Personal Injury Arbitration

Jillian Martin-Brown

Overview

- I will be covering a little bit of background first on arbitration generally
- Then looking at how the law has developed
- And why PI arbitration has taken off south of the border

- I will then hand over to Angela
- Who will look at some of the advantages and disadvantages of arbitration
- And whether there might be an appetite for personal injury arbitration north of the border

What is arbitration?

- So, to kick things off, what is arbitration?
- In simple terms, it is a process whereby two or more parties
- agree to submit a legal dispute to one or more third parties
- whose role it is to pronounce judicially on that dispute in the shape of a binding award

- It's not as formal as court
- And arbitration is not quite as informal as mediation
- Arbitration is somewhere in between the two
- It is known as a form of alternative dispute resolution because it is an alternative to court
- It involves determination of a dispute by an independent third party
- Which the parties agree to be binding upon them

Alternatives

- Of course, arbitration is not the only method of resolving a dispute
- There are alternatives
- Litigation remains my favourite method of resolving a dispute
- But negotiation is a method which many of you will be involved in on a daily basis
- Mediation I have already mentioned, which involves a third party acting as an intermediary between the parties to reach a consensual resolution
- This works well in family cases, or cases where there is an ongoing commercial relationship between the parties

- You can even mix things up a bit and start off with a mediation that progresses to an arbitration if the mediation fails
- Or have an arbitration first and the arbitration award is only revealed if the parties do not reach a settlement through mediation
- The theory is that by having been through the arbitration process, the parties will have a much better sense of the strengths of their respective cases and will thus be readier to settle
- I can certainly think of some proofs where that might have been an attractive option…
- Expert determination involves the parties submitting a dispute for determination by an expert in the relevant field
- And adjudication is an extremely expeditious dispute resolution mechanism, which is very popular in construction disputes to avoid impeding the completion of projects
- It is only binding until the dispute is determined by litigation, arbitration or agreement

Key Features

- So what are the key features of arbitration then?
- Firstly, there has to be an agreement to arbitrate
- That can be in the form of an arbitration clause in a contract **before** the dispute has arisen
- Or in an agreement to submit the dispute to arbitration **after** it has already arisen
- An arbitration can be ad hoc – by which I mean conducted with rules laid down by the parties themselves, or by the arbitral tribunal, or using an established set of rules such as UNCITRAL rules which stands for United Nations Commission On International Trade Law
- Institutional arbitration is administered by a specialist arbitral institution under its own rules of arbitration, such as the international chamber of commerce
- But whichever type or arbitration is used, it is the consent of the parties that provides the basis for the power and authority of the arbitrators to decide the dispute
- The arbitrators operate outside the courts
- But the arbitral awards are binding as between the parties to the proceedings

Legislation

- The Arbitration (Scotland) Act 2010 marked a completely new start to Scottish arbitration
- Prior to that, arbitration had been well established in Scotland since medieval times
- But it was regarded as being unfit for purpose in the modern commercial environment
- For example, in 1972 Scotland attempted to bring itself into line with English Law by introducing something called stated case procedure, which enabled any party to an arbitration to make a reference to the Court of Session on any point of law arising during the arbitration process for a ruling
- But that provision resulted in extreme delay and expense in Scots arbitration
- It was abolished in England in 1979 – so not that long after Scotland had introduced it!
- Thereafter, England decided not to introduce the model law but Scotland did in 1990 – which was a positive move to try and bring Scotland into the international arbitration community
- But the stated case procedure still made the process unattractive

- England passed their own Arbitration Act 1996, which included the principle that the parties should be free to agree how their disputes should be resolved, subject only to such safeguards as are necessary in the public interest
- That led to an increase in arbitration in England
- In Scotland, in an effort to address some of the inadequacies in the previous law, a draft Arbitration (Scotland) Bill was initiated in 1997
- Followed by the Scottish Arbitration Code in 1999
- But the newly formed Scottish Parliament lacked the political will to make the modernisation of Scotland's arbitration law a priority
- It took the election of the an SNP government, with a manifesto goal of encouraging arbitration in Scotland to get to the 2010 Act

2010 Act

- In terms of the structure of the 2010 Act, the main body regulates what you might call the foundations of arbitration, including
- the seat of the arbitration, the enforcement of an arbitral award; and the interaction between arbitration and the courts.

Schedule

- Schedule 1 of the Act includes a set of rules governing the conduct and procedure of the arbitration
- So things like the appointment and powers of the arbitrator for every arbitration seated in Scotland

- Some rules are mandatory rules and apply in all arbitrations seated in Scotland
- Whereas some are default rules, and apply unless the parties agree to modify or disapply them.

- By way of example, Rule 28 provides that the arbitrator can determine the procedure to be followed in arbitration as well as any evidential matters
- That is a default rule, so it can be modified or disapplied, but the point is that arbitration is not simply an imitation of court proceedings

Practice

- There is therefore no need for written pleadings
- Though in practise, a written statement of case and a response can help to focus the issues
- There is even no need for a hearing
- But if there is one, there can be oral evidence and witness statements can be used too
- It is about thinking differently and not just copying court procedures

Comparison with England

- In light of the 2010 Act, Scotland and England are much closer than they used to be in regards to arbitration
- They share fundamental principles of fairness, party autonomy and limited court intervention
- And have similar procedures for challenge
- But the Scottish Act has improved upon the 1996 Act and makes specific provision to confidentiality and covers oral as well as written agreements to arbitrate

PI Arb in Eng

- So, turning to PI Arbitration in particular
- Arbitration is already popular in shipping, building and commercial disputes
- The PIcArbs – or the personal injury claims arbitration service – has been launched in England
- The procedure they follow is
- Parties complete the pre-action protocol
- One party sends a proposal to arbitrate letter and the draft arbitration agreement to the other party
- Both parties then sign the agreement
- Both register themselves on the e-filing online site:
- When they are ready to go, the claimant e-files the Arbitration Agreement signed by both Parties, with a Summary of the Claim
- PIcARBS appoints the arbitrator
- The Defendant then e-files a response to the claim
- The Arbitration runs to settlement or trial

English reasons

- Now, you may be wondering why there was felt to be a need to develop PI arbitration in England now
- Well, firstly, in these times of austerity, the Ministry of Justice cut back court funding by over 20% in 2010 and a further 20% in 2015
- As a result, many civil courts have been closed across England
- Standard court fees have been increased substantially in personal injury and clinical negligence, which end up cross subsidising family and other claims in the civil courts
- The county courts are no longer seem as efficient – instead of local staff, there is greater use of centralised post boxes and things go missing or arrive late

- Trials are being bumped out of county court lists more often in the weeks before trial than they used to be
- The introduction of costs budgeting has added a layer of additional cost and delay in the form of costs management hearings
- Solicitors whose cases have been struck out for non trivial procedural default have found their premiums for professional negligence insurance rising sharply but with no equivalent rise being proposed in the hourly rates which they recover for their work

- Assessment of costs at the end of a case – a bit like our auditor - is said to be cumbersome, slow and expensive.

- The Civil Procedure Rules have a massive increase in permissions applications – that is applications for relief from sanctions for failure to comply with any rule - in personal injury and clinical negligence cases, which has led to increased cost and delay.
- Some see the civil procedure rules as moving away from the overriding objective being justice between the parties towards the courts' own convenience.
- That in turn has led to a lack of co-operation between parties who are trying to trip each other up so as to gain an advantage for their clients.

- The *Mitchell* case is an example of that

- The infamous plebgate case

- The claimant served his costs budget six days late and one day before the costs management conference at which it was due to be considered. The consequence was that the hearing had to be adjourned and another hearing arranged to deal with the question of relief from sanctions and the claimant's costs budget if relief were granted.

- The claimant was refused relief from sanctions so instead of getting his costs budget of half a million pounds, it was restricted to the applicable court fees.

- The Court of Appeal upheld that decision.

- As you can imagine, a high number of relief from sanctions cases followed in the intervening six months with a variety of outcomes, which created a great deal of uncertainty, and a concern that the rules had become too draconian

- In *Denton* the Court of Appeal introduced a new three stage test which was more forgiving to the applicant than the approach in *Mitchell*, but applications for relief from sanctions will not be granted lightly, and deadlines must be treated seriously.

Scottish Reasons

BULLET

- Are the problems that England has experienced really that different from those we are experiencing now in the ASPIC

- We have seen a case in the Court of Session where failure to lodge a statement of valuation of claim on time resulted in decree being granted for the sum sued for (£30,000) and that was upheld by the Inner House

- We also have the prospect of costs budgeting if the recommendations of the Taylor Report are implemented

- So now that I have filled you all with a sense of impending doom, I will hand over to Angela to see if she can lift our moods with some suggestions for a brighter future…

(Revised) PI Arbitration

by

Angela Grahame QC

Introduction

Pre Court Reform, I thought Chapter 43 in the COS was a big success story.

Counsel were instructed, Pre Trial Meetings were conducted at the Faculty's consulting rooms at 142 High Street

Things worked well generally, there was minimal involvement of Judges and many many cases (about 97.2%) were resolved quickly and efficiently, often within 9 months and without going to proof

So the court said, we want rid of that …

Post Court Reform the privative jurisdiction of the Sheriff court was raised to £100,000

Although counsel have been an integral part of the system working well before, having significant experience and negotiating skills, they are now limited by the rule that sanction has to be granted by the Sheriff and the burden is falling on solicitors

ASPIC is having more than a few teething problems, you are waiting for three weeks to have motions heard, you have to wait all day to get in front of a Sheriff and then an unpredictable decision is being forced upon both parties

ASPIC

What is the A for...

A is for Avoiding ASPIC

A is for an Alternative to ASPIC

But what is the alternative:

Well, the Faculty has a cunning plan…

What can the Faculty & in particular Compass members offer?

<u>What are the Advantages:</u>

1. Choice of Arbitrator is Yours

Arbitration is a creature of Consent – you have the control; the power but cannot have a unilateral reference; all done together

FDRS will have a panel and can either appoint an Arbitrator for you or you can choose your own either from the FOA panel or from somewhere else. Benefit of a member of FOA is we are independent from the solicitors profession and not affiliated with a particular firm

You can be guaranteed to have an experienced Arbitrator who has obligations of disclosure in relation to assuring parties of their independence, lack of bias, no conflict (duties imposed by statute and in terms of the agreement between parties) and who must volunteer any issues to you

The FDRS will have a Panel of counsel who are trained by an independent Academic Institution

Today – announcement in Weekly Memo to all members [ATG; Robert Milligan QC, Susan O'Brian QC and Preston Lloyd have already said they will do the course]

The FOA has agreed with Aberdeen University that from January 2017 an Intensive 10 week Course will be provided to members of FOA which will allow them to qualify as Arbitrators and which will result in them achieving a qualification with the Chartered Institute of Arbitrators (CI Arb)

This is a world wide organisation and the qualification is the gold standard of arbitration, based in Bloomsbury Square London

The course will be largely by distance learning and is run by a Senior Lecturer.

It is a recognised course provided by a recognised course provider and a pass on this course will provide automatic entry to membership level at the CI Arb

Three levels:

(i) Associate ACI Arb

(ii) Membership MCI Arb

(iii) Fellowship FCI Arb

Top level which is extremely difficult to achieve is called Chartered Status and there are already 3 advocates (all members of FDRS) who have reached this standard.

There will be a 'Bolt On' option for FOA members which is the chance to take the MCI Arb course and convert it to FCI Arb and this will relate to PI claims

Specialism in PI

Again through Aberdeen University and a certificate (post grad)

Ensuring the confidence of the profession in the choice of Arbitrator

Then the member will be available to be considered for the Panel of FDRS and for instructions as an Arbitrator

By Easter next year we believe the members who are interested and pass the courses will be available to begin offering their services

Course been piloted since 2011 in Dundee and has been very successful

JMB did this course

2. The Arbitrator will have Genuine Expertise in PI

Unlike the current choice in COS or ASPIC you can be absolutely guaranteed to have an Arbitrator who has specialised in PI cases, who has been involved with multiple PI claims and PI proofs, someone who understands what parties are trying to achieve Compass members will be at the heart of this new pilot scheme although other members of Faculty with the relevant experience will also be advised of the course and it's availability

3. Efficiency

Good news - it will no longer take 3 weeks to hear a motion

Want a meeting with your Arbitrator? Want a phone call with your Arbitrator? Make an appointment at a time that suits you all

No more hanging around waiting to be allocated

No more trips to the Keeper to ask how much longer you are going to have to wait

No more waiting for 15 other cases to be heard before you can get on

4. Confidentiality

Written in to the agreement signed by both parties

No binding authority on any party in the future; each case decided on own facts

5. Convenience

Paperless system

All done online (lodging documents) so it's open 24Hrs a day

All parties have access whenever suits them (open all hours)

Procedure is totally flexible and can be agreed between the parties in advance

Flexibility – procedure up to parties to agree. No lengthy pleadings. No adjustments. No MOA. Joint expert reports can be instructed.

"Hot tubbing"

bifurcation is popular:

Separating issues that prove to be hurdle to resolution:

liability; quantum; prescription and waiver can all be farmed out and dealt with quickly

Arb Med mentioned already by JMB

Break out of an arbitration and have a mini mediation on a particular point

Arbitration gives you judicial remedies

Mediation allows an apology to be given; the continuation of a business relationship; employer/employee relationship; continue to receive work from the party you are suing (non judicial remedies)

Because all confidential, I can apologise to you all day

Mediation might settle the case quickly

Query whether continue with Arbitrator as the Mediator or someone else.

Not following court procedure

Problem in Sheriff Court – won't get a 4 day diet so if proof starts you get through it in dribs and drabs;

In COS, last term 5 weeks proofs went off because no judges. One of them a 5 week medical negligence proof that agents had no doubt waited 2 years for the diet; that has continued this term

You have your Arbitrator and you can agree when you get a hearing and how that hearing is shaped

Do you want to just have signed witness statements lodged and go straight to cross examination. Do you want cross?

"Hot tubbing"

6. Continuity

From FOA perspective, counsel in place who do this work day in day out (e.g. Compass members) would be heavily involved. They have the familiarity and the experience.

Not going to criticise Sheriffs in ASPIC – some of my best friends are Sheriffs in ASPIC

Some were more experienced than others in this area. They will build up experience over time but I understand that they have just had the first proof in ASPIC

7. Finality/Timescales

Time limits can be agreed at the start

It can be agreed that the whole thing will be done within e.g. 40 days to Award

The Arbitrator can give an undertaking that within 60 days of hearing evidence there will be promulgation and render of the Award

No more waiting one year for a decision from a Senator

Leads into disadvantage…

Disadvantages Slide

- Lack of appeal

Arbitration is an option. If you want to take a case to the Supreme Court and there is a big issue of law then you probably want to litigate straight away but very few cases fall into that category

Case at the moment being run where defenders looking to take it to the Supreme Court to bring the law in Scotland in line with the law in England re: obligations/duties on councils as roads authorities

Many many cases, are not Donoghue v Stevenson and do not have a legal issue of that importance

Arbitration is not designed to replace litigation entirely, but to be another complimentary option

- Limited powers of the Atbitrator to compel any action from non-parties

Fewer options during arbitration for recovery of documents

But we use mandates, FOI requests now (which retain confidentiality of papers) and there is always s. 1 petitions

Can also get assistance from Court under the Arbitration (S) Act 2010: See Sch 1, Rules 45 & 46
Application would be made by petition in terms of RCS 100
Consent of the tribunal is not actually needed – parties can invoke the court's assistance
So you can still obtain assistance from the court if required

- Multiparty disputes are problematic

When not a party to the arbitration – you would want to get third parties involved at outset and for them to sign up to Arbitration as well. On plus side, defenders unlikely to bring them in at a late stage and they can seek relief later if required

Finally, Costs

Parties pay for the Tribunal

They hire the Arbitrator

But the way it works can be bespoke in every case

You choose an experienced Arbitrator and design your own procedure

You won't get judicial recoveries but you can get costs

Costs can be Agreed in advance

There is to be a large increase in court fees if you want a hearing in COS and both sides pay for that as well. You can't cap/agree those fees and you won't be guaranteed a Senator when your case calls. [I'm told 30 minutes cost increasing from £98 to£200 for each party]

Costs in an arbitration can be by lump sum/ Schedule of Rates/Table of Fees but these can be capped by agreement e.g. £20K

Or they can be £x by hour

Depend on experience and what is required – clerks will discuss

Still have Tenders

Claimants solicitors will be sitting here thinking will there be <u>A Drop in Revenue?</u>

Well, at the moment you either agree at the end of the case or you run the risk that the Auditor will take the view your fees are not reasonable. No transparency with his decisions and you may be better using your own judgement and agreeing fees in advance. Then you have certainty

Legal Aid – medical negligence cases – may be willing to try this given low level of LA fees

Who Might Want to Get Involved?

Audience Participation

One suggestion:

Pilot

Try one case via PI Arb and one case in ASPIC

Who will finish first? Who will have the happier client? Client management easier

Claimants need to get involved and may worry about expenses but if e.g. insurance companies agreed to trial this and perhaps meet ½ the costs of an arbitration with an agreed cap on fees EVEN IF INSURANCE COMPANY WIN then you might find that some firms who offer SPECULATIVE FEE ARRANGEMENTS may be willing to try this

Taylor Report: QOWCS;

Wider Audience

This week the Dean of Faculty and I met with the President and the Vice President (Medical) of the Royal College of Physicians & Surgeons Glasgow

They would like to get involved with arbitration due to delay in medical negligence claims being completed and hanging over the heads of their members (medical practitioners) (13K members)

for years and they can't apply for other promotions

- All of this will depend on whether there is interest in legal profession in using this service if FOA provides it
- Gauge interest from audience [in the room and hope that a wider discussion can take place when we are having fizz afterwards]

If you are interested, we would be interested to hear from you

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A is for Avoiding PI Sheriff Court

A is for the Alternative to the PI Sheriff Court

A is for the Advantages it will bring

A is for Arbitration

Q&A