Arbitration versus litigation: stick to the tracks or choose the open road?

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A panel at Withers' London office debated the respective advantages of litigation and arbitration – compared to a rail journey and a journey on the open road – and whether the prevalence of arbitration is "a serious impediment to the common law", as suggested by the Lord Chief Justice of England and Wales almost exactly a year ago. **Ruzin Dağlı**, associate at Withers, reports.

The evening seminar on 9 February was chaired by **Luca Radicati di Brozolo**, founding Partner of ArbLit in Milan and a door tenant of Fountain Court Chambers. Speakers included **Jackie van Haersolte-van Hof**, director general of the LCIA, and **Hussein Haeri**, who is co-head of international arbitration at Withers with **Eleni Polycarpou**. Van Haersolte-van Hof and Haeri gave the arbitration perspective.

Paul Matthews, master of the Chancery Division of the High Court, and **Rupert D'Cruz** of Littleton Chambers represented the litigation perspective.

The gauntlet – or false dilemma – facing the panel was whether recent wide-ranging challenges to arbitration call into question its bright future or mark its incipient decline as a global force of international dispute resolution.

The debate was kicked off by Radicati who said that recent decades have seen international arbitration emerge as the dispute resolution method of choice for large international transactions and projects – not least due to the advantages of neutrality, effective syncretism of common law and civil law features and ease of enforcement of awards under the New York Convention.

Radicati also emphasised that although the courts in England and Wales might provide a viable alternative to arbitration for certain disputes, the same cannot necessarily be said for disputes with regard to courts in many other parts of the world.

But, he asked, is arbitration really simpler, cheaper and faster? And is the absence of an appeal mechanism a continued benefit for commercial parties?

Radicati highlighted the need for a pragmatic assessment of the respective advantages of arbitration and court litigation in light of the concrete circumstances of the dispute and the underlying commercial relations. He also stressed arbitration's potential to adapt in light of changing perceptions of its role, the needs of users and the competition between arbitral institutions and seats.

As Polycarpou highlighted, there is also the question of whether arbitration has become so successful that it impedes the development of the common law, raised by **Lord Thomas**, Chief Justice of England and Wales, in his Bailii Lecture of 9 March 2016.

Matthews observed that a primary feature of arbitration is that it is founded on the consent of the parties who choose arbitration because they want to proactively manage and resolve their dispute. This operates particularly well for commercial disputes but does not play out as well in disputes regarding status or reputation, such as inheritance or certain types of family disputes.

Matthews added that the institutional nature of the courts enables litigation to achieve certain standards and to observe certain rules and traditions, whereas the performance of individual arbitrators might sometimes be affected by concerns about further appointments or the demands of their busy caseloads.

Van Haersolte-van Hof reminded the audience that arbitral institutions can provide valuable support in the identification and appointment of suitable arbitrators with the requisite expertise to address the issues in dispute between parties. She also highlighted the importance of having accurate data to inform users about the relative advantages and disadvantages of different dispute resolution choices. They should demand better data and facts from institutions, she said.

Members of the panel agreed that the scope for *ex parte* applications, injunctive and interim relief and third party orders afford courts certain procedural privileges. One advantage of litigation, D'Cruz stressed, is the fact that courts can grant injunctions against third parties in support of proceedings. He referred to *Cruz City 1 Mauritius Holdings v Unitech Ltd* – which establishes that courts do not have the power to grant injunctive relief against third parties under section 44 of the 1996 English Arbitration Act.

The power of the courts to provide such injunctive relief, at least if the third party or its assets are in the jurisdiction (and possibly even if they are not), provides the litigation process with greater support than is available in arbitration.

D'Cruz added that in his experience the quality of arbitral tribunals can be quite variable, although many arbitrators are very good. If one is less fortunate, one might see misapplied thresholds for the burden of proof or improper understanding of procedural fairness.

There was a consensus among the members of the panel that parties have more control and flexibility over procedure and case management in arbitration and this can be attractive. Haeri said litigation can be seen as like a train which runs on certain tracks and passes through pre-determined stations on its route, in contrast to arbitration where the parties have a largely open road. They might end up in a cumbersome truck but they also retain the possibility of designing and riding in a highly effective hybrid car – if they use the flexibility inherent in arbitration to that end.

Arbitration may not be cheaper and quicker than litigation in all, or even many, cases but it does afford the *possibility*, if seized, of being both.

Costs and access to justice was another subject of discussion. Haeri reminded those present of the recent *Essar Oilfield Services Limited v Norscot Rig Management Pvt Limited* arbitral award in which third party funding costs were to be held recoverable as "other costs" under the 1996 Arbitration Act. A challenge to that award in the High Court for alleged procedural irregularity under section 68 of the Arbitration Act failed.

This decision doesn't mean that third-party funding costs will be recoverable in all arbitrations, but it is nevertheless an important precedent for third party funding costs recovery in arbitration - something that would not have been possible under the Civil Procedure Rules in the High Court.

The issue of appeal was discussed, partly through the prism of speed in dispute resolution. The 'pro-arbitration' team noted that appeals take time and that there is no guarantee, especially in complex disputes, that a 'second judge' would necessarily arrive at a better decision. Matthews noted that speed is indeed important if all are focused only on knowing whether payment is due. In other cases, getting the 'right answer' is more important than having speedy results.

The panel concluded that both litigation and arbitration are evolving rapidly and increasingly adopting features from each other. English litigation, for example, now offers innovative procedures such as the shorter and flexible trial schemes, which appear to borrow from arbitration. On the other side, the introduction of emergency arbitrator and summary judgment frameworks, to name two relatively recent innovations in international arbitration, adapt features more traditionally associated with the courts.

The debate closed on a point of consensus: that arbitration and litigation are complementary and courts and arbitration need to continue to work together and enhance still further the quality of their relationship.

Arbitration: a cumbersome truck or a sleek hybrid car?

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