas, is the publication of awards with party names redacted. This is pragmatic, as it provides a balance between societal interests and parties’ desire for confidentiality.\(^{63}\) The need for publication was also highlighted by Sir Bernard Rix, who feared that ‘commercial law is going underground’ due to insufficient development via litigation.\(^{64}\) Such a bold statement clearly symbolises the need for the courts to promote certainty. Publication also adds consistency to arbitral proceedings, as awards can be subsequently referred to by arbitrators. This ensures that future arbitral decisions are fair by incorporating principles of precedent within arbitration.

5. Conclusion

Arbitration, as an alternative to litigation, has proved to be popular via the commercial benefits attached to the procedure. Most importantly, flexibility has ensured party autonomy, and


\(^{59}\) McKendrick (ed), Goode on Commercial Law (n 1) ch 39.


\(^{62}\) See Berg, The New York Convention of 1958 (n 4) ch 2.

\(^{63}\) See Lord Thomas, ‘Commercial Dispute Resolution’ (n 47) 6-7.

\(^{64}\) Sir Bernard Rix, ‘Confidentiality in International Arbitration: Virtue or Vice?’ (Jones Day Professorship of Commercial Law Lecture 2015, Singapore, 12th March 2015).
confidentiality has allowed the preservation of business reputation. Furthermore, confidentiality underpins the success of arbitration. In such a dynamic society, preserving a competitive advantage via secrecy is a well-accepted practice among organisations. Additionally, it is difficult to predict the future of English law due to the uncertainties surrounding Brexit. In order for London to remain a viable source of international arbitration, wider developments in the law must be compromised. To improve, however, more judges should act as arbitrators within arbitral proceedings and awards should also be published; with parties’ names redacted. This would help alleviate issues surrounding confidentiality and wider developments via the incorporation of the doctrine of precedent into arbitral proceedings.
A critical analysis of the desirability of arbitration in English commercial law

Yasmin Kalani

1. Introduction

Commercial arbitration has achieved considerable success as a highly efficient mechanism for settling disputes. This article will highlight why arbitration is attractive to commercial parties in comparison to litigation. As well as this, it will analyse the Arbitration Act 1996 and the New York Convention in the light of the rules governing appeals, awards, and enforcement. This article will also argue for greater transparency with regard to principles relevant to arbitration, in particular with regard to the relationship between the private nature of arbitration and the need to ensure the general development of English commercial law.

2. Why is arbitration desirable for commercial parties?

Generally, businessmen prefer arbitration and lawyers prefer litigation.1 With arbitration, parties can choose one or more arbitrators in whom they have confidence, the person(s) appointed often being expected to specialise in, or possess knowledge of, the industry relevant to the businesses in dispute. The arbitral tribunal’s combined knowledge and experience will be greater and the on-going dialogue between arbitrators ensures each case is fully analysed, thus errors are more likely to be avoided. Professor Goode emphasised that a unanimous decision reduces the risk that the award will not be enforced.2 There is further support from Redfern and Hunter in stating that sufficiently experienced tribunals grasp quickly the important issues of fact/law in dispute.3 This will save parties time and money as well as enhance the prospect of a sensible award as a result of parties taking advantage of procedural freedom.

It appears that parties choose arbitration because of private proceedings and the enforceability of awards. Russell on Arbitration states that most importantly, in the modern world of cross-border transactions and collaborations, arbitration provides an element of neutrality regarding

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location, governing law, and constitution of tribunal.\textsuperscript{4} This makes arbitration an attractive proposition in international commerce.

Confidentiality of arbitral proceedings is a powerful attraction for businesses and has been one of the important benefits of arbitration. Unlike litigation, where the public can generally be present at hearings, arbitration is conducted privately. There may be trade secrets or competitive practices to protect or simply the reluctance to have details of commercial issues, for example, bad decision-making, the subject of public and media knowledge and potential scrutiny. Parties can thus discuss their differences, grievances, and financial circumstances without concerns as to public perception. Redfern and Hunter suggest, however, that over years confidentiality has been eroded.\textsuperscript{5} There is compelling evidence to support this because markets often know which parties are involved in arbitration and what arbitration is about. Even if confidentiality is maintained throughout the proceedings, information will begin to leak and private markets in the trade of arbitral decisions develop.\textsuperscript{6}

As businesses become more complex, misunderstandings and disputes are occurring in increasing numbers. To litigate, Charles Bernheimer stated, is ‘the most wasteful procedure a businessman can resort’ to.\textsuperscript{7} This is accurate to an extent since it can dismantle commercial relationships between the parties as well as being expensive. In order to strike a balance between the development of commercial law through court judgments and the doctrine of precedent on the one hand and the desirability of arbitration on the other hand, litigation needs to be made an attractive option for parties.\textsuperscript{8} However, Lord Thomas raised the question, ‘can litigation be sufficiently attractive?’\textsuperscript{9} The introduction of the Financial List is a striking development which is significant for London. The Financial List provides a new forum for

\textsuperscript{4} D St John Sutton et al (eds), \textit{Russell on Arbitration} (24th edn, Sweet & Maxwell 2015) 1-027.
development by revising procedures to make court proceedings more cost effective.\textsuperscript{10} The Financial List draws in a wealth of expertise; judges are expected to keep up to date with changes in the market and to resolve disputes based on their speciality, knowledge, and understanding of markets.\textsuperscript{11}

The attractiveness of litigation, compared to arbitration, might be doubted, however, because arbitration embodies elements of party autonomy, confidentiality, enforcement, speed, low cost, and often avoids significant degrees of hostility – factors which litigation does not always have the capacity for. Yet, the benefits of arbitration must not be overstated. Arbitration has the potential to be cheaper and speedier than litigation, but by no means does this always follow. Moreover, the arbitrator’s powers, despite being reinforced by statute, are not as extensive as a judge’s. Indeed, a fundamental flaw in the imbalance of power between a judge and arbitrator is that judges are trained to think and act judicially and treat admissibility and weight of evidence with caution. Some arbitrators might feel inclined to decide a case on their view of what is fair without regard to the nature of the evidence.

3. Enforcement and New York Convention

Another perceived advantage of arbitration is the enforcement of awards through the New York Convention (NYC). The NYC constitutes a framework for overcoming differences between various legal systems which might serve to frustrate commercial parties contracting internationally. At the end of arbitration, assuming no settlement has been reached, the tribunal will issue a form of award. The end result will be a binding decision (unlike mediation or conciliation where parties are free to accept or reject as they please). It is another opportunity for additional delay and expense. When it comes to certain provisions of the NYC and the enforcement of awards, the NYC’s drafters specifically chose to use the word “may” rather than “shall”.\textsuperscript{12} This is satisfactory on the one hand, because it shows the drafters’ intention to preserve the discretion of every legal system. On the other hand, it highlights practical inadequacies because the position taken by the courts of the seat of arbitration has no absolute

effect in other legal systems. This is supported by Malcolm Holmes who states ‘such provisions lack in certainty’. Therefore, the language of the NYC is to be read in good faith, in context and with a reasonable degree of common sense.

One solution that has been suggested is to create a new international court for resolving disputes over the enforcement of arbitral awards. But in cases in which different tribunals reach different conclusions on the same issues, the proposed international court would need to function, in effect, as a court of appeal rather than simply as an enforcement court. This would, however, be desirable for lawyers and arbitrators, who would welcome consistency of decisions; but it might not be suitable for commercial parties looking for the solution to the particular dispute they are faced with, rather than for the opportunity to contribute, at their own expense, to the development of the law.

4. The Arbitration Act 1996

The Arbitration Act 1996 is satisfactory because it gives total supremacy to the wishes of the parties. This is supported by Thomas Carbonneau, describing the Act as a ‘remarkable piece of legislation’. This is accurate in the sense that it is highly accessible from a linguistic and organisational viewpoint. However, the restricted nature of the right to appeal is unsatisfactory because it is limited by section 69 which reflects the guidelines set out by The Nema and The Antaios. It remains difficult to predict with a reasonable degree of certainty in what circumstances the court will accept an appeal. It is unsatisfactory that leave to appeal is given in few cases because it is problematic for commercial parties as they cannot predict whether their case will be one the few. This is widely supported by Lord Thomas who

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17 BTP Tioxide Ltd v Pioneer Shipping Ltd (The Nema) [1980] QB 547 (CA).
emphasised the real concern of the lack of case law. Neil Andrews in his lecture also supported this by stating that section 69 has potential to be problematic if it ‘chokes off too many commercial cases.’

5. What does arbitration mean for commercial law?

Lord Thomas, in a series of lectures, argued that the relationship between the courts and arbitration requires re-balancing. It is restrictions on appeals that have held back commercial law from developing. His Lordship suggested introducing a flexible test for appeals on a point of law. This is potentially problematic because expanding section 69 would risk disregarding parties’ intentions and would drive international arbitration out of London. This view is further supported by Sir Bernard Eder who said the balance currently struck is the right one.

Lord Denning in *The Nema*, observed that, in certain circumstances, a commercial arbitrator was more likely to be right than a judge. For example, the arbitrator, with its commercial expertise, will interpret contractual clauses in a way that is consistent with commercial common sense. On the other hand, a judge with no knowledge of the trade might interpret contractual clauses in their literal sense. Therefore, a final decision from a commercially-minded arbitrator might be more valuable to businesses than a decision from a judge which is legally accurate. The recent case of *Flota Petrolera Ecuatoriana v Petroleos De Venezuela SA*, is to be welcomed. The case highlights the courts’ consistent approach in interpreting contractual provisions with commercial common sense as well as taking into account business common sense to establish the law and jurisdiction of the contract.

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24 *BTP Tioxide Ltd v Pioneer Shipping Ltd (The Nema)* [1980] QB 547 (CA) 564.
26 *BTP Tioxide Ltd v Pioneer Shipping Ltd (The Nema)* [1980] QB 547 (CA) 564.
Further analysis might be made in the light of the recent decision of the UK to leave the European Union. Professor Goode has suggested the effects of that decision remain unknown, but that the decision is unlikely to have a significant effect on arbitration in commercial law.\textsuperscript{28} He makes a sensible point since the seat in London is governed by the Arbitration Act, not subject to EU Law.\textsuperscript{29} Nevertheless, the psychological effect of the leave vote may be interpreted negatively by commercial parties as hostility towards Europe. This will influence views regarding the neutrality and impartiality of the London seat, as well as increasing competition for English law.

As previously mentioned, arbitration has developed a strong doctrine of confidentiality, however, with a restricted appeal system, the law’s development can be frustrated. Sir Bernard Rix highlighted the ‘lack of publications’ and ‘lack of transparency’ as creating ‘the difficulty or impossibility of getting such awards into the public domain’ with the consequence ‘that our commercial law is going underground.’\textsuperscript{30} He argues that this risks our losing sight of the basic feedstock to commercial law.\textsuperscript{31} Furthermore, Lord Salmon rightly stated in \textit{The Laconia},\textsuperscript{32} ‘certainty is of primary importance to all commercial transactions.’\textsuperscript{33} This is best achieved by following Neil Andrews’ suggestion that, instead of going to a commercial judge, there should be a direct right to go to the Court of Appeal for arbitration, in which the arbitrator would be a retired judge.\textsuperscript{34} This is sensible and the idea of judges as arbitrators should be encouraged because they have been exposed to a range of disputes.

Moreover, arbitration’s confidentiality overlooks the need for public engagement. This is unsatisfactory because such an absence of openness has prevented individuals and lawyers from accessing the law, including how it is applied and interpreted. Lord Thomas emphasised this further, saying it reduces a degree of certainty in the law and that public scrutiny leads to a debate in the commercial market place, meaning the development of law is not hidden from

\textsuperscript{32} Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (\textit{The Laconia}) [1977] AC 850 (HL).
\textsuperscript{33} Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (\textit{The Laconia}) [1977] AC 850 (HL) 878.
view. The question of transparency in relation to arbitration has arisen and will continue to rise. Professor Richard Garnett rightly stated that confidentiality has negative implications for commercial certainty, future litigants, and public confidence.

6. Conclusion

A more flexible test for appeals under section 69 would enable the courts to develop the law. This has been achieved to an extent with the Market Test Case Scheme which resolves market uncertainty and makes litigation attractive. A series of decisions in the courts may expose issues that call for Parliamentary and legislative reform, whereas, in arbitral decisions, this will not be the case since those issues carry on in the future arbitration. Arbitration confidentiality extends continuing hazards and systematic problems as result of a lack of transparency.


1. Introduction

This article will argue that while arbitration is becoming increasingly desirable, arbitration harms certainty and the development of English law as it has taken a “wrong turn”. Parties are turning to arbitration mainly due to factors such as the New York Convention, being able to protecting their commercial reputation through the confidentiality and privacy associated with arbitration, and international certainty. Moreover, litigation can be time-consuming, costly, adversarial, and can provide parties with a lack of control. This has pushed parties to choosing arbitration over litigation. Arbitration resolves most of litigation’s issues but creates its own problems, with the appeals regime being at the centre of these problems. If appeals to the courts following an arbitral award were more readily available, this may help develop the law, but the desirability of this must be considered alongside the risk that it defeats the purpose of arbitration. A balance therefore needs to be found.

Lord Thomas believes arbitration is happening underground as it is resolved privately which harms certainty, with certainty being ‘a major selling point of English Commercial law’. Therefore, for the key aspects of arbitration to reach their full potential, a system of principles governing arbitration should be implemented that provides clarity and certainty and which allows English commercial law to be developed.

2. When is arbitration appropriate?

Arbitration is most appropriate where parties want their dispute to be resolved in private, as the private nature of arbitration will help parties protect their commercial reputation and avoid the potential consequences of harmful public perception. Arbitration is also suitable where parties

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would like their dispute to be resolved by one meeting rather than several court visits. However, as the arbitral process is based upon a ‘court-based appellate process’, this can make arbitration time-consuming and costly. Indeed, arbitration would not be appropriate where one party would like to retain a right to appeal, as it is not a mandatory provision and follows a strict approach.

3. Appeals

Appeals under section 69 of the Arbitration Act 1996 (hereafter ‘the Act’) are only via a question of law and not one of fact. Section 69 challenges are rare and, when made, are usually unsuccessful. The right to appeal against an award on a point of law is not a mandatory provision of the Act. This means that parties to an arbitration agreement may agree to exclude the right of appeal.

The distinction is difficult to draw when it comes to a question of appeal. In *Demco Investments & Commercial SA v SE Banken Forsakring Holding Aktiebolag*, Cooke J stated that the legislative intent of section 69(3) was to prevent parties seeking ‘to dress up questions of fact as questions of law’. Jackson J also adopted this approach in *Surefire v Systems Ltd v Guardian ECL Ltd* and added that any party seeking leave to appeal under section 69 must take the arbitrator’s findings of fact as a starting point. The case of *Morris Homes (West Midlands) Ltd v Anthony Paul Keay* serves as a reminder as to the hoops parties must jump through in order to satisfy the test for leave to appeal. The court found that the nature of the enquiry in an application for leave to appeal was essentially summary in nature. Section 69 provides no guidance as to the way in which the threshold test must be applied. This rigorous sifting out of cases at leave-to-appeal stage has led to what some see as a dearth of cases coming through to nourish the development of the law. Lord Thomas suggested that the statutory provisions should be revised in order to make appeals more readily available. Sir Bernard Rix agreed with

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5 *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860 (TCC) [21].
Lord Thomas that the appeal process needs to be improved to keep the ‘feedstock of the law’ alive. A more flexible approach to appeals would help to avoid the problem whereby the strictness of the current approach means there is an absence of necessary case law which in turn impedes the development of the law, by preventing the law from adapting according to the changing commercial climate.

It could be argued that it should be difficult to appeal against arbitral awards. If awards were easy to appeal, with disputes instead ending up in court, this would undermine the point of going to arbitration. Therefore, it is argued parties to an arbitration should not have the chance of appealing on a point of law. An amendment might be to exclude the appeal process, as Article 35(6) of the ICC Rules does.

The difficulty with this, however, is that, as highlighted above, it stifles the development of the law. Section 69 should enable appeals to be more readily available to the courts. Lord Thomas recommended a reform of section 69 to allow a broader right of appeals to allow the law to develop and become public knowledge; as the growing concern is that ‘reducing the flow of arbitral appeals harms the development of the common law’.

4. The importance of section 9 of the Act

When proceedings have started, section 9(1) allows parties to apply for a stay, which will prevent the court from taking the proceedings any further. Courts are unable to grant a stay if the parties to the proceedings in court are not the involved parties to the arbitration agreement.

Philpott and Orton v Lycee Francais set a marker that English courts will strictly enforce agreements to arbitrate by ordering a mandatory stay of court proceedings, subject only to

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11 Philpott and Orton v Lycee Francais [2015] EWHC 1065 (Ch), [2016] 1 All ER (Comm) 1.
limited exceptions. The approach used by the judge in that case provides certainty for parties that their agreement to arbitrate will be upheld, and that the court will look at the substance of the dispute in order to determine the appropriate forum. The decision does, however, provide a contrast with Salford Estates (No. 2) Limited v Altomart Limited.12 There, the Court of Appeal held that the mandatory stay provisions in section 9(1) do not apply to winding-up petitions brought on the basis that a company is unable to pay its debts. Whilst this is a welcome development, these contrasting decisions may be a source of some uncertainty for insolvency practitioners, who will need to consider carefully the circumstances in which they should apply to the court to supervise certain procedures where the parties have submitted disputes to arbitration. Overall, the strict section 9 approach helps commercial parties in terms of certainty as it ensures the courts will not interfere.

5. Publicising arbitral awards

One of the main issues with arbitration is that the hearings take place behind closed doors. The lack of openness reduces the degree of certainty in the law and disables the effect of future arbitrations following previous awards, as arbitrators will not be aware how and why the arbitrator came to their decision. Moreover, details of the arbitration are kept confidential from the public. This has led to a strong doctrine of confidentiality in UK law in this context. This prevents the law from developing. Sir Bernard Rix13 believes that unless we can keep the law dynamic and in a state where modern forms of commerce come to the court, we will not make the progress that we should make. Lord Thomas spoke at Aston University in 201714 and proposed an alternative solution to that advance by Sir Bernard Rix. Lord Thomas believed that publishing awards should be implemented on a more systematic basis, which would protect the anonymity of the parties involved. Lord Thomas suggested some courts have begun to look at expounding principles in the law that leave elements of the case confidential. Lord Thomas

suggested this to be a ‘highly regressive suggestion’ due to the public and forms of media disliking information being kept from them.

This is in contrast to other countries around the world which possess a private and public commercial arbitration. For example, Brazil has enacted arbitration laws that provide public-private arbitration which is subject to the ‘principle of publicity’. English law should look to other jurisdictions and follow their lead in adapting.

6. Arbitral Awards

The New York Convention has been regarded as the ‘bedrock’ of success for international trade law. The Convention states another country will have to recognise and enforce the arbitral award. It facilitates the recognition and enforcement of foreign arbitral awards. It also gives an extra provision for commercial security for parties entering into cross-border transactions and helps to remove some of the uncertainty associated with difficulties in enforcing awards.

At the same time, no arbitral tribunal can be expected to guarantee that its award will be enforceable in whichever country the winner chooses to enforce it in. The key to successful enforcement of awards is being aware of the peculiarities and risks that arise in each particular country.

7. Conclusion

Arbitration does face problems and can cause cracks in commercial law. One of the main problems is the stagnation in the development of the law. Due to the private nature of arbitration, there is a risk of a conceptual and legal void in respect of how commercial law can develop. Lord Thomas suggested that the criteria for appeals should be revised to provide a more flexible test for permission to appeals. Statutory reforms should be implemented to introduce a public element. This would enable the courts to more readily develop the law whilst leaving arbitration as an important means of dispute resolution.

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Take a seat, any seat…but maybe not in London: Brexit’s effects on arbitration in London

Samira Ali

1. Introduction

The exit of United Kingdom (UK) from the European Union (EU) has sparked much dialogue on its effect on the integrity of the English legal system.¹ This article will begin to explore its exact impact as regards arbitration specifically. It assumes prior knowledge of arbitration as a form of dispute resolution. All in all, the observations contained in this article encapsulate what should happen in theory and are largely speculative; they assess the likely impact, not the true impact. The latter is determined on the basis of the quality of the deal – if any – the UK manages to secure with the EU. In the light of contextual factors which will be discussed, the outcome of this becomes impossible to reliably predict. Essentially, this article presents only one set of potential outcomes out of many possible ones. It will make these observations in service of a balanced argument in which it will be held that arbitration will be unaffected from a direct exit from the EU. This is on account of the separateness of the national legal framework, which governs much of arbitration, from EU influence. However, the real sting of the UK’s departure will be as a result of the indirect effects of leaving; the resultant environment of uncertainty which may be concerning enough for parties to look elsewhere to arbitrate, effectively siphoning influence away from London as many commercial parties’ desired seat (that is, place) of arbitration. In the light of a very tense geopolitical environment, it will be argued that it is difficult to reliably assess long-term effects.

2. Arbitration after Brexit: benefits and opportunities

In a climate where state sovereignty is the flavour of the day, its natural antagonism with the collective nature of the EU reached its zenith on 23 June 2016 when the UK, in a historic referendum, voted to leave the EU.² It does not appear that any Brexit deal will mirror that

² ibid.
agreed at Chequers in early July 2018, and indicators as regards what form it is likely to take are few and far between.

The scene is set; so what does this uncertain contextual background mean for arbitration and the rules which govern its content and scope? Arbitration after Brexit must be thought of as providing both opportunities and challenges. It is imperative to assert that arbitration retains advantages inherent in the way it is carried out which will be unaffected by Brexit. It is worth, first, and by way of mitigating the bleakness of the picture painted above, exploring some positive avenues for arbitration in London unlocked by our exit from the EU.

The desirability of arbitration when compared to litigation

Arbitration in London has been tailor-made with the nature of commercial disputes and the general market in mind. Weighing up the advantages of arbitrating in London over litigating a dispute in an English court makes it clear that arbitration is usually more commercially practicable.

First, London as parties’ designated seat of arbitration guarantees the resulting proceedings a high degree of confidentiality conferred as a matter of priority, the same of which cannot be argued for litigation. This level of confidentiality is not even something very common to other arbitration jurisdictions; to the extent that commercial parties desire confidentiality, London retains a competitive advantage which will endure Brexit. Additionally, the swiftness of arbitration proceedings is less commercially disruptive and may be lower in cost for commercial disputes of a particular character.

The integrity of, and commercial parties’ preference for, arbitration as a form of dispute resolution is clear on a comparison of the way disputes in both mediums are adjudicated. Arbitration’s use of experts and specialists with significant knowledge in very specific areas increases party trust in the eventual decision with full assurance that the arbitrator has considered the case fully. This is especially important where, as McDermott asserts, the

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4 For example, Australia. See *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.
7 ibid 583.
judiciary lack the requisite ‘hands-on mercantile experience’\(^8\) to be useful in the intricately detailed disputes that specialist arbitrators usually deal with. This is especially where national courts may be considered to be particularly ‘unfamiliar, inexperienced, unreliable’,\(^9\) which manifests a state of affairs which means that, often, arbitration becomes ‘the only game in town’\(^{10}\) for parties of certain types. The unique ability arbitration confers to parties to bypass a court’s jurisdiction and choose arbitration instead is rooted in the fundamentals of freedom of contract to which English law has always been wedded.\(^{11}\) This is a commercially sensible notion which even the English courts themselves advocate; the cordial atmosphere of arbitration has been cited as one which avoids the same degree of ‘ill-feeling’\(^{12}\) as that propagated in the fundamentally adversarial nature of litigation, allowing the continuation of important commercial relationships in a neutral environment.\(^{13}\) In stark contrast to litigation, arbitration’s markedly ‘consensual character’\(^{14}\) means that even parties with near-irreconcilable positions, as Kaufmann-Kohler puts it, ‘have no choice but to find some common ground’.\(^{15}\) This environment operates in what Posner argues is in pursuit of ‘aggregate social value’.\(^{16}\) To sum up, arbitration’s overriding goal is reflective of this entire sentiment; its focus on justice is far removed from litigation’s focus on, as Ritchie strongly argues, what is most convenient for the court.\(^{17}\)

Importantly, the legal framework which enables arbitration to carry so many attractive features, the English Arbitration Act 1996, derives from national law which is created and exists independently of EU influence, which will render the character of arbitration largely the same on our exit from the EU. This legal framework is further discussed below. The demonstrable

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\(^{10}\) ibid.


\(^{12}\) *Pennock v Hodgson* [2010] EWCA Civ 873 [46].

\(^{13}\) Blackaby and Partasides (n 6) 29.

\(^{14}\) Roy Goode, Herbert Kronke and Ewan McKendrick (n 3) 558.


\(^{17}\) Andrew Ritchie, ‘ADR and arbitration; the alternative to civil litigation for personal injury and clinical negligence claims’ (2017) 4 Journal of Personal Injury Law 238.
level of abstraction between the content and procedure of arbitration and litigation means that it is arguable, therefore, given the legislative framework’s disconnect from EU influence, that arguments as made above will continue to hold water even after our exit from the EU.

Moreover, according to Lord Hoffmann, key commercial considerations for parties in their choice of seat in which to arbitrate disputes boil down to three criteria ‘on grounds of neutrality, availability of legal services and the unobstructive effectiveness of the supervisory jurisdiction’. 18

It is argued that the English legal framework upholds all of these values in a way unlikely to be affected by Brexit. First, the EU’s Council Regulation 1215/2012 explicitly states that the EU has no jurisdiction as regards arbitration anyway. 19 Secondly, and importantly, its attendant attractiveness is encapsulated in national law which is unaffected by our eventual exit from the EU. 20 This is as discussed below.

**The content of the English Arbitration Act 1996**

The Arbitration Act 1996, which came into force on the 31st January 1997, can be argued to provide a highly supportive legislative environment to which Brexit will have no effect. It applies where the legal ‘seat’ (place) of arbitration is England and Wales. First, it is noteworthy that neither the 1996 Arbitration Act nor its previous variations place restrictions on which disputes are capable of or suitable for arbitration. This allows for a broad application of arbitration for all manner of disputes, 21 which provides reassurance which will remain attractive to commercial parties. 22 Importantly, however, the aspiration for a London arbitration entails that they shall be so heard according to the general principles outlined in section 1(a) of the Act. This is the operative feature of the Arbitration Act 1996 from which the attractiveness of arbitrating disputes in London is best borne out. While making no effort

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18 *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA (The Front Comor)* [2007] UKHL 4, [2007] 1 All ER (Comm) 794 [12].
22 Arbitration Act 1996, section 1(b).
to define arbitration, its purpose and objective are defined, namely to ‘obtain the fair resolution of disputes without unnecessary delay’. It is clear that it has been drafted with the relevant commercial scene in mind; it sets out an objective which manifests conditions ideal for industry and the resolution of disputes by arbitration in that industry.

Section 1(b) speaks to an arbitration in London as, at all times, promoting and upholding paradigms of party autonomy which is important for certainty for commercial parties. Section 1(c) sets out a limited role for the courts as intervening when arbitration is not satisfactory, for various reasons. The Act is certainly drafted with the commercial considerations in mind; its user-friendly drafting and avoidance of obscure terminology make it layman-friendly for the commercial parties who arbitrate here and rely greatly on its provisions. Section 69 confers a very limited right of appeal on a point of law in relation to an arbitral award (which may also be challenged as allowed in sections 67 and 68). As Liu argues, this respects the finality of an award and enhances the integrity of arbitrating in London. The Act remains distinct from, for example, the UNICITRAL rules as a source of arbitration law, helping it retain much of its marketability to the extent the national legal framework is unique.

The practicality of the Act may be better borne out in an analysis of comparative law. In French law, the existence and scope of the arbitration agreement is determined exclusively by the parties’ common intention. This is fundamentally different to the English ideation of party autonomy in a way which leads to a very subjective measure in which the inconsistency of ‘party intention’ becomes the gateway to litigation, a situation already seen to be commercially inefficient.

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26 Bruce Harris, Rowan Planterose and Jonathan Tecks (n 23).
Enforcement of arbitral awards: the 1958 New York Convention

An arbitral award is enforced via the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). This aims to provide an effective framework for the straightforward enforcement of international arbitral awards. Its central substantive provisions – like the overriding objective in section 1 of the Arbitration Act – is to compel the national courts of all its 156 state signatories to, essentially, take arbitral awards seriously. Article II(1) provides that all parties will at least recognise an agreement to arbitrate, with Article III stating that all states will recognise arbitral awards as binding on their respective court and enforce them.

The wide scope it provides for enforceability means that if one party refuses to honour an award made out at the end of arbitral proceedings, there is a guarantee that it will be recognised and accordingly enforced by national courts all over the world. This ensures that the ‘arbitral award is final’ and generates certainty for parties.

The success of the New York Convention as a means of enforcing arbitral awards stems not only in the way that it is ‘adhered to by… all the major trading countries’, but crucially from the way it makes arbitral awards ‘transportable’. It ensures there is no onerous court action post-arbitration to renegotiate an award; the New York Convention compels parties to take awards seriously and adhere to them.

Arbitration’s collaborative nature is a sentiment echoed in the New York Convention too. When enforcing this clause, the arbitration clause is severed from the agreement and enforcement is sought for it alone; the courts see no reason to invalidate the whole commercial

33 Equal to the number of states who are signatories to this Convention.
relationship, especially where – as is evident in case law – this runs contrary to the spirit of alternative dispute resolution.\textsuperscript{38}

The same can be said regarding whether arbitral awards will be as enforceable on the UK’s exit from the EU. Like the Arbitration Act 1996, the New York Convention operates as totally separate from the EU and remains intact as long as the UK remains a signatory to the Convention. Even if this were not so, the Convention’s 156 signatory states include all 27 of the remaining EU member states; it is imperative to consider that the Convention is not a product of our membership of the EU, so parties who arbitrate here will still be able to enforce in 156 jurisdictions all over the world\textsuperscript{39} notwithstanding our departure from the EU.

While such progressive features peculiar to arbitration are either governed by national law created and subsisting independently of the EU, or are otherwise independent of the latter, its provisions, and accordingly, the uniquely commercial receptiveness it encourages and its positive consequences for London as a seat of arbitration, should remain unchanged. There will most likely be no adverse effects on the way it continues to be interpreted by English courts,\textsuperscript{40} and, importantly, it will not stunt the beneficial effects it confers which makes London a prized seat of arbitration.

3. Things London can do without the constraints of EU membership: some positives to Brexit for arbitration

In theory, and assuming no deal has been reached, the below outlines things the UK can do as of right on its departure from the EU. The fact that they manifest positive outcomes for arbitration make them relevant and worthy of discussion.

**Anti-suit injunctions**

London’s desirability as a centre for commercial arbitration may be further strengthened in the way that it would be able to encourage arbitration by issuing anti-suit injunctions which restrain proceedings started in EU member state courts, in breach of an arbitration agreement. A legal

\textsuperscript{38} Société Nationale Algérienne pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v Distrigas Corp (1987) 80 BR 606, 612.


\textsuperscript{40} ibid.
mechanism that can be traced back to the sixteenth century, an anti-suit injunction is a means by which a court can stop a party from bringing an action in a foreign court in favour of arbitration. Anti-suit injunctions may be issued by courts in response to the breach of either an arbitration agreement or an exclusive jurisdiction clause.

The official EU position

While the UK certainly has general authority to issue anti-suit injunctions (and does so ‘where convenient’ under section 37(1) of the Senior Courts Act 1981), generally, the EU position levels that the granting of an anti-suit injunction to restrain a party from carrying on proceedings in another EU member state is deemed incompatible with laws and authority of the EU. Put simply, EU member states cannot issue them in response to certain proceedings in other EU states.

This prohibition on member states to restrain proceedings in this way derives its authority from the Brussels Regulation, and its underlying principle ensures that an EU member state ‘respect[s] the right of the court of another member state to determine its own jurisdiction and respect the result it reaches’.

Anti-suit injunctions, therefore, are clearly contrary to the scheme of mutual trust and ‘European judicial co-operation’ which underlines the existence of both the Regulation and, more broadly, the EU itself.

There are worries that anti-suit injunctions may have the effect of depriving an EU member state’s exclusive jurisdiction to decide the case. This is interpreted in the European Court of

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42 David Mwoni Ndolo and Margaret Liu, ‘Does the will of the parties supersede the sovereignty of the state? Anti-suit injunctions in the UK post-Brexit’ (2017) 83(3) Arbitration 254.
43 Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07) [2009] 1 AC 1138.
44 Case 159/02 Turner v Grovit [2005] 1 AC 101 (ECJ).
48 Turner v Grovit (n 44) [31].
Justice (ECJ) as constituting an interference with a state’s jurisdictional authority, and their prohibition is as codified within the Brussels Convention.49

The theoretical post-Brexit position

To the extent London is no longer bound by EU Regulations like the Brussels Convention, this means it is free to issue anti-suit injunctions which are, importantly, binding on all EU member states.50

This means that on our exit from EU, and in the absence of a deal ensuring the continued application of the Brussels Regulation, the UK will in theory be free to grant anti-suit injunctions again. This may see an increased use of English law to gain such injunctions not found in the EU, and it is easy to see how this may present an especially lucrative opportunity for London. This is especially where, as Mok notes, anti-suit injunctions have seen a global rise in popularity.51 For London to adjudicate on some of this by issuing anti-suit injunctions in response to a breach of an arbitration agreement is highly important; London’s resulting broader power (administered carefully ‘with due regard for the scheme and terms’52 of section 44(2) of the Arbitration Act 1996) should compel parties to comply with their contractual obligations to arbitrate.53 Where the London courts issue anti-suit injunctions, the frequency of the arbitrations it accordingly allows to happen has considerable scope to increase, with greater influence conferred on London in a way which may mitigate the harshness of Brexit. This is clearly welcome in an environment where there exists great support for anti-suit injunctions in the UK. The ECJ’s West Tankers54 case, which did not grant an anti-suit injunction as against the Brussels Convention, was a decision which overturned more supportive findings in the

49 See the opinion of Advocate General Colomber delivered on 20 November 2003 in West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA (The Front Comor) (C-185/07) EU:C:2009:69, [2009] 1 AC 1138 [34]; David Ndolo and Margaret Liu (n 42) 247.
52 Ust-Kamenogorsk Hydropower Plant JSC Vaes Ust-Kamenogorsk Hydropower Plant LLP (n 45) [60].
Commercial Court\textsuperscript{55} and the House of Lords\textsuperscript{56} before the case’s reference to the ECJ. Given such trends, the UK may not wish to continue to access the EU and be bound by its rules in this regard.

**Effect of Brexit on enforcement of court judgments: a subtle encouragement to parties towards using arbitration instead**

**The official EU position**

As a member of the EU, the UK benefits from the EU Regulation 1215/2012,\textsuperscript{57} also known as the Recast Brussels Regulation. This framework compels EU member states to enforce a judgment made in another member state in their own courts.\textsuperscript{58} This has general application to ‘civil and commercial matters’,\textsuperscript{59} and includes the enforcement of a wide variety of ‘protective measures’ such as access to injunctive relief.\textsuperscript{60}

**The theoretical post-Brexit position**

As EU judgments cease to be binding on the UK on its EU exit, this will greatly limit the scope for enforcement of judgments given through litigation across the rest of Europe.\textsuperscript{61} This may make recourse to arbitration more common. Importantly, unlike EU Regulation 1215/2012, the source of international arbitral awards’ enforceability stems from sources independent of the EU\textsuperscript{62} so, contrarily, will not be affected on our exit from the EU. This framework, as its name suggests, is derived from the EU so it will cease to render English court judgments enforceable within the EU. This is a direct result of our exit, in which EU law will cease to apply.

\textsuperscript{55} West Tankers Inc v Ras Riunione Adriatica di Sicurt\`{a} SpA (The Front Comor) [2005] EWHC 454 (Comm), [2005] 2 All ER (Comm) 240 [367].
\textsuperscript{56} West Tankers Inc v Ras Riunione Adriatica di Sicurt\`{a} SpA (The Front Comor) [2007] UKHL 4, [2007] 1 All ER (Comm) 794 [307], [311]-[312].
\textsuperscript{57} Council Regulation (EU) No 1215/2012 of the European Parliament And of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) 351/1
\textsuperscript{58} ibid, Art 14.
\textsuperscript{59} ibid, Art 1.
\textsuperscript{60} ibid, Art 4.
\textsuperscript{58} Sara Masters and Belinda McRae, ‘What does Brexit mean for the Brussels regime?’ 33(4) Journal of International Arbitration (Special Issue on Brexit) 483.
\textsuperscript{62} This is the English Arbitration Act 1996 and the 1958 New York Convention, as discussed above separately.
Investor-state arbitration and Bilateral Investment Treaties (BITs)

A positive aspect of Brexit is also seen on consideration of arbitration between investors and state parties, as codified in Bilateral Investment Treaties (BITs). This relationship commits a state party seeking foreign investment to ‘make a standing offer to arbitrate’ any eventual dispute which may arise in the future between itself and a qualifying investor of the other state who is party to the Treaty.

Essentially, they incorporate a dispute resolution mechanism which allows ‘an investor from one country to bring arbitral proceedings directly against the country in which it has invested’.63 Their purpose, writes Vandervelde, is to ‘provide investment security and a great degree of neutrality to foreign investment’.64

The official EU position

The EU has adopted a hostile state towards individual member states forming BITs with one another in their capacity as states, as well as those with other, non-EU, countries;65 the EU as a collective bloc negotiates BITs for itself as an agent of all of its member states.

This hostility is best seen on consideration of the relevant case law. In Slowakische Republik v Achmea BV,66 an arbitration clause between the Netherlands and Slovakia was held to be incapable of ‘ensuring that [the national courts] effect the full effectiveness of EU law’.67 This ‘adverse effect on the autonomy of EU law’68 created by this BIT attests to the high degree of paternalism the EU offers in this regard.

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66 Case 284/16 Slowakische Republik v Achmea BV [2016] (CJEU).
67 ibid [43].
68 ibid [59]
**BITs post-Brexit**

Brexit may offer ‘interesting advantages for both the UK as a host state and for investors who perceive the EU’s current investment policy as unduly harsh’. As we exit the EU, Regulation 1219/2012 will cease to apply and the UK can enter into its own BITs. In theory, it is a positive for the national sovereignty (the sole, or at least main, rationale for Brexit) as the EU is no longer the mouthpiece for the UK in this regard.

However, in the uncertain commercial environment associated with Brexit, it is arguably becoming increasingly difficult for parties to be sure that they are making a worthwhile and sound investment. Many BITs impose on the host state being invested into various obligations to treat foreign investors with a great degree of fairness and equity, as they do their own. This entails an obligation to allow them to carry on business with no disruption without good reason. Its operation as a catch-all provision with a relatively wide remit may not be desirable for the UK as a host state of its own BIT. As mentioned, the environment of uncertainty may confound the above tenets of equity and fairness which safeguard and inform the investor’s interest in investing in the EU. Where a fluctuating and unstable commercial market renders high-level investments risky and causes both investment contracts and the BITs with which they are allowed to be agreed to be frustrated, it is easy to envisage a situation in which the UK arbitrates any resulting dispute in London (a positive) but uses money to so arbitrate derived from taxpayers and reserved solely for the creation and maintenance of public projects and infrastructure. There may be complex issues as regards contractual interpretation too, in the way that, for example, the definition of an investor turns on the wording of the treaty itself.

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70 Council Regulation (EC) 1219/2012 (n 65).


72 Continental Casualty Company v Argentina, ICSID Case No ARB/03/9, Award of 5th September 2008 [254].

73 PSEG Global v Turkey, ICSID Case No ARB/02/5, Award of 19th January 2007 [238]-[239].


In this way, the UK’s freedom to negotiate its own BITs without the agency of the EU may present more bad than good. But in terms of the aspiration of state sovereignty which formed the premise of the vote to leave, it is clear that in this regard, the UK has taken back control. If it chooses to make this the subject of an ensuing deal on its exit, the UK can keep the existing BIT framework intact.

In any case, any positive effects of BITs may be affected by the tense geopolitical landscape within the UK. Ever since Brexit entered into the contemplations of the UK, it has brought into question the sustainability of the Northern Irish peace settlement, as well as fuelling an already fire-eating movement of campaigners for Scottish independence. This may make other states more reluctant to invest in such a fragmented state of affairs, and means there will be fewer opportunities for related arbitrations to be heard in London, let alone for it to happen at all.

On the other hand, Liu writes that in the short-term post-Brexit environment, the nervousness regarding the UK’s support for businesses will undoubtedly increase. The UK should avoid being perceived as arbitration-unfriendly, and should, accordingly, open itself up to as many new opportunities, including this one notwithstanding its risks.

4. Uncertainty and politics. Barriers to the continued success of arbitration in London

So far, the discussion of the implications of Brexit has framed it as a mostly liberating exercise for arbitration; Brexit has been envisaged as opening new possibilities in which arbitration becomes relevant. This is in the way that, free from EU constraints, London can now arbitrate on issues on several and diverse types. However, it will be so freed up in an environment of continued uncertainty about both the terms of any eventual Withdrawal Bill and the increasing popularity of seats other than London potentially being exacerbated by London. These will be considered in turn.

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77 Margaret Liu and David Mwoni Ndolo (n 71).
The emergence of viable competitors

The growing emergence of viable competitors to oust London as the world’s preferred arbitral seat\(^80\) has been an underlying trend which will unfortunately only become more pronounced on Brexit. The 2018 International Arbitration Survey\(^81\) and its findings best illuminate this. It is a survey of 1068 respondents who have had some prior engagement with arbitration in London at some level (as, for example, in-house counsel and arbitrators) and is arguably the most authoritative source from which current implications for Brexit can be gauged.

The survey finds that while the popularity of arbitration in London is unlikely to wane as a direct result of Brexit (to the extent that the legal framework will remain the same),\(^82\) the uncertainty it will create will compel parties to look elsewhere to arbitrate their disputes. 99 percent of respondents expressed a preference for arbitration over ADR, but it is worthwhile to note that their preference for where they would like this arbitration to occur means that a London arbitration may not be as durable a medium for dispute resolution as first thought.

The emerging popularity of other seats of arbitration as, in this context, conferring a greater degree of certainty than that provided by post-Brexit Britain is important to consider. Any hypothetical decrease in London’s influence as a commercial arbitration centre and the resulting void of influence it leaves is liable to be filled by other countries at London’s expense. While arbitration remains incredibly popular, 70 percent of 330 respondents believe Paris is the seat that will benefit most from any negative impact of Brexit, hearing the disputes of parties who consciously choose not to use London,\(^83\) with 38 percent of parties expressing a new preference for Swiss seats.\(^84\) This void might even be filled closer to home. Liu and Ndolo argue that Irish arbitration, with its ‘similarity to London’,\(^85\) carries many of its features, as well as, importantly, the requisite commercial certainty and stability London may not have on our exit from the EU.

There is, however, evidence that some of this increase in influence and attractiveness of other seats may not be so inadvertent. In France, the Legal Committee for the Financial Markets of

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\(^81\) ibid.
\(^82\) ibid 2.
\(^83\) ibid 12.
\(^84\) ibid 10.
\(^85\) Margaret Liu and David Mwoni Ndolo (n 71).
Paris has, since Brexit, renewed calls to establish a specialist court to hear commercial proceedings in the English language, arguably in an effort to siphon business away from London’s arbitration centres. While London remains ahead of Paris in desirability as a seat of arbitration by a margin of 10 percentage points, London’s ability to react quickly to such changes will determine whether, if at all, this margin decreases. It is clear, however, that as Brexit is a political issue, any discussion of arbitration’s position post-Brexit would not be complete without a brief analysis of political factors which have hindered the negotiation process of any deal the UK signs with the EU, further increasing uncertainty about London’s future viability as a seat of arbitration. This is as discussed below.

**Political barriers**

As already argued, since so much of the prognosis for arbitration depends on the quality of the eventual deal, if any, Britain reaches with the EU as regards its exit, a fully correct assessment of what arbitration will be like after Brexit is impossible.

This has made it difficult to provide much more than a speculative glance at one of many potential and different outcomes which may not necessarily align themselves with those propounded in the course of this article. This is because such outcomes relating to the specific instances of EU law’s relevance (as outlined above) hinge directly on what type of deal, if any, the UK strikes with the EU. Notwithstanding ‘strong indications that the UK would not accept a role for the ECJ and EU laws as it currently does’, the UK government’s desire to continue a ‘deep and meaningful relationship’ is one well made out. With regards to arbitration, its plans to maintain this by establishing ‘a new dispute resolution mechanism to address any disagreements between the UK and the EU’ signify an intention to transact cordially with the EU on our exit, with obvious benefits for the certainty attributable to London’s success as a seat of arbitration.

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87 2018 IAS (n 80) 10.
88 For example, the readiness with which we sign Bilateral Investment Treaties with the EU will depend on the proximity of the relationship we decide to have with the EU.
91 ibid.
However, the language of the above-quoted Future Partnership Paper is little more than sentiment, and, at best, an aspiration; it is clear that, de facto, the state of political affairs does not point to such a sentiment materialising. It is clear, from recent events, that the future of arbitration because of our decision to leave the EU is rendered further uncertain by domestic factors, which, when considered overall, do not do much to quell uncertainty, which may have disastrous consequences for the desirability of London as a preferred seat of arbitration. The progress of this deal-making has been a long and arduous one, to say the least.

The triggering of Article 50\textsuperscript{92} began a two-year timer on the UK’s negotiation of the terms of a deal ensuring a continued partnership with the EU. This triggering occurred on March 29\textsuperscript{th} 2017. With more than one year having elapsed since this timer began running, and against the backdrop of the urgency this conveys,\textsuperscript{93} the UK is still without a semblance of a deal. The former Brexit Secretary David Davis’ Future Partnership Paper on Enforcement and Dispute Resolution sets out the government’s desire to continue ‘a deep and special relationship with the EU’,\textsuperscript{94} but the extent to which we can believe this sentiment is confounded by the current state of affairs. It is becoming increasingly clear that a negotiated settlement pursuant to the Chequers agreement will mean that the UK becomes less influential, with the status of arbitration affected as collateral damage. There is evidence that a ‘Hard Brexit’ will have a severely negative effect on international business presence in London, as their propensity to do business drops away.\textsuperscript{95} This has been confounded by a ‘deliberate spread of confusion’\textsuperscript{96} surrounding statements made by the official campaign to leave the EU, Vote Leave, resulting in a state of affairs in disarray and many competing and deeply conflicting voices. This muddled political dialogue runs contrary to the collaboration a smooth Brexit requires, and has recently even included calls from senior government officials to hold a second Brexit

\textsuperscript{94} George Parker, ‘Davis proposes post-Brexit dispute mechanism on EU relations’ Financial Times (London, 21st August 2017) \textlangle}https://www.ft.com/content/7234155a-8599-11e7-8bb1-5ba57d47ef77\textrangle\textgreater\ accessed 12th July 2018.
The possibility that the two-year time period for Brexit negotiations may even be extended will ensure that Brexit negotiations drag on and become more difficult.

While not an exhaustive summary of the tumultuous and protracted timeline of events since the vote to leave, these remain issues which fundamentally override the possibility of a smooth exit from the EU. This has crystallised a state of affairs which, at the time of writing, have rendered the political scene so intolerable that it has seen both the Secretary of State for Exiting the European Union, David Davis, and the Foreign Secretary, Boris Johnson, resign, both of which detail a fatal lack of confidence in the government’s Brexit stance, which had supposedly reached Cabinet agreement just days before. It is easy to see how unhelpful this environment is to the retention of as much commercial certainty as possible in London as a seat of arbitration. This level of abstraction between the sentiment and the political reality has cast doubts on the UK’s seriousness regarding a viable Brexit deal, with disastrous consequences for the certainty that the continued attractiveness of arbitrating commercial disputes in London carries; any length of productivity and success, argues George Parker for the Financial Times, can only be ‘measured in hours’. This paints a picture of disorganisation and discord which does not provide arbitrating parties with the requisite certainty they need to make continuing to arbitrate in London a viable choice.

5. Conclusion

Arbitration may come out of Brexit a more durable medium than litigation. The national legal framework has been shown to be unaffected by Brexit, and it is this which governs the content and procedure of arbitration. However, the uncertain political landscape has been argued to render arbitrating in London much riskier for commercial parties. It will make it harder for the progressive objectives of the Arbitration Act 1996 to be borne out in practice. While it presents opportunities in theory, these may be overstated to the extent that they exist in theory only. In essence, it is extremely difficult to argue what will happen. And that sentiment infuses politics with the future of the entire commercial framework, with direct consequences for the future of

100 ibid.
London as the preferred seat of arbitration. Coupled with the emergence of viable competitors, this results in an unsatisfactory state of affairs with potentially disastrous consequences for arbitration.

Arbitration’s merit as a form of dispute resolution has been made clear; these benefits will not go away on Brexit. Parties are free to continue to take a seat, and take any seat they wish. But the undeniable waning of certainty means that they must first be sure that the chair does not break beneath them.
The increased popularity of alternative dispute resolution: a double-edged sword?

M. Jurana Ahmed

1. Introduction

Effective and accessible means of dispute resolution coupled with the ability to enforce contractual rights and/or remedies are of manifest importance to the interests of commercial parties.\(^1\) Though not a novel phenomenon,\(^2\) where disputes arise, voluntarily seeking the guidance of a third party without involving the courts by way of alternative dispute resolution (hereafter ADR) has become increasingly popular in the business arena.\(^3\) Depending on the nature of the dispute, parties may elect either adjudicative or non-adjudicative methods of ADR.\(^4\) Adjudicative ADR relates to situations in which a binding decision is made by a third party via arbitration, adjudication,\(^5\) or expert determination.\(^6\) Alternatively, non-adjudicative ADR, such as negotiation, mediation,\(^7\) and conciliation, is controlled by the parties themselves.\(^8\)

In \textit{Pennock v Hodgson},\(^9\) Mummery LJ alluded to the main problems with litigation. His Lordship observed ‘the unfortunate consequence of [litigation is] that, in the absence of compromise, someone wins, someone loses, it always costs a lot of money and usually generates [ill-feelings that do not] end with the litigation’. Similarly, Baskind submits so-called

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\(^5\) See eg \textit{CSK Electrical Contractors Ltd v Kingswood Electrical Services Ltd} [2015] EWHC 667 (TCC).
\(^6\) See eg \textit{Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd} [1993] AC 334 (HL).
‘mainstream’ litigation is ‘the most disruptive factor a business is likely to encounter’.\textsuperscript{10} Given their clear hostility towards litigation, and the technicalities therein, both of these observations strongly suggest the use of ADR is to be encouraged. With this in mind, this article shall commence by submitting ADR, more specifically in the context of arbitration, should be considered by commercial parties in resolving their disputes.

The article will develop by acknowledging, though arbitration is a temptingly neat method of dispute resolution, the practice of resolving disputes behind closed doors heralds a significant danger to the development of English commercial law.\textsuperscript{11} As such, what is often perceived as the hallmark of ADR, the privacy element commercial parties so ardently desire, is,\textsuperscript{12} by the same token, proving to be something of a ‘double-edged sword’ due to its competitive effect upon the official court system.\textsuperscript{13} It is to this end the article shall maintain, where complex points of general interest have arisen, the Commercial Court should remain the central means of resolution.\textsuperscript{14} The article will then go on to suggest selective publication of arbitral awards may be an effective solution to the current backlash against the continued popularity of commercial arbitration. Anonymising the identities of the disputants while allowing the public access to the learned decisions of arbitrators will not only uphold party privacy and confidentiality but will further promote arbitration as both a reliable and credible doctrine.

2. The benefits of ADR in the context of arbitration

It is frequently thought the nature of litigation fails to capture commercial reality, with Lord Neuberger maintaining judges are not always the most commercially minded, let alone the most commercially experienced of people.\textsuperscript{15} This, in turn, suggests judges should be diffident before arrogating to themselves overconfidently the role of arbiter where expert knowledge is


\textsuperscript{11} See Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (The Bailii Lecture, March 2016).

\textsuperscript{12} Hassneh Insurance Co of Israel v Mew [1993] 2 Lloyd’s Rep 243.


\textsuperscript{14} See Lord Thomas, ‘Keeping commercial law up to date’ (The Jill Poole Memorial Lecture, Aston University, March 2017); and Lord Thomas, ‘Commercial Dispute Resolution: Courts and Arbitration’ (The National Judges College, Beijing, April 2017).

\textsuperscript{15} Skanska Rasteigh Weatherfoil Ltd v Somerfield Stores Ltd [2006] EWCA Civ 1732 [22]. See also Lord Neuberger, ‘The impact of pre- and post-contractual conduct on contractual interpretation’ (Banking Services and Finance Law Association Conference, Queenstown, August 2014) where he questions whether judges are reliable assessors of commercial common sense.
required, thus preventing parties becoming embroiled in the procedural morass so often viewed as ‘standard’ in court proceedings. Cruz therefore argues arbitration presents the alternative we so fervently seek from ADR, namely expertise in the industry in question; a forum in which to tailor the process to the dispute; flexibility in scheduling hearings and organising evidence; and minimising the amount of time and expenditure needed to reach a sound solution with which both parties are content – something not always possible with the winner-loser nature of court decisions. With that being said, it must be noted arbitration is not exempt from yielding antagonism between commercial parties.

Though a staunch supporter of arbitration, Carbonneau admits arbitration, now governed by the Arbitration Act 1996, does not achieve absolute perfection. Rather the voluntary relinquishing of power to a third party to make a binding decision not only mimics litigation but is arguably less attractive than going to court because of the restricted rights of appeal on questions of law. What is more, the continued popularity of arbitration in commercial disputes has made arbitrators highly sought-after, putting them in a position in which they can demand considerably high fees similar to the expenses incurred via litigation. It would thereby come as no surprise Reif describes arbitration as taking on a ‘quasi-litigation complexion’; whilst O’Connor goes as far as to say arbitration has distilled down to being little more than a ‘blood brother to litigation’. Polarising commercial parties as a result of the shortcomings of arbitration and litigation is perhaps better prevented therefore through non-adjudicative

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16 Skanska Rasleigh Weatherfoil Ltd v Somerfield Stores Ltd [2006] EWCA Civ 1732 [22].
19 Reif maintains arbitral proceedings share the adversarial construct found in litigation, stating there is a real possibility of a ‘winner-loser’ outcome in arbitration cases wherein one disputant may obtain no satisfaction at all. She thereby praises non-adjudicative methods like conciliation, claiming they typically result in resolutions that are of some benefit to both parties: see Linda C. Reif, ‘Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes’ (1990) 14 Fordham International Law Journal 637. See also Patrick O’Connor, ‘Alternative dispute resolution: panacea or placebo?’ (1992) 58 Arbitration 265-274 where it is argued it is not uncommon both parties receive an award neither is happy with, leading to a degree of disenchantment with the use of arbitration to solve their dispute. See also Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd [2014] EWHC 2104 (Comm), [2015] 1 WLR 1145.
22 See R. Williams, ‘Alternative dispute resolution (ADR): salvation or chimera?’ (1990) 56 Arbitration 101-109 where it is argued, in substantial cases, arbitration now costs as much as litigation, if not more.
methods of ADR, namely mediation, wherein fulfilment of any proposed solution will depend on the mutual agreement of the disputants on its implementation.\textsuperscript{25} Norris J further argues the engagement of a trained mediator is more likely to lead to an outcome satisfactory to both parties in terms of speed, cost, resolution, and future relationships than the pursuit of litigation\textsuperscript{26} and, by extension, arbitration.\textsuperscript{27}

Be that as it may, the benefits of arbitration should not be eclipsed simply because of a few similarities to litigation. Cruz, though admitting having had ‘some bad experiences with arbitration’, maintains it should not ‘[sour] parties on the arbitral process which, when managed properly, can [still] give parties a fair hearing in less time and at less cost’.\textsuperscript{28} That said, each case shall turn on its own facts in that arbitration will, of course, not be suitable for all cases.\textsuperscript{29} Legal advisors should therefore take great care in guiding their clients on which procedure is most appropriate,\textsuperscript{30} paying particular attention to the material facts of the case.\textsuperscript{31} As both Stephens\textsuperscript{32} and Hogan\textsuperscript{33} quite rightly seek to remind us, we must therefore appreciate arbitration, and ADR more generally, should not be regarded as a universal panacea to the woes of litigation. A better understanding would be to view it as a mechanism simply designed to complement, help, and fortify the relationship between commercial parties where litigation can be avoided.\textsuperscript{34}

\textsuperscript{26} \textit{Bradley v Heslin} [2014] EWHC 3267 (Ch) [22].
\textsuperscript{27} See also Patrick O’Connor, ‘Alternative dispute resolution: panacea or placebo?’ (1992) 58 Arbitration 265-274 where it is submitted the very nature of non-adjudicative ADR takes out much of the acrimony, and in the course of the hearing, it may very well be possible for a new business arrangement to be created as part of the settlement process.
\textsuperscript{29} See comments in Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (The Bailii Lecture, March 2016) where he maintains ‘what is good for one dispute may not be for another’.
\textsuperscript{31} Eg how much the dispute is worth.
\textsuperscript{34} See also J. Walker and N. Fricker, ‘Alternative Dispute Resolution – state responsibility or second best?’ (1994) CJQ 29-49 where a similar point regarding the promotion of so-called ‘alternatives’ to litigation was made. It was submitted the encouragement of said alternatives was not born because of some overbearing despair or dissatisfaction with the existing legal system, but from a belief in the value of extending and clarifying the range of options available. This therefore recognises the importance of matching disputes to dispute resolution mechanisms by considering such factors as (i) the nature of the dispute; (ii) the relationship between the disputants; and (iii) the costs involved. See also R. Williams, ‘Alternative dispute resolution (ADR): salvation or chimera?’ (1990) 56 Arbitration 101-109.
3. Threatening the development of English commercial law

The digital and data revolution in relation to innovations such as blockchain contracts and the commercial exploitation of bulk data demands the law is kept up to date. The Market Test Case Procedure was introduced as a result to ensure the common law was made more readily accessible with clarification of novel legal principles. However, as is well known, the development of commercial law in England and Wales is effected, not only through court claims, but also through claims brought in arbitration which, according to Sandeep, has increasingly contributed to the development of norms of commercial usage. As such, the insight of arbitrators is extremely valuable, not least because it reaffirms and, at times, produces procedural and substantive rules which can become part of practice and followed in future. Nonetheless, the fact arbitration is a private process has led to fewer legal developments in some sectors of economic activity where such clauses are widespread, in turn, reducing the degree of certainty often attached to authoritative court decisions. Arbitrator, Sir Bernard Rix, thus admits the growth of private methods of dispute resolution, coupled with the lack of

39 See D. Luban, ‘Settlements and the Erosion of the Public Realm’ (1995) 83 GEO. LJ where it is argued private adjudications fail to produce rules or binding precedents.
40 For example, areas such as insurance, reinsurance, construction, engineering, commodities, shipping and chartering: see R. Liu, ‘A balancing act: section 69 of the Arbitration Act 1996’ (2018) 21 Int ALR 18-31.
42 It must be noted, however, the UK has not reached the stark example which appears to be taking place in the United States where mandatory arbitration clauses in contracts are removing whole classes of claim from the jurisdiction of the courts and undermining aspects of the law’s development. See J. Maria Glover, ‘Disappearing Claims and the Erosion of Substantive Law’ (2015) 124 Yale LJ 3052-3092; and Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (The Bailii Lecture, March 2016). Nonetheless, critics have still vocalised a myriad of concerns relating to the privatisation of the various modes of ADR: see eg Jean R. Sternlight, ‘Creeping Mandatory Arbitration: Is it Just?’ 57 (2005) Stan L Rev 1661-65 (arguing privatisation of dispute resolution systems fails to serve an important educational function to the public).
appeal rights,\textsuperscript{43} has in fact proven to be commercially problematic as it has made us ‘[lose] sight of the basic feedstock of our commercial law’\textsuperscript{44}.

Thomas claims the time and energy which is needed to establish and improve private schemes may well divert attention away from the more pressing task of reforming the Commercial Courts,\textsuperscript{45} a point explicitly recognised by the Royal Commission on Legal Services in Scotland who, though expressing they ‘certainly do not want to discourage arbitration’, firmly believe ‘the Civil Courts are, and should remain, the principal means for resolving civil disputes’.\textsuperscript{46} Lord Thomas is very much in favour of this approach, comparing the commercial law of England and Wales to that of France’s recently revised Civil Code on contractual obligations.\textsuperscript{47} He argues fundamental revision of the Civil Code was due to a fear that, unless the law of France was updated, the French influence across the world-wide market would, in time, fall into disuse in international transactions. It would therefore seem the increased use of arbitration (and private methods of dispute resolution more generally) has created a tug-of-war situation in which party privacy and confidentiality, frequently cited as the most valued components of ADR,\textsuperscript{48} are at odds with the continued development of English commercial law.\textsuperscript{49}


\textsuperscript{44} Sir Bernard Rix, ‘Confidentiality in International Arbitration: Virtue or Vice?’ (Jones Day Professorship in Commercial Law Lecture, SMU, Singapore, March 2015). See also J. Walker and N. Fricker, ‘Alternative Dispute Resolution – state responsibility or second best?’ (1994) CJQ 29-49 where it is suggested the ad hoc shift towards informal methods of dispute resolution is dangerous as it undermines the important function of the judiciary as the final arbiter; and, Jean R. Sternlight, ‘Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad’ 15 (2007) DePaul Law Review 569-591 where it is noted privatisation of dispute resolution can be viewed as problematic because the elaboration of law achieved in public trials and published decisions is necessary to protect and enhance individual rights. For similar observations, see Harry T. Edwards, ‘Commentary, Alternative Dispute Resolution: Panacea or Anathema?’ (1986) 99 Harv L Rev 675-82 where it is submitted a virtue of litigation is its ability to ensure the proper resolution and application of public values and that public officials, as opposed to private individuals, must interpret the values of the statutes; Owen M. Fiss, ‘Commentary, Against Settlement’ (1984) 93 Yale LJ 1073-1075; and Carbonneau, ‘Rendering Arbitral Awards with Reasons’ (1985) 23 Columbia Journal of Transnational Law 579, 607.


\textsuperscript{46} Chairman: Lord Hughes, Royal Commission on Legal Services in Scotland (Cmdn. 7846, 1980).

\textsuperscript{47} Lord Thomas, ‘Keeping commercial law up to date’ (The Jill Poole Memorial Lecture, Aston University, March 2017).

\textsuperscript{48} See E. Zlatanska, ‘To publish, or not to publish arbitral awards: that is the question’ (2015) Arbitration 25-26. By way of contrast, see Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (The Bailii Lecture, March 2016), where it is argued the strength of this perceived benefit is not, however, as clear cut as it might seem and is ‘overrated’. This is because ‘the market tends to know which parties are involved in which arbitrations and what the arbitration is about’.

\textsuperscript{49} See Lord Thomas, ‘Commercial Dispute Resolution: Courts and Arbitration’ (The National Judges College, Beijing, April 2017) where it was recognised the ‘key point is the balance between respect for party choice and the wider state/public interest in ensuring the law is developed and keeps pace with change’. 

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As noted by Resnik, ‘open court proceedings enable people to watch, debate, develop, contest and materialise the exercise of both public and private [law]’\(^{50}\) whilst arbitration does not.\(^{51}\) According to Lord Hughes, to make litigation more appealing to commercial parties, the aim therefore should be to develop in the Commercial Courts themselves ‘those same qualities of cheapness, speed and informality’\(^{52}\) which, alongside privacy and confidentiality, are additional selling points of the various modes of ADR. Examining whether markets would be prepared to waive arbitration/ADR in cases where there are significant points of general interest would indeed be an effective starting point, particularly where the dispute in question not only involves legal issues better determined via formal court proceedings but, more importantly, the wider interests of their industry.\(^{53}\) Interestingly, Sternlight\(^{54}\) has observed even the staunchest advocates of ADR, namely Menkel-Meadow,\(^{55}\) recognise and agree there are certain circumstances in which disputes are better resolved publicly by way of litigation.

Others, namely Blavi\(^{56}\) and Sir Bernard Rix,\(^{57}\) have attempted to redefine the confidentiality structure of commercial arbitration by toying with the idea of publishing certain aspects of arbitral awards. It is thought selective publication shall preserve the benefits of privacy and confidentiality whilst enabling the legal community\(^{58}\) to have access to the valuable information contained therein.\(^{59}\) This same point was subject to judicial comment in Hong

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\(^{51}\) Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (The Bailii Lecture, March 2016). By way of contrast, see L. Tout and A. Patel, ‘Arbitration exposed? Recent cases remind us that parties cannot assume arbitration awards will remain confidential’ (2017) 20 Int ALR 144-147.


\(^{53}\) Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (The Bailii Lecture, March 2016).


\(^{55}\) See Carrie Menkel-Meadow, ‘Whose Dispute is it Anyway? A Philosophical and Democratic Defence of Settlement (In Some Cases)’ (1995) 83 GEO LJ 2663 where it is recognised certain settlements, such as mass torts actions, have such a significant impact on our justice system that ‘public exposure of such cases may be a necessary part of our democratic process’.


\(^{57}\) Sir Bernard Rix, ‘Confidentiality in International Arbitration: Virtue or Vice?’ (Jones Day Professorship in Commercial Law Lecture, SMU, Singapore, March 2015) (his view being that we should begin to look at publishing awards on a more systematic basis and, where necessary, try and disguise or anonymise them so that the benefit of privacy is not lost).

\(^{58}\) Particularly arbitrators who found themselves called upon to decide the same point.

\(^{59}\) This approach has been adopted by some national jurisdictions, namely Chile, as well as the International Chamber of Commerce (ICC), who publish arbitral awards to differing degrees.
Kong in the case of *Schindler Lifts v Dickson Construction*\(^{60}\) where Leonard J maintained it is ‘greatly hoped’ contractors in the construction industry, as well as the professionals who serve it, ‘will before long see the wisdom of reporting the decisions of arbitrators on points of law of general interest’.\(^{61}\) He went further by submitting producing a report regarding an arbitrator’s reasoning would be ‘a simple matter’; and that such a report, devoid of any mention of the particular facts of the case or the identities of the parties, could hardly be regarded as detracting from the principle of privacy.\(^{62}\) All that is required of course is the consent of the parties.

As appealing as this solution may seem, however, there are those who remain sceptical of how selective publication will operate in both the legal and public arena. For instance, Lord Thomas has expressed his reservations by describing it as a ‘highly regressive approach’,\(^{63}\) whilst Shilston submits arbitral awards should be viewed as ‘ad hoc solution[s] to particular [disputes]’ and should consequently avoid having precedential value ‘for the future guidance of arbitrators’.\(^{64}\) In line with Shilston’s view, Zlatanska goes further by arguing that, in practice, the majority of awards will not be of much value.\(^{65}\) This is because disputes usually involve a unique set of facts on which the award is made. It would, therefore, be impossible to draw general conclusions from them\(^{66}\) since awards are simply addressed to the parties to the dispute in question and, by extension, limited to ‘doing justice’ to that particular situation.\(^{67}\) It is to this end Nariman maintains the function of arbitration is to ‘decide, not to teach’.\(^{68}\) That being so, to completely disregard the practical importance of systematic publication of awards, as well as the educational value therein for future arbitrators, is misguided to say the least. In the words of Cresswell, ‘any award will affect…business and people’.\(^{69}\)

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\(^{62}\) Some commercial courts in offshore jurisdictions are also looking to expound principles of the law in terms that leave the facts of the case confidential; see Lord Thomas, ‘Keeping commercial law up to date’ (The Jill Poole Memorial Lecture, Aston University, March 2017).

\(^{63}\) Lord Thomas, ‘Keeping commercial law up to date’ (The Jill Poole Memorial Lecture, Aston University, March 2017).


Essentially, international business requires certainty and predictability.70 Surely, the publication of arbitral awards, even if partial, will only add to that, thus making the system more transparent and fair by allowing the public to see ‘justice is done’.71 Though it is argued arbitration is not concerned with justice but rather the deciding of specific cases,72 we must appreciate arbitration is a social phenomenon with decisions on disputes having a significant effect on the public at large.73 In other words, a relatively homogenous body of awards can further promote arbitration as an efficient and reliable means of settling disputes. Therefore, if the work of arbitrators is rendered more visible, the legitimacy of the system will, undoubtedly, be strengthened, leading to the development of a coherent doctrine of authoritative writing that can be used as guidance in future disputes.74 Future users of arbitration will thereby gain a better understanding of the process and, incidentally, be encouraged to use it, whilst existing users will, more likely, use arbitrators again as they will be convinced they can get a fair hearing which meets their (reasonable) expectations.75 Both Smit76 and Carbonneau77 further maintain publication will ensure arbitrators are making high-quality decisions, thus prompting arbitrators to make novel and creative propositions, particularly as ‘much of the creative efforts of [the arbitral] tribunals is not generally known’.78

4. Conclusion

Ultimately, this article has explored the broad subject matter that is ADR, more specifically in the context of commercial arbitration and the merits and pitfalls therein. Inspired by concerns regarding efficiency, expenditure, expertise and time, the article first submits, though arbitration has, to some degree, steadily become akin to litigation, it remains a phenomenon

71 See famous expression that justice should not only be done but should manifestly and undoubtedly be seen to be done, coined by Lord Hewart CJ in Rex v Sussex Justices Ex p McCarthy [1924] 1 KB 256.
which commercial parties should be encouraged to consider where disputes arise. To expect arbitration to be a ‘cure-all’ solution to the shortcomings of litigation therefore fails to understand arbitration is, quite simply, an adjunct to the existing court system 79 which commercial parties, where appropriate, should make use of. 80 Second, the article has dissected the central hallmarks of arbitration, namely privacy and confidentiality, noting the settling of disputes behind closed doors has activated a potential threat to the development of English commercial law. The article has therefore suggested, though the Civil Courts should arguably remain the primary means of resolving disputes, selective publication of awards wherein the identities of the parties are anonymised could be the solution we have been looking for.

79 Lord Thomas, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (The Bailii Lecture, March 2016).
A critical assessment of the role of alternative dispute resolution in English law

Anisa Salam

1. Introduction

Alternative dispute resolution (ADR) is a voluntary process, which is increasingly becoming a key instrument for parties to settle their disputes. Litigation has proven to be very problematic and is avoided for multiple reasons. Such reasons include the fact it is very expensive, time-consuming, in a public setting, and is adversarial. The flexibility of ADR and the less formal proceedings has increased party autonomy, and is hence better suited for businesses. In recent years, there has been the growth of use of ADR in commercial contracting, specifically through arbitration and mediation, to the extent the courts themselves encourage the process.

First, this article will examine the disadvantages of litigation and why ADR would be more suitable to resolve disputes. Secondly, the article will argue that whilst the courts do not compel a party to use ADR, from a practical perspective, the position is different. The courts cannot force a party to use ADR, however, they may impose different sanctions for either unreasonably refusing to attempt it or for not taking it seriously. Finally, this article will evaluate how the growth of attempting arbitration has prevented English commercial law from developing.

2. Why would a party choose ADR as opposed to litigation?

The courts accept that litigation is problematic and thus encourage parties to attempt ADR before pursuing litigation. Where it is possible, ADR should be used for multiple purposes. A classic problem is the expensive costs associated with litigation that have risen in recent years. In many circumstances litigation costs can exceed the amount in dispute, and this presents a clear reason why litigation should be avoided. For instance, in *Egan v Motor Services (Bath) Ltd*, the costs of the litigation (£100,000) ended up being significantly more than the amount in dispute (£6,000). This imbalance occurred as the parties had got into an adversarial position, lost sight of the amount in dispute, and were described as ‘completely cuckoo’ by ‘engaging...
in expensive litigation with so little at stake’. Such cases ‘cry out for mediation’ and demonstrate the risks and consequences of litigation. Generally, litigation should be a last resort, unless it is really unavoidable.

One of the greatest issues for commercial parties with litigation is the fact it usually takes place in a public setting. This is problematic because when a case goes to court, the world at large is in principle aware of the fact of the dispute and of the parties involved. As a result, the parties’ reputations are at risk. This elucidates the point that ADR is a much more attractive method; its confidential nature can help commercial activity to continue and help parties maintain future commercial relationships. In comparison, litigation creates an adversarial setting where ‘someone wins, someone loses’ and it ‘usually generates a lot of ill-feeling which does not end with the litigation’. Overall, the engagement of ADR leads to a more satisfactory outcome for all parties as regards speed, expenses, and future relationships, when compared to litigation.

The uncertainty presented by going to court is also a major disadvantage of litigation. When the parties go to the courts, they cannot be certain of the outcome and it is generally very unpredictable. Additionally, parties have no control over the process or outcome, which is different to adjudicative ADR (to some extent) and also to the general autonomy parties have with non-adjudicate ADR. Moreover, a major attraction of arbitration is the fact an arbitrator is typically a specialist in the relevant commercial field. In contrast, judges do not always have the same level of expertise. Thus, arbitration will be attractive, with an expert ‘better placed to interpret the contract in a commercial sense than a judge’. This will be beneficial as the parties can be certain and confident they will get an outcome that is sensitive to their particular industry.

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3 ibid [53].
4 ibid [53]; Oliver v Symons [2012] EWCA Civ 267 [53].
5 R (Cowl and others) v Plymouth City Council [2001] EWCA Civ 1935, [2002] 1 WLR 803 [27].
7 ibid.
8 Bradley v Heslin [2014] EWHC 3267 (Ch) [22].
3. Can a court compel a party to use ADR?

The courts take multiple approaches when parties do not use ADR. First, the Civil Procedure Rules, which regulate litigation, support ADR.\(^{10}\) Furthermore, in *Halsey v Milton Keynes General NHS Trust*\(^ {11}\) the court accepted it could not force parties to attempt ADR. A party can only be encouraged by the courts to agree to attempt ADR, and a court cannot oblige parties who are truly unwilling to do so.\(^ {12}\) Imposing on parties a requirement to attempt ADR would violate parties’ right to access the court and right to fair trial under Article 6 of the ECHR.\(^ {13}\) This view is controversial and is open to criticism as other countries to the ECHR do allow the courts to compel a party to use ADR. Thus, the reasoning is arguably weak.

In contrast, the question whether the court can compel a party to use ADR is different from a practical perspective. When a party does not attempt ADR, and more importantly refuses to engage in ADR, the courts recognise different factors. In *Halsey v Milton Keynes General NHS Trust*,\(^ {14}\) Dyson LJ held that when a party refuses to engage in ADR, but wins at trial, they can be penalised with an adverse costs order for not attempting ADR.\(^ {15}\) Similarly, in *Dunnett v Railtrack Plc*\(^ {16}\) the winning party was deprived of costs as they refused a reasonable offer to attempt mediation. The courts emphasised the importance of mediation and that it should be taken seriously when attempted, namely the parties cannot merely pay lip-service to ADR.\(^ {17}\) This is supported by the CPR r.44.2(2) where the general principle of civil litigation is that the party that loses at trial pays the winner’s costs. However, under CPR r.44.2(2)(b), the court may make a different order regarding costs, and may prevent a party from recovering all or some of the costs when they have refused to engage in ADR. In this instance, the courts will look at when ADR should and should not have been attempted. As costs are a substantial element in commercial cases, this factor tends to be a key incentive for a party to attempt ADR. Nonetheless, a party cannot be forced into a settlement due to the fear or threat of cost.

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\(^{10}\) For the provisions of the CPR which support ADR, see: CPR r.1.1; r.1(2)(b); r.1(2)(c); r.1.4; r.1.4(2)(e).


\(^{12}\) ibid [9].

\(^{13}\) ibid [9].


\(^{15}\) ibid [13]-[14].


\(^{17}\) *Watson Wyatt SARL v Maxwell Bately (a firm)* [2002] EWHC 2401 (Ch).
sanctions. Cost sanctions in no way should be used as a tactical device to force a party to attempt ADR or to try and settle.18

Further to the courts’ sanctions for unreasonably refusing ADR, the courts also penalise where ADR is not taken seriously. Clear guidelines have been established as to how a party should act in response to a request to mediate. As well as ignorance, silence will also not suffice, thus, where a party ignores a request to mediate, rather than refusing to do so, the court will potentially regard this as unreasonable behaviour resulting in a costs penalty. Hence, in PGF II SA v OMFS Co 1 Ltd19 the court held that ‘silence in the face of an invitation to participate in ADR is...unreasonable’.20 Nevertheless, parties can avoid the costs sanction where they have a reasonable ground for refusing to engage in ADR,21 which includes refusing the type of ADR requested, refusing at that time period, and raising certain obstacles or arguments as to shortages of information and evidence. Therefore, it can be argued that a court cannot compel a party to use ADR, but can penalise an unreasonable refusal and can penalise parties that do not take ADR seriously.

4. Arbitration and the development of English law

Arbitration is a type of ADR and is attractive to commercial parties for many reasons. Nevertheless, it is not without its drawbacks. Despite the encouragement, attraction in the international market and general success, arbitration has impeded the development of English law.

First and foremost, appeals in relation to arbitrator’s awards have been made difficult. Under section 69 of the Arbitration Act 1996, the limits based on appeals have in turn ‘reduced the potential for the courts to develop and explain the law.’22 Lord Thomas argued that there has been significant reduction in appeals from arbitral awards to the courts since the introduction of the current test. This implied that ADR methods can to some extent prevent the development of the law, and that the appropriate dispute resolution method should be in place to allow the

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20 ibid [34].
21 ibid [30]. The judgment addresses four stages of refusing to participate and states refusal should be given in full reasons based on the Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 WLR 3002 guidelines outlined at [16].
22 See the arguments of Lord Thomas in the lecture cited above at n 9, 10.
effective development of commercial law and keep up to date and underpin the modern market, trade and commerce. Reserving the important points to the private forum of arbitration denies the courts (and parties) the opportunity to achieve this desired result. Relatedly, the increasingly widespread use of arbitration clauses is also hindering the development of the common law.\textsuperscript{23}

In addition, the privacy of arbitration has proved to be an obstacle. Arbitrators’ awards are not made public and this carries the risk of conflicting awards on the same issue and matter. The confidential nature of arbitration has arguably reduced the degree of certainty in the law, which is a key criterion for commercial parties. This suggests arbitration has affected the general development of English commercial law.

Indeed, Sir Bernard Rix argued that commercial law is losing sight of its basic feedstock to develop, with more cases going into arbitration.\textsuperscript{24} This is due to the use of arbitration clauses in contracts increasing and subsequently impeding the development of the common law. Lord Thomas pointed out that ‘it is the courts that develop law. Arbitration does not.’\textsuperscript{25} However, as discussed earlier in this article, when interpreting contracts the judges often do not have the commercial common sense and expertise that the particular industry or sector requires. Arguably, arbitration will be more suitable in avoiding this uncertainty. Hence, parties may prefer arbitration due to this reason as they can get a decision that is sensitive to their particular industry, resulting in confidence and certainty for parties.

5. Conclusion

Returning to the question posed at the beginning of this article, it is now possible to say that the court cannot compel a party to use ADR as this would violate parties’ rights to access the courts. Nonetheless, where parties are acting unreasonably or are not being serious regarding the process, a court may impose sanctions on parties regarding costs. Where parties are reasonable and can provide reasoning and evidence for not attempting ADR, they will not be penalised.

\textsuperscript{23} In \textit{Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd} [2014] EWHC 2104 (Comm), [2015] 1 WLR 1145, the parties contracted to resolve their disputes through friendly discussion for the duration of four weeks, but where the dispute was not resolved, then the arbitration clause would be invoked.


\textsuperscript{25} See at n 9, 17.
Furthermore, the growth of arbitration has impeded the development of English law, as Lord Thomas argues. This principally relates to the ability to appeal against awards and the confidential and private nature of arbitration. Nevertheless, ADR is still preferred by businesses due to its confidential nature, relatively quick speed, flexibility and respect for party autonomy. Hence, ADR is continuing to gain in popularity as a choice for dispute resolution.
Should commercial parties favour litigation over alternative dispute resolution?

**Philippa Harper**

1. Introduction

Alternative dispute resolution refers, as its name suggests, to the many alternative voluntary options commercial parties have when considering how to solve disputes other than through litigation.¹ As this paper will examine, the various methods of alternative dispute resolution (hereafter, ADR) and litigation each have their advantages and pitfalls. As Jeffery Cruz suggests, it is difficult to advocate ‘any particular dispute resolution process for every situation’² and commercial parties should consider a conglomeration of factors when deciding which is the best solution for them. These might include cost-effectiveness (a factor of particular importance in the commercial world), how quick and easy the procedures are, and the effect they may have upon future relations between parties. Generally, there is no right or wrong answer as to whether ADR or litigation is ‘better’, although we will critically analyse the reasons for which one may be more attractive than the other.

A good starting point might be a brief overview of the various forms of ADR which commercial parties may choose to employ. Broadly speaking, ADR can be adjudicative or non-adjudicative. Adjudicative means the parties largely control what information is provided during the process and a ‘result’ is guaranteed. Non-adjudicative methods include negotiation, which is one of the most basics forms of ADR, and mediation, which is a commonly used method during which a third party ‘attempts to facilitate settlement of a dispute by listening to the parties and uncovering their strengths and weaknesses’.³

The most widely used method of adjudicative ADR is arbitration. Arbitration is a flexible method of ADR which involves a third party adjudicator coming to a binding decision in relation to the dispute. Arbitration is an area of law underpinned by the successful legislative framework of the Arbitration Act 1996, section one of which describes arbitration’s basic principles, which include obtaining the fair resolution of a dispute ‘by an impartial tribunal

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without unnecessary delay and expense’, and which has been commended by critics as a particularly ‘comprehensive and thorough’ piece of legislation. These aspirations illustrate two of the most important factors in the consideration of dispute resolution, which we shall now discuss.

2. Cost-effectiveness of dispute resolution

In the commercial world one of the most important things parties should consider is the cost-effectiveness of dispute resolution. This is an immediate disadvantage of litigation. Traditionally, litigation comes with hefty legal fees: there are court costs and solicitors’ fees, which might be unappealing, particularly for smaller parties who cannot afford such costs or for disputes where the amount of money in question is smaller. Proportionality is key; arguably it is sensible to keep the costs of dispute resolution relative to the amount in question. An extreme example of a failure to recognise this can be seen in the case of *Egan v Motor Services*, where the parties became so embroiled in the dispute that the litigation costs mounted into the hundreds of thousands, far surpassing the value of the claim. For obvious economic reasons, this is a situation parties should seek to avoid.

We can, then, look to ADR as a cheaper solution. Although in general ADR is more cost effective, arbitration may become expensive. The arbitrator may be someone skilled in a particular area and for particularly skilled or sought-after arbitrators, their fees can be very high. Despite this, in general, it is reasonable to suggest ADR as a cheaper and more cost-effective solution, with ‘relatively minimal’ costs. Methods such as mere negotiation or mediation can be particularly effective from this point of view. Indeed, in *Bradley v Heslin* it was suggested that mediation is ‘satisfactory to both parties in terms of speed, cost, resolution and future relationships’.

3. Speed of the dispute resolution process

The speed of dispute-solving processes is a crucial factor which links seamlessly to their cost-effectiveness; to many large commercial firms, time is money, and to become embroiled in a

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8 *Bradley v Heslin* [2014] EWHC 3267 (Ch).
9 ibid [22].
lengthy dispute may result in a significant loss of earnings or revenue. Longer processes will also cost more in fees. Moreover, the sooner the dispute is resolved, the sooner the parties can move on from it. Litigation typically involves lengthy delays and parties may face a long wait for their case to be heard, whereas it has been suggested that arbitration can lead to a resolution ‘in much less time overall’\textsuperscript{10}. It has also been suggested that the finality of arbitration ‘translates into less time and money spent on the dispute’\textsuperscript{11}.

Companies may also choose to explore ADR methods such as expert determination and expert evaluation, which are notably particularly quick processes but are less commonly used.

4. Specialism and control

As mentioned above, one attractive element of arbitration, a method of ADR, is that commercial parties can choose their own arbitrators. This is highly beneficial. It means parties can choose an arbitrator with specific, skilled knowledge: for example, some arbitrators have particular knowledge of the construction industry. This translates into an accurate interpretation of the dispute and sensitivity to the context of the dispute. Arbitration also offers the attraction of parties being able to choose the rules used, where it takes place, and whether an institution is involved.\textsuperscript{12} Further to this, methods such as adjudication can be specialised somewhat as they may be suited to a particular industry.

On the other hand, litigation involves a judge who may have little or no specific knowledge of the subject matter,\textsuperscript{13} which might lead to an unjust or unpredictable result which is not desirable for the parties. Judges are prone to construe contracts very literally.\textsuperscript{14} Moreover, in interpreting contracts, judges may lack the specific knowledge to construe the contract as it was intended taking into account its commercial context, whereas a skilled arbitrator would be able to do so by taking into account the whole circumstances of the case in context. Therefore, litigation risks a judgment lacking commercial common sense, which might produce an undesirable, or unintended, outcome.

\textsuperscript{11} Rebecca Callahan, ‘Arbitration vs Litigation: The Right to Appeal and Other Misperceptions Fuelling the Preference for a Judicial Reform’ (2006) 2.
\textsuperscript{13} Steven C. Bennett, \textit{Arbitration: Essential Concepts} (ALM Publishing 2002) 6.
\textsuperscript{14} \textit{Arnold v Britton} [2015] UKSC 36, [2015] AC 1619.
5. The binding nature of dispute resolution

Parties always take a risk when they choose any form of adjudicative dispute resolution; a risk that the outcome may not be the one they had hoped for. Therefore, whether or not the decision is binding should be a factor strongly considered by commercial parties when choosing a method of dispute resolution. This is a pitfall of arbitration and litigation in particular; they focus on a ‘winner and loser’ concept; that is to say, one party ‘wins’ whilst the other ‘loses’. This risks bitterness and entrenchment between the parties, which will be discussed in further detail shortly. In these circumstances, although a decision is reached, it does not necessarily resolve all the issues between the parties, particularly where they are in a long-term commercial relationship.

Another problem to be taken into account regarding the enforceability of dispute resolution lies with expert determination, a straightforward method of ADR during which an expert makes a relatively quick, binding decision on the facts of the case. With expert determination, the decision remains binding even if the expert makes a mistake as to the facts of the case, which could be potentially catastrophic. Therefore, parties might choose to consider options such as mediation, where no binding decision is reached.

In some situations, however, it is advantageous for decisions to be binding. It makes it easier for awards to be enforced and for parties to claim monies they are owed. Companies should also be aware of the benefits of the New York Convention, a unique international framework which makes it easier to enforce international arbitral awards in other jurisdictions and to which we can perhaps attribute some of the rise in popularity of arbitration. It works on a ‘pro-enforcement basis’, 15 which means parties have a strong chance of being able to claim any monies they are awarded, and allows arbitrators to ‘speak a common language’ 16 which synchronises international arbitration to a degree.

6. Can parties be compelled to use ADR, and what effects may it have upon future negotiations?

Elsewhere, to further develop the point made regarding the entrenchment of parties, the winner and loser concept focuses only on the award made rather than resolving differences and

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16 ibid xix.
maintaining future relationships between parties. Polarisation is risked by methods such as litigation; without resolving the dispute properly, parties face becoming embroiled in further disputes\textsuperscript{17} and damaging their chances of future negotiations. On the other hand, ADR is seen as more productive in ‘detoxifying the relations between the parties’.\textsuperscript{18} Methods such as mediation in particular are ‘a good choice’\textsuperscript{19} and seek to achieve the opposite of animosity: mediation encourages the resolution of the dispute even if no award is made. In addition, anything disclosed by the parties in such proceedings may not be used in further proceedings; for example, should the parties later choose to go to court. This is to be commended in that it encourages a ‘cards on the table’ approach and preserving parties’ business relationships.

This can be linked to the enforceability of dispute resolution in terms of whether or not parties can be forced to use ADR as an alternative to court. Whilst parties cannot currently be denied access to court and forced to use ADR, as this would be in breach of Article 6 of the European Convention on Human Rights, certain orders may be made if the court believes it would have been a more sensible option to use ADR for example to save time and money. Several provisions of the Civil Procedure Rules also support the use of ADR; they favour dealing with cases ‘justly and at proportionate cost’, which would suggest support for methods such as mediation.

Penalisation may be reflected in financial awards in such cases. An example of this kind of situation is illustrated in \textit{Dunnett v Railtrack},\textsuperscript{20} where the parties instead opted for litigation. Similarly, in \textit{Halsey v Milton Keynes General NHS Trust}\textsuperscript{21} the Court of Appeal stressed the importance of ADR, while also reinforcing the point that parties cannot be forced to use ADR in the sense a court cannot deny parties the right to access the court should they refuse to engage in ADR. In this case, Dyson LJ also reiterated that parties can be penalised by an adverse costs order, meaning they may not be able to recover all their costs even if they win the case. From a practical perspective, therefore, the courts can certainly coerce parties into using ADR, although they cannot force it in law.

It must also be recognised that ADR will not be appropriate for all situations. For example, if there are allegations of fraudulent or criminal activity, litigation will be a more appropriate

\begin{itemize}
  \item \textsuperscript{17}Jeffery R. Cruz, ‘Arbitration vs Litigation: An Unintentional Experiment’ (2006) 16.
  \item \textsuperscript{18}Nancy F. Atlas, \textit{Alternative Dispute Resolution: The Litigator’s Handbook} (Litigation ABA, 2000) 28.
  \item \textsuperscript{19}ibid 42.
  \item \textsuperscript{20}\textit{Dunnett v Railtrack Plc} [2002] EWCA Civ 303, [2002] 1 WLR 2434.
  \item \textsuperscript{21}\textit{Halsey v Milton Keynes General NHS Trust} [2004] EWCA Civ 576, [2004] 1 WLR 3002.
\end{itemize}
method. Moreover, if there are particularly high tensions between the parties, ADR may not be appropriate.

7. Importance of context and privacy

It is clear, therefore, that commercial parties, in general, will opt for a dispute resolution method which suits their circumstances, but it is vitally important that the implications of their method of choice should be considered in a broader context – in particular, the development of English commercial law as a whole. Although this article has discussed and shed light upon several appealing features of ADR, particularly arbitration, a major problem which must be highlighted is the private nature of commercial arbitration. This private nature means decisions in disputes are not publicised; an attractive prospect indeed for parties who seek to uphold their reputations and prevent lengthy disputes from being in the public eye. In contrast, litigation offers the opposite as court decisions are published. Further, there is a general obligation of disclosure with regards to litigation, meaning parties must reveal all necessary information, whereas with most methods of ADR there is no such obligation. This means the parties retain privacy to some degree and need not reveal anything they think may reflect poorly upon them.

Although this is preferable for individual parties, more generally speaking it poses an alarming risk of seriously shunting the growth of English law for the following reason. With more and more parties opting for arbitration and fewer disputes being heard in our courts, there is a risk of a decline in fresh case law and thus a risk to the development of principles of commercial law. This presents a more general problem as regards the desirability, and thus competitiveness, of English commercial law when considered against other jurisdictions.

In a series of lectures, Lord Thomas has highlighted this need to ‘keep up’ with other jurisdictions22 in an ‘increasingly competitive marketplace’23 when it comes to dispute resolution. Lord Thomas reiterates the point that arbitration does not develop law. On the other hand, open court proceedings allow people to ‘watch, develop, debate, contest and materialise’24 principles of law which help to nurture our legal system into a more advanced one. Whilst Lord Thomas does not ignore the benefits of arbitration, as outlined in this paper,

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he instead highlights a solution suggested by a leading arbitrator; a middle ground, perhaps, between arbitration and litigation. Such a solution is to publicise awards but keep them anonymous as regards the parties involved in the arbitral proceedings; thus protecting ‘the benefit of privacy’ and parties’ reputations whilst allowing for the development of English commercial law. The courts would hypothetically be able to look at and analyse such decisions and use them as a platform for the vital development of legal principles and the law’s response to changing commercial climates.

8. Conclusion

In the final analysis, it is clear that litigation is less advantageous for individual commercial parties as a form of resolving disputes than some of the other methods of ADR which have been looked at. It may be more expensive, take longer, and may not resolve deep-rooted disagreements between parties in the long term, whereas arbitration and mediation offer far better solutions to these problems. Crucially, however, it must be argued that Lord Thomas and other academics are advocates of a very valid point in illustrating the effect of neglecting litigation on the English legal system as a whole. This is a point which cannot be and ought not to be ignored; for it demonstrates the importance of arbitration and litigation developing in conjunction with each other, rather than as rivals.