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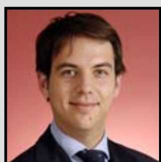

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REFLECTIONS ON EXPERT EVIDENCE

by Markus Esly

There is an urban myth about a US trial attorney who, throughout his career, had experienced many cases where the opposition led expert evidence of what he saw as dubious credibility or reliability. The attorney became frustrated with "hired charlatans" who professed to have an expert opinion on just about anything. So he decided to take action, and drew up a proposed new procedural rule that he wanted to apply to all expert testimony. It is said that it went something like this:

> "*All those holding themselves out to be an expert in civil proceedings shall attend Court in suitable attire. Such attire shall comprise:*
>
> *- A robe, with long sleeves.*
>
> *- A pointy hat, marked with stars or other astrological symbols.*
>
> *- A beard of appropriate bushiness.*
>
> *- A wand.*
>
> *When giving evidence before the Court, the expert shall emphasise important points with a wave of his wand.*"

A quick check of the law, however, shows that this has not been adopted.

Naturally, such mythical individuals are by no means representative of experts as a whole. There is however an interesting question as to

where the line between opinionated views and true expert assistance to the Court lies.

The difference between expert evidence and witness testimony is that the former consists of an opinion, while the latter is generally limited to facts of which the witness has personal knowledge. Any opinion that a Court may rely on should have a sound and reliable basis – in other words, it should be admissible evidence. US law in particular has long grappled with the concept of what amounts to admissible expert evidence.

This article outlines the position in the US under the Federal Rules of Evidence ("**FRE**") and compares it to the relevant principles of English law. The main difference between these two systems that emerges can be summarised as follows.

Summary – Comparison Between US and English Law

Under US law, testing the admissibility of expert[1] evidence involves a review of the methods and analysis on which the expert relies, and may extend to a review of his or her conclusions. An expert witness in litigation is not subject to any express duty of independence, or a positive duty to the Court to set out the full basis (factual or otherwise) of his opinion[2]. The safeguards against unreliable or partisan expert evidence lie in a "gatekeeping" role carried out by the judge (often at procedural hearings held for the particular purpose of testing admissibility), and in the adversarial system itself: it should be unlikely that the credibility of an unreliable expert survives rigorous cross-examination.

English law subjects experts to more positive controls in how they are to provide their evidence to the Court. It places the expert under a duty to the Court and requires him or her to be independent. There are guidelines as to the content of expert reports, which extend to an expert having to set out the range of possible opinions and justifying the opinion that he or she has adopted. Procedural hearings dealing with admissibility of expert evidence are rare.

When considering admissibility generally, English law is less focussed on the reliability of the methods used by the expert. It may be that this is because there is already a positive duty on experts to be independent and assist the Court, so that there should be less unreliable experts appearing on the scene in the first place.

US Law

For any evidence to be admissible under US law, it must be relevant – it must have something to do with the issues to be decided. FRE Rules 401 and 402, if read together, are permissive in nature. If evidence is relevant, and therefore helps to prove a fact in issue, it is admissible unless excluded by some other law or procedural rule. All irrelevant evidence is – not surprisingly - inadmissible. This is not materially different from the general principles of English law. It is suggested that in practice, relevance is not a difficult hurdle to overcome for a party who wishes to rely on expert evidence.

Admissibility of expert evidence is further governed by FRE Rule 702:

> "*If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3)*

[1] In other words, answering the question of whether the expert evidence can be relied on at trial and can go to the jury, who may (ultimately) accept or reject it.

[2] No such duty is contained in the FRE. Further, FRE Rule 705 provides that an expert is not required to testify as to the facts underlying his opinion in the first instance, but can be required to do so by the Court or under cross-examination. The requirement to disclose the basis of any expert opinion to the other party arises under the Federal Rules of Procedure, Rule 26, and is therefore not a question of admissibility. See also FRE Rule 703, which makes it clear that facts or data reasonably relied on by an expert for the purpose of his opinion are not admissible simply because the opinion is admissible.

the witness has applied the principles and methods reliably to the facts of the case."

The Old Test of "General Acceptance"

FRE Rule 702 is a statutory adoption of principles set out by the US Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc* (1993). Prior to the decision in *Daubert*, US Courts tended to follow the case of *Frye v. United States* (1923) when considering admissibility of expert evidence. The "*Frye* test" provided that expert evidence had to be based on techniques that were "*generally accepted*" in the scientific community. If general acceptance could not be shown, the evidence was thrown out - as happened in *Frye*, where the expert in question relied on novel technology which measured an individual's systolic blood pressure (a precursor to the lie detector).

The *Frye* test of "general acceptance" has been criticised. Judges might find themselves struggling when dealing with complex scientific theories. If a Court has to rule on what is generally accepted in the scientific community before the evidence can be presented to the jury as admissible, is there a need for further (expert) evidence on the state of scientific acceptance?

The "Daubert" Guidelines

In *Daubert*, the Supreme Court found that insisting on general acceptance was too exacting a standard, and could lead to "*wholesale exclusion*" of potentially relevant evidence. The Supreme Court did however emphasise the need for any expert evidence to be based on a 'scientific method'. An expert, unlike a witness of fact, will not necessarily inform the Court of matters within his own knowledge, and may not be the most reliable source of information. For that reason, the Supreme Court emphasised the principles which later became enshrined in the revised FRE Rule 702:

- The expert has to use "*reliable*" (scientific) principles and methods. These do not have to be "*generally accepted*" (but it helps if they are). Other relevant enquiries about the methods used include the potential rate of error, whether a method has been published and reviewed by other peer scientists, and whether it has been tested - if a scientific theory points to a conclusion, has there been an experiment that has shown that conclusion to be correct? Or can the theory be refuted or "*falsified*"?
- The expert opinion should be based on sufficient facts and data.
- The expert should have applied his methods reliably to the facts of the case.

Excluding Expert Evidence

The Supreme Court in *Daubert* also explained the principles governing whether relevant expert evidence should be excluded, noting that expert evidence might be misleading because it can be difficult to assess:

> "*Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...". Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Weinstein, 138 F.R.D., at 632.*"

In the US, it is the function of the trial judge to screen evidence before it goes to the jury – in so doing, he or she will apply the *Daubert* principles, which are guidelines rather than an exhaustive checklist.

In *Daubert*, the Supreme Court noted that carrying out their "gatekeeping" duty, judges should focus "*solely on principles and methodology, not on the conclusions that they generate*". This might suggest that as long as the methods employed by the expert seem reliable, the conclusion (which might be surprising or even outlandish) is not a matter to be taken into account when determining admissibility of the evidence. Whether the expert's conclusions are ultimately accepted would be a matter for

the jury under US law, once the evidence has been found to be admissible[3].

The Supreme Court revisited this point in *General Electric Company v Joiner (1997)*, explaining that conclusions and methodology are not distinct from one another. This ruling has been interpreted as meaning that the trial judge should also consider the conclusions reached by the expert when ruling on admissibility – something which might be seen as the province of the jury. Indeed, Stevens J in *Joiner* dissented, criticising the majority for having intruded on the distinction between methods and conclusions.

Breyer J (concurring with the majority in *Joiner*) noted that the Court always had the power to go beyond the expert evidence on which the parties wanted to rely, appointing an independent expert under FRE 706. He seemed to suggest that such an independent expert might be of assistance where the application of the *Daubert* principles would otherwise be difficult. US law (in contrast to English law) has not, however, adopted an express requirement for all experts to be independent, but has instead set out a number of factors by reference to which unreliable experts can be exposed by the opposing party. The formal "notes" to FRE 702 show that these considerations in substance relate to the independence of an expert, but they remain matters to be raised by the attorney seeking to undermine the expert in question[4].

What If a Dubious Expert Gets Through the Gate?

The US Supreme Court in *Daubert* rejected criticism that the revised guidelines would lead to a situation where jurors were faced with 'pseudoscientific' theories in an attempt by partisan experts to persuade them. It was stressed that if an expert just about managed to slip through the gate, the opposing party should be able to carefully deconstruct that evidence at the hearing so that the jury would not accept it. There were further safeguards built into the adversarial system itself. It seems, therefore, that US law has fully embraced the adversarial approach to litigation.

English Law

Under English law, a judge will decide almost all civil litigation cases. It might therefore be thought that there is less need to control expert evidence since an experienced judge would be able to attach the correct weight to dubious or partial expert evidence, particularly after that evidence had been attacked by the opposing advocate at trial.

Duty of Independence and Other Controls on Expert Evidence

However, English procedure relating to expert evidence nevertheless underwent a reform when the Civil Procedural Rules ("CPR") were introduced in 1996. Part 35 of the CPR brought a series of new controls and duties to combat the previous practice of some litigants relying on expensive and unsatisfactory experts. The CPR place a great deal of emphasis on resolving cases justly and introduced the concept of proportionality. As regards expert evidence, the CPR introduced the following key controls:

- Any expert appointed by the parties has an overriding duty to the Court[5]. It follows from this that an expert must be independent, which he or she must

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[3] Unless the evidence, though admissible, is so shaky that the trial judge feels he has to direct the jury to reach a verdict.

[4] The considerations set out in the "notes" include the following: (i) whether experts are "*proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.*" *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995); and (ii) whether the expert "*is being as careful as he would be in his regular professional work outside his paid litigation consulting.*" *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997), and also *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999): *Daubert* requires the trial court to assure itself that the expert "*employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field*".

[5] CPR Rule 35.3.

confirm[6]. If an expert is seen as partisan (in effect arguing the case of the party who has instructed him), the Court will not hesitate to criticise the expert[7].

- The Court has a duty to restrict the use of evidence to that which is reasonably required to resolve the proceedings[8]. Where the Court considers it to be appropriate, a single expert may be appointed instead of the parties each relying on an expert of their own[9].
- All expert evidence must be presented in the form of a report that complies with set criteria.
- There are requirements of disclosure relating to the material instructions given to the expert – what has he or she been asked to do? – as well as the information and documents upon which the opinion is based. This is a wider duty than that arising in the US under FRE Rule 705, although other procedural rules do impose an obligation of disclosure in the US[10].

The policy of the CPR in requiring experts to be independent is illustrated by one party being able to use an expert report that was prepared for the opposing side, but on which the opponent no longer wishes to rely – as noted by the Court of Appeal in *Mutch v Allen* [2001] 2 CPLR, 200 at 208.

Perhaps the most onerous requirement placed on experts is that where there is a range of possible opinions, the expert must set out what these are and explain why it is that he has formed a particular opinion[11]. The precise extent of this duty is not clear. Where there is a difference in methodology, an expert would seem to be required to explain why he prefers one method of analysis over another. But what is the effect of this rule where experts might differ in the application of one methodology to the facts of the case. Must an expert imagine how another expert might apply the relevant theory to the facts[12]?

Admissibility

The positive requirements as to how expert evidence must be presented under the CPR extend to the expert having to set out his qualifications (the basis of his expertise). However, the admissibility of expert evidence continues to be governed by statute and common law, rather than the CPR.

In *Barings Plc v Coopers & Lybrand (No.2)* [2001] Lloyd's Rep Banking 85, the Court explained that under Section 3 of the Civil Evidence Act 1972, expert evidence is admissible where the Court accepts that there is "*recognised expertise governed by recognised standards and rules of conduct capable of influencing the court's decision on any of the issues which it has to decide and the witness to be called satisfies the court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues.*"

The Court went on to explain that such evidence might still be excluded where this is required to dispose of the case justly, a concept that also forms part of the overriding objective of the CPR, which also emphasises the need for the parties to be on an equal footing. One question that arises is whether a multi-national corporation may rely on complex scientific

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[6] See further the Practice Direction to CPR Part 35: "*1.2 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.*"

[7] See for example the decisions in *Pearce v Ove Arup Partnership Ltd* [2002] 25(2) IPD and *Great Eastern Hotel Co Ltd v John Laing Construction Ltd* [2005] EWHC 181.

[8] CPR Rule 35.1. Whether expert evidence is reasonably required depends also on whether the costs of that evidence are proportionate to the amounts in issue.

[9] The circumstances in which a party dissatisfied with the joint expert may call his own expert were set out in *Cosgrove v Pattison* [2001] 2 CPLR 177. The Court of Appeal has, however, indicated that a party would normally be given permission to have their own expert if they were dissatisfied, which might be seen to go against the spirit of Part 35 – *Layland v Fairview New Homes* [2002] EWHC 1350

[10] See Federal Rules of Procedure, 26.

[11] CPR Part 35 Practice Direction, paragraph 2.2(6).

[12] This question is asked in *Phipson on Evidence*, 16th Edition, at 33.26 (page 991).

evidence in a product liability case where the opponent is comparatively impecunious. Can these parties really ever be on an equal footing? In this context, the Court of Appeal in *Mann v Messrs Chetty and Patel (a firm)* [2000] EWCA Civ 267 explained that the cost of the expert evidence, and the relationship of this cost to the size of the claim, are relevant considerations when looking at admissibility of expert evidence.

It is not usual in English Court proceedings to mount preliminary challenges to admissibility of expert evidence on the basis of anything other than bias (due to a prior involvement of the expert with one of the parties) or other types of conflict.

Conclusion

Having highlighted the main differences in approach, which is more attractive?

A proponent of the English approach might say that US law still encourages the use of "hired guns" as experts and, whilst some control over the methodology is exercised to keep true charlatans away from the juries, litigants are in reality expected to deal with partisan experts either at procedural hearings or at trial. As it is for one party to convince the Court that the other party's expert is not to be believed, this might well increase the cost of, and prolong litigation.

A proponent of the US approach might respond that the insistence on independence of experts favoured by English law does not, in reality, sit well with the adversarial system. It might be questioned whether an expert retained by a party (and not a true independent expert appointed by the Court) will ever approach his task on the basis of the principles put forward by the CPR, without being overly influenced by a sense of loyalty to those instructing him.

The issue is relevant to all forms of dispute resolution. Our practice is to consider the regime applicable to expert evidence at the outset of cases. Arbitration of course offers some flexibility in this context. In practice, however, the key is for an expert - partisan or otherwise – to be credible and persuasive. Ultimately, of course, the credibility of the expert is very much in his or her own hands.

ANTI-SUIT INJUNCTIONS IN ARBITRATION: AN UPDATE

by Robert Blackett

The December 2006 edition of "Decisions Decisions" featured an article about the English courts' power to issue anti-suit injunctions restraining foreign proceedings brought in breach of English arbitration agreements.

In that article, I suggested this power might soon disappear, at least where the offending proceedings are brought in states to which Council Regulation (EC) 44/2001('the regulation') applies. I looked at how a party might protect itself from proceedings which were brought in breach of an arbitration agreement, if anti-suit injunctions were no longer available.

The regulation sets out a common scheme all regulation states must apply to determine whether they have jurisdiction. The starting point is that people may be sued in the courts of the country where they are domiciled. There are then exceptions, whereby claims may be brought in other countries. One is where parties agree a particular jurisdiction, to the exclusion of others. The other regulation states must recognise this, and their courts must decline jurisdiction if a party tries to bring proceedings before them, in breach of the agreement.

It is, however, for the state where the offending proceedings are brought to consider whether it has jurisdiction under the Regulation, and decline jurisdiction if it does not. The state which properly has jurisdiction cannot restrain the foreign

proceedings. It must, instead, trust the other court to apply the Regulation correctly, and decline jurisdiction.

The Regulation provides that it does not apply to 'arbitration'. So an issue arises whether the Regulation prevents a court restraining proceedings which breach an arbitration agreement, as it does those which breach a jurisdiction agreement. On one view, the English court which grants an anti-suit injunction simply holds the parties to their own agreement. The effect of that agreement falls to be determined by English law and not by the regulation, so when it restrains the foreign proceedings the English court is not impeaching the foreign court's application of the regulation. The alternative view is that, where the foreign proceedings which are brought in breach of an arbitration agreement *purport* to be brought under the regulation, an anti-suit injunction is still an impeachment of the foreign court's ability to decide whether it has jurisdiction under the regulation or not.

In my article, I referred to a case called *The Front Comor*, where this question was due to be considered by the House of Lords. By way of update, their Lordships have now found[1] they must refer the issue to the European Court of Justice. To assist the ECJ, Lord Hoffmann gave his opinion on the issue. This includes a strong policy argument in favour of preserving the anti-suit injunction:

> "*17. … perhaps the most important consideration is the practical reality of arbitration as a method of resolving commercial disputes. People engaged in commerce choose arbitration in order to be outside the procedures of any national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as amiables compositeurs, apply broad equitable considerations, even a lex mercatoria which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices.*
>
> *18. Of course arbitration cannot be self-sustaining. It needs the support of the courts … different national systems give support in different ways and an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests.*
>
> *19. The Courts of the United Kingdom have for many years exercised the jurisdiction to restrain foreign court proceedings … it is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. … it saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction … and so little as to lead to a default judgment. That is just the kind of thing that the parties meant to avoid by having an arbitration agreement.*
>
> *20. … the courts are there to serve the business community rather than the other way round. No one is obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly does not deter parties to commercial agreements. On the contrary, it may be regarded as one of the advantages which the chosen seat of arbitration has to offer. Professor Schlosser rightly comments that if other Member States wish to attract arbitration business, they might do well to offer similar remedies. In proceedings falling within the Regulation it is right … that courts of Member States should trust*

[1] [2007] UKHL 4

each other to apply the Regulation. But in cases concerning arbitration, falling outside the Regulation, it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of Kompetenz-Kompetenz) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate. … the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world.

If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction."

We can simply await the ECJ's decision, and hope that they agree.

AN INCONVENIENT TRUTH? SUMMARY PROCEEDINGS IN ARBITRATION

by Zachary Segal

The inconvenient truth (with apologies to Al Gore) is that, notwithstanding its advantages when correctly led, there are aspects of the arbitral process which might be improved. One such area is summary determination of arbitral proceedings. Most lawyers and clients have at some point been confronted by an opponent with what could politely be described as a very weak case. English Civil Procedure has a mechanism to deal with such a situation: the Court may award summary judgment at an early stage of proceedings if the case advanced by one party has "*no real prospect of success*". There is no directly equivalent provision in the English Arbitration Act 1996 (the "**Act**") or in the major institutional rules. Moreover, for the reasons that will be described below, most arbitrators seem positively averse to summary determination of arbitral proceedings.

This article looks at the options available to parties involved in arbitral proceedings and responding to a case which has no merit.

Who cares anyway?

There may be two categories of party who might feel aggrieved by the lack of a procedure akin to summary judgment in arbitration. Firstly, there is the claimant with a rock solid case, but committed to a lengthy and costly arbitral process with no possibility of summary relief. It will usually be of little consolation to that claimant that it will eventually receive the money owing to it, plus interest relating to the period of default. Most commercial enterprises want to see their money as soon as possible. Debtors know this and may raise a spurious defence in an attempt to settle the claim at an unfair discount.

Secondly, there is the respondent, forced to defend a claim wholly without merit. That respondent may recover some (but rarely all) of its costs in contesting those arbitral proceedings. The respondent is forced to devote resources, both in terms of employee time and monetary cost in defending such an action. The existence of a claim may appear in the respondent's accounts and affect its credit rating. The nightmare scenario is that the respondent's assets are frozen by a Mareva injunction, pending resolution of the dispute.

Difficulty created by section 33 of the Act

Section 33 of the Act provides that:

> "*[t]he tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent*" (section 33(1)(a)) and shall "*adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters falling to be determined*" (section 33(1)(b)).

In many ways, this states the obvious – parties would have no faith in the arbitral system unless the tribunal was compelled to act fairly and impartially, and gave both parties a reasonable opportunity to present its case and rebut the case of its opponent. A failure to adhere to this general principle would amount to a "*serious irregularity*" for the purposes of section 68 of the Act.[1] Therein lies the seed of difficulty. Nothing horrifies an arbitrator more than having his decision challenged in the courts. Given that most, if not all arbitration in this country is conducted in private, comment on the attitude shown by arbitrators is, to some extend, anecdotal. However, it would not seem unreasonable to surmise that one of the ways in which arbitrators protect their decisions from challenge is by giving parties, including those with a very weak case, every opportunity to state that case and avoid a challenge under section 68 of the Act.

There is authority on the question of what amounts to the failure by the tribunal to comply with section 33 of the Act, and failure by the tribunal to deal with all of the issues that were put to it.[2] However, there is no direct authority on the question of whether summary determination by an arbitrator might amount to a serious irregularity. This may be because summary determination is generally considered to be something of a "no-go" in arbitral proceedings.

There is reported authority arising from the Arbitration Act 1950 to suggest that "*misconduct*" (the previous incarnation of serious irregularity) includes failing to hear one of the parties, for example, by refusing to hear his primary evidence,[3] and treating the parties in a discriminatory fashion.[4] One can see how the losing party to a summary judgment application might seek to argue such matters.

If one assumes that summary judgment/determination is unavailable in arbitral proceedings, one must then consider what are the options available to the parties.

Early resolution of arbitral proceedings: the options

(1) Preliminary determination of an issue

It is accepted practice in arbitration for a challenge to the jurisdiction of the tribunal to be held at the outset of proceedings. It would not make sense for parties to engage in years of expensive and hard fought arbitration, only to find at the end of the process that the award is unenforceable on the grounds that the tribunal lacked jurisdiction in the first place. By extension, the same principles should apply if one party can identify a discrete question of law which will be determinative of proceedings.

One issue that springs to mind is limitation. If a claimant has brought a claim after expiry of the limitation period, it would appear reasonable in all the circumstances for the respondent to make an application, following the exchange of pleadings, for the tribunal to make a preliminary determination

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1 Section 68(1) of the Act provides that "*[a] party to arbitral proceedings may…apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award*". Section 68(2)(a) provides that this includes failure by the tribunal to comply with section 33 of the Act.

2 See, for example, the decision of the Court of Appeal in *Checkpoint Limited v Strathclyde Pension Fund* [2003] EWCA Civ 84.

3 *Modern Engineering (Bristol) Limited v C. Miskin & Sons Limited* [1981] 1 Lloyd's Rep 429.

4 *Stockport Metropolitan Borough Council v O'Reilly* [1983] 2 Lloyd's Rep 70.

on that issue. This is consistent with section 47 of the Act, which provides that:

> "*…the tribunal may make more than one award at different times on different aspects of the matters to be determined*" (section 47(1)) and "*[t]he tribunal may in particular make an award relating to an issue affecting the whole claim or to a part only of the claims or cross-claims submitted to it for decision*" (section 47(2)).

An application to the tribunal for the preliminary determination of an issue, resulting in a partial award, is different from summary judgment in the sense that summary judgment effectively brings proceedings to an end. A partial award is determinative, although it should be limited to specific issues. In a recent case, Christopher Clarke J stated that "*Section 47, in my view, confers an entirely general power to determine the issues arising in the reference in more than one award and to determine part only of the claims or cross-claims submitted to the tribunal for decision in its first award*".[5] The power conferred on the tribunal under section 47 of the Act is consistent with the major institutional rules, which permit partial awards on different issues at different times.[6]

If a partial award has the effect of neutering the claimant's case, the claimant ought to have the good sense to drop the claim before more time and costs are wasted.

Whilst a tribunal should be persuaded to make a preliminary determination on the question of limitation, a respondent might also be tempted to make an application for preliminary determination on other grounds, for example, the construction of an exclusion clause. If a claimant asserts a claim for loss of profits arising from a contract and the contract expressly states that the parties shall not be entitled to recovery for loss of profits, that issue should also be capable of preliminary determination.

(2) Separation of liability and quantum

A partial award may also be issued if it is possible to separate issues of liability and quantum. An application for bifurcation of proceedings would benefit the respondent who has an irresistible case on liability and wants to avoid being put to the time and expense of an inquiry into the issue of quantum. An assessment of quantum is often (but not always) the most expensive part of the arbitral process, involving complicated expert evidence. If the respondent has no case to answer on liability, there is no good reason to consider issues of quantum. In addition, a partial award on liability may encourage parties to reach a settlement on quantum, mindful of the comments of the tribunal in its partial award.

Birfurcation is a ploy often used by the defendant in court proceedings, who might also seek to avoid the difficulties of the quantum phase if it has a strong case on liability. However, this approach is not without danger. It may be difficult to disentangle issues of liability and quantum, leading to confusion and uncertainty. Moreover, the respondent in arbitral proceedings who believed that it had a caste iron case on liability, made a successful application for bifurcation of proceedings and then conspired to lose the liability phase is then left to contest a quantum phase, having wasted time and money. In these circumstances, it would have been quicker and cheaper for all concerned if the tribunal had heard issues of liability and quantum at the same time. An application to split liability and quantum is a calculated gamble, and is not suitable in every case.

(3) Expedited or "fast track" arbitrations

If the tribunal is not prepared to divide the issues in the arbitration and/or a partial award fails to resolve the proceedings, it may be that the best option remaining for a party is to seek a final hearing on an expedited basis. It may be that a shorter reference allows the party to control costs

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5 *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Limited (The Athena)* [2006] 2 All ER (Comm) 648.

6 See article 26.7 of the LCIA Rules, article 2 of the ICC Rules and article 32.1 of the UNCITRAL Rules.

and keep the uncertainty created by the arbitration as short as possible.

Although there is no provision for "fast track" arbitration in the Act or the major institutional rules, parties can resolve their disputes by arbitration in short order if all parties concerned cooperate. One celebrated example of fast track arbitration involved a dispute in the mid-1990s between a Formula 1 motor racing team and F1A which regulates the Formula 1 championship.[7] A dispute arose between the team and F1A at the end of one season, in November, and both parties actively sought resolution of the dispute in order to allow the team's cars to be shipped to Australia in mid-February of the following year in order to allow the next season to start as planned and without further disruption. Following failed settlement negotiations, a Notice of Arbitration was filed with the ICC between Christmas and New Year and an expedited process began. The parties received a fully reasoned award on the last day in January and the team's cars were shipped to Australia in good time.

In truth, the situation described above is most unusual. The Formula 1 case involved two parties keen to resolve their dispute in order to meet a common deadline. However, in most other arbitrations, one party has less incentive, or even a positive disincentive, to participate in an accelerated procedure.

If one party is bringing a weak claim, and that party is cognisant of the weakness of that claim, then there is every chance that delay will be employed as a tactic to extract concessions from the respondent. The respondent will, most likely, not wish to be dragged into tortuous proceedings and might be minded to settle, in spite of the weakness of the claimant's case.

Conclusion

The absence of a procedure akin to summary judgment does expose arbitration to criticism. Arbitration, like any other form of dispute resolution, attracts its fair share of misconceived claims and sham defences. However, this article outlines some of the tactics that can be employed in an attempt to resolve arbitral proceedings without undue delay. One has to hope that arbitrators will use their common sense to manage the process effectively, focus on the important issues at an early stage and avoid wasted time and costs. All of which demonstrates the importance of choosing the right arbitrator. That is, however, another issue altogether.

For more information, contact:

Melanie Willems
WillemsM@howrey.com
+44 20 7936 5354

22 Tudor Street
London EC4Y 0AY, United Kingdom
T: +44 (0) 20 7936 5300
F: +44 (0) 20 7936 5301

[7] ICC Case No. 10211/AER. This case is not confidential following widespread coverage in the motor racing press.

MEET THE TEAM

Each quarter we will introduce one of the members of Howrey LLP's International Dispute Resolution Group.

JOHN EVANS
evansj@howrey.com

JOHN EVANS is a partner in the Global Dispute Resolution group in London. He is recognised internationally as a Product Liability defence lawyer (featuring, since the publication's inception, in "An International Who's Who of Product Liability Defence Lawyers") and is one of the most experienced practitioners in the United Kingdom in proactive and pre-emptive Issues (or Risk) Management. Litigation risk, reputational risk, operational risk, financial risk, insurance risk and directors' risk have all been successfully managed in many high profile instructions. He also has extensive experience of wider product stewardship issues and, more generally, of high-profile and high-value banking and finance litigation, of cutting-edge multinational insolvency proceedings, of construction and engineering matters, and of complex issues of private and public international law. In his spare time John is a rugby coach and a team builder extraordinaire.

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