WHY DO FRAUD LAWYERS DISLIKE ARBITRATION?

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WHY DO FRAUD LAWYERS DISLIKE ARBITRATION?

BECAUSE

- Its greatest strength is its greatest weakness in fraud claims
- It is a consensual process
- It is not a state process: state legislation only supports the process
- Even with state support arbitration lacks the musculature of Court- based litigation at its best

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WHY DO FRAUD LAWYERS DISLIKE ARBITRATION?

BUT

- Institutional arbitration may be better than Court based litigation in some jurisdictions
- A few examples or hypotheticals?
  - Copper disputes in the Congo
  - The doctrine of "vertikal" in Russia
  - Home-Team advantage
  - Jury assessment
- The enforcement regime may tip the balance

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WHY DO FRAUD LAWYERS DISLIKE ARBITRATION AS COMPARED TO ENGLISH COURT LITIGATION?

BECAUSE

- At each critical stage in the process ECL is advantageous
  - Pre-action
  - Interim relief
  - Disclosure
  - The hearing
  - Appeals

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PRE-ACTION

- With multi-party claims it will rarely be possible to join all relevant parties to arbitration proceedings: contrast the "*anchor defendant*" and "*necessary party*" provisions in the CPR jurisdictional gateways
- Because the process is consensual, Arbitrators have no power to grant third party disclosure orders pre or post commencement: contrast *Bankers Trust* and *Norwich Pharmacal* orders
- Arbitrators have no power to give pre-action disclosure: contrast CPR 31:16

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INTERIM RELIEF

- Arbitrators cannot issue interim relief until the tribunal has been established yet this may take some time. Many institutions now allow the appointment of "Emergency Arbitrators".
- Often Arbitrators have no power to grant interim relief ex parte : see LCIA Rules (2014 revision) Articles 25.1 and 25.2
- Fixing urgent applications before Arbitrators are often more problematic than equivalent applications before a Judge
- Arbitral orders for interim relief lack state-backed sanction (imprisonment for contempt, sequestration etc) unless made orders of the Court

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DISCLOSURE

- Invariably Arbitrators adopt a more limited approach to production of documents than in ECL
- Arbitrators have no power to order disclosure of documents from third parties
- Sanctions for non-compliance are not as effective as in ECL

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WHY DO FRAUD LAWYERS DISLIKE ARBITRATION AS COMPARED TO ENGLISH COURT LITIGATION?

THE HEARING

- The comfort of confidentiality vs the threat of the Judge "*referring the matter elsewhere*"
- The arbitral attitude: " *I have never seen a witness who needed to be cross-examined for more than half a day*"
- The party-appointed Arbitrator
- Are Arbitrators disinclined to make findings of fraud?

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APPEALS

- Rights of Appeal are circumscribed

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CONCLUSION

- Interestingly it is a view shared across many different jurisdictions
- It is not just because of failings in the domestic legislation supporting arbitration in those jurisdictions
- It is because of the difficulties inherent in the fact that arbitration is a consensual process that is only supported by state processes and not a state process itself
- The *Fiona Trust* approach to interpretation of arbitration agreements trumpets the importance of "*one stop shopping*" yet all the goods necessary for prosecution of fraud claims are not for sale in the arbitration shop.

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