

The Worshipful Company of Arbitrators



The Master's Lecture 2002

Flexing the Knotted Oak – English Arbitration's Task and Opportunity in the First Decade of the New Century

A paper for the Worshipful Company Of Arbitrators

by

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1. I must begin by thanking Victoria Russell for the invitation to speak. It is a particular privilege and pleasure to address the Worshipful Company; and to do so on the occasion of this annual lecture is a great honour. Thank you very much.
2. Given the source of my invitation, listeners to or readers of the paper will understand that the pronoun “she” includes “he” and “they”.
3. The title of this paper comes from Shakespeare. In the full quotation it is the splitting wind that makes flexible the knees of the knotted oaks¹. It seemed appropriate because it might be said that in recent times arbitration has become somewhat arthritic - fixed in its ways - unbending; and one result has been to focus the attention of those involved or interested in arbitration on other methods of dispute resolution. Mediation and conciliation came first; then there were the Woolf reforms; and most recently, in construction at least, there has been adjudication. And while for the moment adjudication is limited to construction, there are already moves on foot to introduce ad hoc schemes of adjudication into other areas of commercial activity.
4. I agree with those many commentators who think that these other

¹Troilus and Cressida, Act 1 Scene 3. My wife assured me that with a title like that, there would be no one at the lecture and that Victoria and I would get to the drinks well ahead of schedule.

methods of dispute resolution provide a strong incentive for arbitration to become more flexible. And it seems to me that over the same period that has seen the arrival of these other methods of dispute resolution, there have been a number of changes on the arbitration front which have done a good deal to provide arbitrators with the tools to address these new challenges.

5. An important area of change has been on the substantive front, in the shape principally of the 1996 Arbitration Act. And there have been developments on other fronts that should provide assistance in the task ahead.
6. The aim, therefore, of this paper is to consider what it is suggested is an important aspect of the general approach that the arbitrator should adopt; and also to consider examples of these tools which have been made available to the arbitrator, in the process highlighting the sort of reflection that arbitrators should bring to their use. To put it another way, the examples are intended to encourage arbitrators to look more closely at all the possible weapons in their armouries.

THE APPROACH

7. The approach of an arbitrator in England is now conditioned, of course, by Sections 1 and 33 of the 1996 Act - which are always worth repeating:
 - a. Section 1

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;*
- (a) in matters covered by this Part the court should not intervene except as provided by this Part.*

b. Section 33

- (1) The tribunal shall-*
 - (a) 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, and*
 - (a) 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.*
- (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.*

7. So far as the approach - or at least the aspect of the approach - that I wan to emphasise is concerned, may I introduce it with one of my favourite sayings, which comes from a French philosopher, whose name I have unfortunately mislaid. It is to the effect that what goes without saying goes better said. I therefore make no apology for stating what many may regard as obvious.

8. This particular obvious proposition is as follows: The function of arbitration is to produce a decision of quality by reference to the rights and obligations of the parties. (I do not mean by this to paraphrase, let

alone to produce a substitute for, the general principles set out above - this is merely (!) a very important aspect of the task of the arbitrator².)

9. This is both obvious and important for a number of reasons.
 - a. The decision of the arbitrator is imposed on the parties by an outsider and it is, subject to very limited grounds of attack, binding and conclusive. It is these qualities that dictate that it must be related to the rights and obligations of the parties.
 - b. In this sense it is to be contrasted with the process of mediation or conciliation, which is not binding and where the wider range of solutions that are available are so available precisely because their utilisation depends on the consent of the parties. If parties properly advised are prepared to consent, any solution imaginable is possible. By definition, this latter situation is not the one that obtains where an arbitrator has to reach a decision. Hence the emphasis in arbitration on the rights and obligations of the parties³.

²In many ways I think that the greater powers and therefore potentially greater involvement of the arbitrator in the process prior to decision time makes for an appreciably harder task for the arbitrator than used to be the case.

³In the discussion after the paper had been read, it was suggested that parties expected some degree of mediation or conciliation from an arbitrator. I agree that an arbitrator may, and indeed should if the circumstances seem strong enough, invite the parties to consider settlement of the whole or part of the dispute on some basis or another. But she should not be upset if the parties fail to adopt the suggestion; and it is very important that the arbitrator avoids giving the appearance that she has made up her mind - which can often be the effect of such suggestions. Furthermore the parties almost certainly will have had the opportunity of a mediation or a conciliation before they got to arbitration;

- c. The other contrast is with adjudication, where the decision is binding and is imposed by an outsider but where its most important qualities are its speed and its potentially temporary nature. Tony Bingham tells me that a politician has described the process as “dirty”; and the epithet seems to me to be apposite. This is not, of course, one trusts, in the sense of underhand, but to highlight the very rough process that is involved. One is doing the shaping of the ship’s mast with an adze, rather than with a plane and sandpaper. The benefit is that the parties get the adjudicator’s snapshot of (in some cases little more than a gut reaction to) the dispute that has evolved⁴. The distinction here, one would hope, would be with the quality of the decision in arbitration.
10. Since arbitration is to be distinguished from processes of mediation and adjudication it follows that the methods that those two processes adopt are not necessarily likely to be of assistance in producing the different sort of decision that is the aim of arbitration. Arbitrators should therefore not be looking to import such methods into their particular process. They must resist the temptation to embrace the wider choice of solutions available in a mediation or the snapshot (and therefore speedy) solution appropriate to adjudication. To succumb to such embraces is to distort

and it seems to me therefore that, even if there was a mediation or conciliation role for an arbitrator in the past, that role has for all practical purposes gone.

⁴There is a parallel with the mini trial in mediation here - although adjudication has more teeth since the adjudicator’s decision determines, for example, who holds disputed sums of money pending a final settlement or decision in arbitration or court. But it is this latter aspect that, it seems to me, will drive ad hoc agreements for adjudication in non-construction commercial areas.

the nature of arbitration; and to fail to provide that for which the parties have contracted.

11. And equally importantly, nor should parties expect arbitrators to give them something other than that for which they contracted.
12. That is not to say that arbitration must hold to the precise processes that have developed over the last twenty or thirty years. On the contrary, it is clear from the existence of both the 1996 Arbitration Act and from the introduction of the Woolf reforms in the court system that the would-be users of arbitration and litigation expect changes. The important thing is not to lose sight of the principle object when employing the tools that are now available.

THE TOOLS

13. These tools can perhaps be divided into the two groups of substantive (much the larger group and emanating principally from the 1996 Act) and technological.
14. Substantive - the 1996 Act. This Act has now been with us for some years and it is a convenient moment to remind ourselves of the powers that it gave to arbitrators. Annex 1 hereto is taken from Bernstein's Handbook. It is a listing of some of the powers of the arbitrator under the new Act⁵.

⁵The autonomy of the parties must, of course, not be forgotten - they have the ultimate power, where they agree, to decide what the arbitrator can or cannot do - but if the arbitrator is clearly pursuing the achievement of the principle object, agreement between the parties to restrain her is unlikely.

15. I wish to suggest that arbitrators should regularly review a list or table such as this - one falls into habits in dealing with disputes and before long one is applying the same set of rules to each arbitration that comes along, without really considering whether that set of rules is appropriate - whether in one's usual form, or in a varied form - or whether there are powers or approaches that one does not usually use at all which might be more appropriate to this particular dispute.

16. Next, and by way of highlighting the sort of consideration that each of the powers may give rise to, I thought that I would comment on four particular powers where some exposition may be interesting. The same sort of exercise could be done for every power; and the purpose is to highlight the importance of the arbitrator applying his mind to the situation with a view to tailoring the procedure to the dispute, using the appropriate powers.
 - a. Amendments⁶.
 - i. The old rule was that amendments should be allowed whenever they surfaced, provided that any consequences to the other party sounded in costs and could, at least in theory, be recompensed in due course. Part of this was the desire to get at the right answer, even if somewhat late and at enhanced cost.
 - ii. Nowadays, it seems to me that the arbitrator, at the start of the proceedings, should consider asking the parties what their expectation is as to the possibility of future amendments. If any positive answers are forthcoming then the tribunal should note them carefully, and refer to them

⁶(h) in the list and S. 34 (2) (c). I return to amendments when it comes to capping the costs - see below at page 11.

should applications be forthcoming which are contrary to the original position.

- iii. If on the other hand, one or both sides are non-committal, then the arbitrator should take an early opportunity to consider the substance of the dispute and whether she thinks that amendments might be likely or should not be necessary; and should indicate this to the parties as soon as convenient. This will lay the ground for dealing with late applications that come her way⁷.
- iv. In this context, nowadays, in litigation there will have been the opportunity, at least, and probably the fact, of pre litigation processes designed to tease out the dispute in some detail and accordingly there is less justification for a late amendment.
- v. The sort of processes that nowadays are likely to precede litigation may also precede arbitration - in particular

⁷Another statement of the obvious. This approach does NOT mean that no amendments should be allowed, whatever - it merely means that one approaches a contested application to amend with some background knowledge and understanding and with some caution.

One further point - and only one of many - that arbitrators raise in this context - to what extent if at all, should she seek to determine and take into account the question of whether the lateness of the application is due to a genuinely late event or occurrence, outside the control of the party or whether it is due to incompetence or to idleness on the part of the party or the representative. For my part, I doubt if it is possible for a tribunal properly to evaluate either element of the second part of these alternative considerations; and arbitrators should in my view focus simply on the objective lateness, while allowing some room for error or misdirection - no one, including the tribunal, is perfect. And while late amendments may have to be rejected on the basis simply of their lateness, nonetheless, it is a more satisfactory outcome, if it can be managed, if the decision represents the full picture rather than an artificially cropped one.

mediation and conciliation.

- vi. One of the potential benefits of a mediation or conciliation that does NOT succeed in actually resolving the disputes is that the parties should at least have a much better understanding of the issues and therefore there should be limited room or need for late amendments of the case of one side or the other in the adversarial process.
 - vii. But from the arbitrator's point of view, there is a difficulty about these preliminary processes providing a guide when it comes to allowing or refusing late amendments. The processes are likely to be privileged and she is not likely to be told what happened in them. They will provide no relevant guidance, save for the fact that they took place, and self evidently were at least not wholly successful.
 - viii. Nonetheless, if she is told or realises at an early stage that there has been a mediation or conciliation (or indeed any other process of attempted settlement) then it seems to me that, if she has not raised the point before, she should now ask about the position on amendments. Given the existence of the previous proceedings, can she assume that it is highly unlikely that there will be any late amendments? It may be that a useful answer will be forthcoming but an arbitrator should not be disappointed if it is not.
- b. Deciding on the balance between written and oral evidence and submissions⁸. I do not know how regularly arbitrators consider this point. It is, I suggest, of some importance⁹. I would mention the

⁸(1) in the table. - S. 34 (2) (h) of the Act.

⁹In this context, see the apparently rather conservative decision in Boulos Gad v

following aspects.

- i. Oral presentations, whether of evidence or argument are likely to be of greater impact than written ones¹⁰. Apart from anything else there is the opportunity for interactive communication explanation and elaboration.
- ii. It is also likely to be a more expensive process, since you are assembling a group of people, all of whose time costs money, in a room at the same time.
- iii. So it is important to ask how central to the main issue or issues is the matter to be addressed, whether it be evidence or submission. The more peripheral, the more unlikely it is that an oral presentation is justified¹¹. And this is particularly the case with evidence - oral submissions can anyway be limited in time; it is harder to limit oral evidence while ensuring that the parties have no genuine grievance about the way in which this aspect of the case has been cut short¹².
- iv. In so far as the Tribunal opts for a written presentation, it seems to me that these consequences may follow:

Uniground, 16 November 2001 BLISS IB/92.

¹⁰I appreciate that both can send the listener to sleep - but I suspect that the written version of the sleep inducing sort does not get read at all much beyond the first few lines.

¹¹To make this determination involves an understanding of the issues and their relative importance.

¹²But note that if the credibility of central individuals is an important issue in the case especial care is needed when cutting back the oral evidence. Witnesses who are peripheral to many substantive issues may be important to obtaining a balanced view of the main characters.

- (a) First, it behoves the Tribunal to read with particular care the writing, so as to be sure of understanding it¹³.
- (b) Second, the Tribunal should have no qualms about asking for clarification if uncertain as to the meaning or impact that is intended.
- (c) Third, the Tribunal should be aware of apparently conflicting submissions from the same party at other times in the same arbitration and should seek a resolution of the apparent conflict if appropriate¹⁴. To put it another way, it is not for the Tribunal to treat any submission as in isolation from other ones in the case. Of course, one should expect the representatives of the parties to pick up such points - but whether or not they do, the arbitrator should make her business to carry out her own review.
- (d) Fourth, the Tribunal should consider the possibility of giving a rather fuller exposition of its conclusions on written materials when it comes to an award than might otherwise have been the case, so that all can see that the written material has been understood

¹³There is of course an equal responsibility on the parties' representatives to ensure that the material is presented in a way which maximises its comprehensibility.

¹⁴A good if rather obvious example of this is the claimant who argues for a generous rate of interest on awards in its favour, basing itself, for example, on the return it would have expected to get from the monies if paid at the correct time; but when it comes to an entitlement on the part of the respondent, suddenly concludes that a basic simple interest "bank-type" return is appropriate.

and appreciated¹⁵.

- c. Ordering security for costs¹⁶.
 - i. Under the 1996 Act, the arbitrator has the power to order the claimant to provide security for costs. The court does not retain the power that it had under the 1950 Act¹⁷.
 - ii. There was always one difficulty with this change to the law - namely the position of the respondent who makes a Calderbank offer and then seeks security. Under the old law, the Court had the opportunity to consider the fact and the amount of the Calderbank and to take it into account if so minded when considering whether to make an order for security; and if so for how much.
 - iii. The argument was that a Respondent making a substantial offer presumably expected the outcome of the proceedings to be an award against itself; and should not be able,

¹⁵I agree that this is tricky - one needs to provide a clear indication of an understanding, without opening the door to an attack by the losing party, based on an alleged misunderstanding. It is this balance that militates in favour of seeking explanation if in doubt as to the meaning. One possible solution is of course to circulate the award in draft - but that too can lead to problems. For example, if your “draft” award contains a figure for the award, you may trigger activity on the Calderbank front that itself will cause problems (e.g. the claimant suddenly realises that an offer should have been accepted, and promptly accepts it - as the award is in draft the argument is that the point at which the offer ceases to be available - normally immediately before release of the relevant decision - has not arrived!)

¹⁶S. 38 (3) of the Act.

¹⁷With the benefit of hindsight, it might have been a good idea to retain the power for the court but limit it to situations where the parties agree or the arbitrator sends the issue to court.

potentially, to stifle a good claim by a security application. Furthermore, and given the same assumption that ultimately there would be an award against the Respondent, the Respondent could “secure” itself, if an appropriate machinery was built into the order for security¹⁸.

- iv. Under the 1996 Act, with only the arbitrator who is actually dealing with the substantive case to go to, there is no room for taking into account the Calderbank¹⁹ - but the result is that the decision on the security application - whichever way it goes - is made without access to all the information that might be thought to be relevant.
- v. It follows that an arbitrator should approach such an application with even greater care than usual - and should seriously consider inviting the parties to agree on another arbitrator just to hear the application²⁰.
- vi. And in conducting such an application an arbitrator should endeavour to ensure that the parties do not apprise her of the existence of a Calderbank let alone its contents unless both parties have so agreed²¹.

¹⁸The same situation obtained in court proceedings - another judge than the one who was seized of the case would hear the application.

¹⁹ Unless the application for security is said to waive the privilege that attaches to the offer, which must be doubtful.

²⁰NB - this may not be a runner on grounds of cost, apart from any other objection. The long term answer may a panel similar to the “jurisdiction” panel operated by the RICS for adjudication cases - thanks again to Tony Bingham for drawing to my attention the existence of this panel.

²¹This is the responsibility of the representatives of the parties and should not really be necessary - but unfortunately some representatives forget themselves and the warning is

- d. My fourth example is also costs based - it is the power to cap the costs²².
- i. The benefits of capping the costs are very clearly and fully spelt out in Bernstein, which is attached as Annex 2.
 - ii. However, it was a completely new departure from previous practice and was introduced without any experience of how it would work. Problems have surfaced in its utilisation which make it an area into which the arbitrator should only venture with great caution, unless the case is simple and its ambit clearly limited²³.
 - iii. The source of some of the problems is to be found in subsection (2) - which reads as follows:

Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.

This wording needs to be very carefully considered - it imposes a considerable brake on enthusiastic would-be cappers!

sensible. This is particularly so since a threat to resign may suit the offending or potentially offending party; and an effective sanction in costs is very difficult to formulate.

²²S 65 of the Act and see Bernstein at 2-806.

²³If both parties confirm that they understand each other's case at the beginning of proceedings, then that might well be a suitable case for the exercise of this power.

- iv. The sort of problem which can be thrown up can be exemplified by two cases.
- (a) One is where the Claimant has done a very considerable amount of preparation in advance of the hearing²⁴. It may be keen to limit the costs to an unreasonably low amount so as to hinder the Respondent's answer. (The reverse may also happen.) Accordingly the tribunal will need to have some grasp of the normal level of costs of conducting the sort of case that is in hand if it is to put a realistic cap in place²⁵.
 - (b) The second is where, after the cap is fixed, a party seeks to amend. In deciding how to approach the amendment the fact amount and effect of a cap are new factors to be taken into account; and they are not easy factors to introduce into the equation. Again, the tribunal will have to be astute to identify who is extracting tactical or strategic advantage beyond the norm in adversarial proceedings²⁶.

²⁴Perhaps as part of a failed mediation.

²⁵And if this is not within the arbitrator's general expertise, then advice may have to be sought - probably formally, under the 1996 Act - s. 37(1).

²⁶And there are other interesting questions - to what extent does the would-be amending party have to seek an adjustment to the cap before it does the work that leads up to the application for the amendment? Of course, if it does not seek an adjustment, that might, by itself cause no problem; but what if the responding party seeks an adjustment in order to cover the costs of answering the amendment? Presumably that will have to be granted if the amendment has been allowed; and the question arises as to whether the cap

17. The role of the courts in arbitration. While the role of the courts in arbitration has been severely cut back by the 1996 Act, it has not been completely decimated and what is left is still important²⁷. I have attached as Annex 3 hereto an appendix from Bernstein which summarises the position in tabular form. It seems to me that arbitrators often forget that these powers exist; and if an application by a party to the courts for the exercise of these powers is supported by the arbitrator, the application is likely to have an appreciably greater chance of success than it would otherwise. Questions of jurisdiction, requiring compliance with a peremptory order, securing the attendance of witnesses are just three particularly obvious examples of the way in which the courts can positively support the arbitral process - and arbitrators ought to have these matters well in mind. See generally in this context Viking v Rossdale, 1 August 2001 BLISS IB/10/5.
18. Conversely, the opposition, reasoned one would hope, and qualified or wholesale, of an arbitrator to an application to the court by a party is also likely to carry considerable weight; and arbitrators ought to be slow to refrain from expressing their views in such a situation²⁸.
19. Substantive - the Woolf reforms. These are relevant to arbitration in those areas where the court procedure has to be adopted by arbitrators. It is suggested that one such area is in making orders for costs. The circumstances to be taken into account in making orders for costs in

can be varied for one party only?

²⁷And most courts can respond very quickly these days.

²⁸For example, I think that one recent arbitrator who refused to decide a procedural issue of some importance and sent it straight to court erred in doing so. He should at the least indicated his reasoned views before sending it off to the judges.

court have very substantially changed, courtesy of the Woolf reforms²⁹. The picture is now a much larger one than it used to be. It is my view that arbitrators are bound to follow the Court approach when it comes to costs. - and therefore that this larger picture is one which arbitrators have to review also. I have addressed some aspects of this issue in a recent paper for the Society of Construction Law, and accordingly I do not think it appropriate to repeat the points here. I should however note that the proposition that arbitrators are not bound to follow the Court approach when making orders for costs is disputed by some - so there is further food for thought on the part of arbitrators³⁰.

20. Technological. Given that hearings are potentially expensive and difficult to set up; and given the importance of avoiding delay and expense, it seems to me that arbitrators must seek to maximise the benefits of technology, however much that goes against the natural grain. Just as once there was a postal service that delivered letters at numerous times during the day; and just as once there was a system called telex; now there are courier services, the telephone, the facsimile machine, voice mail and above all e mail. Arbitrators should be prepared to deal with as much of the administration as possible by way of these mechanisms, since they should speed up and/or minimise the cost of intercommunication with the parties.
21. It is therefore sensible to have the relevant facilities (and if necessary someone who knows how to operate them!).

²⁹One consequence may have been to front load costs in commercial cases, thus making cases that do not settle pursuant to an alternative process more difficult to settle during the course of the litigation.

³⁰See generally, Fence Gate v NEL Construction CILL February 2002 at page 1817.

22. Where a hearing of some sort is necessary, then again the arbitrator should be prepared to consider the use of a telephone conference facility or a video conference³¹; and the latter is also potentially beneficial for taking evidence, albeit that it is necessary to put in place a clear protocol to do so³².
23. Concomitantly it seems to me that an arbitrator should seek to have written materials provided in electronic form as well as hard copy (indeed, if comfortable with the idea, electronic form only may suffice). Apart from anything else, this facilitates the transfer of materials to the award.

CONCLUSION

24. There are plenty of methods of dispute resolution about. Arbitration is only one of them. But it seeks to deliver a different product to that of the other methods; and if the product is one of quality parties will still want it. To deliver that product of quality it is essential that arbitrators break loose from old habits; and take the opportunity to utilise the new tools that are available to enable the delivery of that product within the criteria set down in, above all, Section 1 (a) and Section 33 of the 1996 Act.
25. A principle key to the matter is, it is suggested, flexibility - as indeed it was 25 years ago:

³¹That said, it is true that parties often prefer to have the initial meeting on a face to face basis so that they can get some measure of all of those involved. Whether this is beneficial or not, I am not sure. I was once told at one such meeting, where I was chairing the proceedings, that I wrote a much bigger letter than I was - the speaker was the senior executive of one of the parties. It suggested to me that I should have stuck to letters!

³²As to which, see the next edition of Bernstein!

Remember you are the masters of your own procedure, then never try to fit every case into the same procedural strait-jacket because some won't fit. Be flexible, as flexible as you can in trying to meet the wishes of the parties.....

26. Such was the observation of Lord Roskill (Lord Justice as he was then) in the 1977 Alexander Lecture. He did not have in mind the panoply of tools now available to the arbitrator to achieve that end.
27. Of course there is a price. Shaw remarked that most people think once or twice a year. He went on to observe that he had gained an international reputation and made a fortune by thinking once a month. The greater the variety of tools available and the more there are competitive methods of dispute resolution about, the more important it will be for arbitrators to engage in the hard work of thinking about what they are doing.
28. But that seems a good New Decade Resolution - think about what you are doing. By this means will knotted - even arthritic - oaks gain suppleness.

John A Tackaberry

7 March 2002