The Arbitration Award

Now we come to the Award. It is the climax of the arbitrator's task. In the vernacular, it could be called "make your mind up time". And that thought should not be taken lightly. Until the point of decision, the arbitrator has been under a moral and legal duty to keep an open mind. He or she may have begun to form a view, but that view remains subject to re-examination until the arbitrator has taken the logical steps, all the logical steps, required for a sound decision.

In a little while, I will discuss the formal requirements of the Award, the stipulations of the Law. For now, I would like first to say something about presentation. This is not one of those areas where the form is more important than the substance. In many ways the whole purpose of arbitration is that decisions are made entirely on substance and not at all on form. Nevertheless presentation is important, as a courtesy to the arbitrator's employers (for that is what they are), the parties who have honoured the arbitrator by inviting him or her to decide the issues they have been unable to resolve between them.

If you believe Lord Donaldson, Sir John Donaldson as he was at the time, an arbitrator could write a letter or scribble the award on the back of an envelope[1]. I rather imagine there is no objection to writing the award on the back of a cow[2], in memory of Sir Alan Herbert. On reflection, perhaps there will be a regulation from the new countryside ministry.

Be that as it may, I return to my point. Courtesy requires a presentable award. In my view, that means a presentable document, well finished in appearance, perhaps on paper of reasonable quality and having some reasonable form of binding. That may be no more that a stapled card at the corner, it may be tied as documents used to be tied, with green ribbon, it may be a more modern binder. All that is a matter of taste.

What is more important, however, is that it should be a presentable document in respect of its content. The reasoning should be clear, the discussion polite. It is unnecessary to call a man a liar, or to question his motives. All that is necessary is that the arbitrator make a choice - "I prefer the evidence of Mr So-and-so about this". Remember that the arbitrator is the creature of the parties, there to judge the issues, not the people. That is a vital distinction, often forgotten. In the Court, it is the participants who are on trial. In arbitration, only the issues are the arbitrator's concern.

Let us now consider how to go about the award. About writing it, certainly, but first and foremost about preparing for it. And to do that, I want to think about whom the arbitrator should consider when making the Award. Three persons are important.

First I would put the loser. He or she needs to be satisfied that his case was heard and considered and, so far as s possible to be satisfied that the arbitrator has been fair and that the Award is right. He or she will have been the customer, after all and is likely to have paid for all of it. The same

---

1 **Bremer Handelsgesellschaft mbH v. Westzueker GmbH (No. 2); Westzucker GmbH v. Bunge GmbH** (1981) Lloyds' Rep. 130, CA per Donaldson LJ at p. 132: "It is of the greatest importance that trade arbitrators working under the 1979 Act should realise that their whole approach should now be different. At the end of a hearing, they will be in a position to give a decision and the reasons for that decision. They should do so at the earliest possible moment .... No particular form of Award is required. . . . All that is necessary is that the arbitrators should set out what on their view of the evidence, did or did not happen, and should explain why in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award'. . . . Where a 1979 Act award [*or a 1996 Act award*] differs from a judgement is in the fact that the arbitrators will not be expected to analyse the law and the authorities. It will be quite sufficient that they should explain how they reached their conclusion.... The point I am seeking to make is that a reasoned award .... is wholly different from an award in the form of a special case. It is not technical [in the legal sense], it is not difficult to draw and above all it is something which can and should be produced promptly and quickly at the conclusion of the hearing ..... *My notes are added in square brackets.*

2 cf **BOARD OF INLAND REVENUE v. HADDOCK, REX v HADDOCK**]The Negotiable Cow] Misleading Cases, **A**. P. Herbert. I make no apology for including references to the brilliantly logical work of Herbert, it casts a kindly but searching light upon the law and its foibles

applies to those claiming through or under the loser, with the added poignancy that the whole affair may have been outwith their control.

Secondly, the Award is intended for any Court which may have to enforce it (and that Court may be in another jurisdiction) or to hear any appeal or application under Section 67, 68 or 69 of the Arbitration Act 1996. That requires the Award to be clear in its legal reasoning, and it requires it to be set out clearly so that the Court can see precisely what is intended. There used to be a schools of thought which encouraged arbitrators to say as little as possible, to avoid giving grounds for appeal. That is not in the spirit of the legislation and is to be deprecated. The arbitrator's job is to be confident and not to try to fudge the reasoning in the hope of getting past a Judge.

Now, an arbitral award is a documentary instrument that has legal effect. There are six primary requirements, four of which are, so to speak natural requirements. The natural requirements are that it should be cogent, complete, certain and final. In addition, if it is to attract the benefits of support and enforcement within a legal system, it must be substantively compliant and procedurally compliant. Briefly, the natural requirements may be summarised thus:

Cogent: The award must be compelling or convincing in its reasoning.

Complete: The award must deal with all issues properly submitted to the arbitrator (exceptions may be a Partial Award or, in England and Wales, an Order or Award[3] which is provisional by the operation of Section 39 of AA 1996)

Certain: The award must state what has been decided, if it is a declaratory award, and direct what is to be done and by whom, if it is dispositive. There must be no scope for doubt (although Section 3X AA 1996 provides for interpretation by the arbitrator).

That the award should be capable of performance is perhaps a further requirement, but it seems sufficient to regard possibility as an aspect of certainty.

Final: The Award must deal finally with all the issues in the reference; nothing should be left to the decision of another, although it is possible that the effect of an award may be contingent upon some future event.

As to the specifically legal requirements, if one may call them that:

Substantively Compliant Broadly speaking, the decisions in the Award should be consonant with the laws or rules of law that the parties have selected. Otherwise, the Court may not enforce them. There may be other questions, which I discuss later.

The extreme case is that of Public Policy, which is one of the grounds that may persuade a Court not to enforce a foreign award under the New York Convention.

Procedurally Compliant Procedural compliance itself is partly natural. It is widely accepted that arbitration must be fair - otherwise why consider it at all - and that has implications as to procedural fairness. Failure to comply with the agreed process, failure to give each party an acceptable opportunity to make his case and protect his position, the wrong arbitrators, all these are reasons for refusing enforcement under the New York Convention and within the provisions of national laws.

Additionally, for example under AA 1996, there are formal requirements, such as that the award shall be signed and the seat of the arbitration recorded on the award. Some jurisdictions require awards to be notarised, some require them registered in the Court.[4]

---

[3] There is sometimes a semantic debate as to whether the document recording a decision made under S. 39 AA 1996 is an award or an order. That may be sterile because, whichever is true, the provision, whereby the relief is subject to the findings of a final award, may well mean that a Court will have difficulty in reviewing such a decision, as all arbitral recourse will not have been exhausted.

All these requirements interact, as you might suppose. It is in that context, the context of interacting requirements, that I would like to continue the discussion of this paper.

For reasoning to be cogent, of course it must be logical and clear, but first it must be based upon sound premises. The premises upon which an arbitral award is based include, firstly, the facts. The facts, in this context, include the relevant law. Indeed there is an argument that suggests that the distinction between law and fact is not a logical distinction but practical one, simply to obviate the need for law, as such, to be subject to proof. That proposition is supported by the approach of the English legal system to foreign law, which is a matter of fact, subject to proof.

However, the principal facts are those that the parties have presented, some of which may have been the subject of evidence by witnesses, some of which may have been common ground, and some of which may have been within the arbitrator's own knowledge and experience.

When the arbitrator sits down, in his or her study or office, to commence writing the award, the first task is to marshal the evidence and the arguments, but it is already too late. However complex and prolonged the arbitration - and truly it should have been neither - the arbitrator must have had this task, of preparing the award, constantly in focus. At every turn, he or she must have asked the question: "does this help me in deciding upon my award?" Out loud and directed to the parties if necessary, but certainly in the mind.

Moreover, one of the categories of fact that I have mentioned demands to be dealt with well before the award writing begins. It is at once perhaps the most vexed aspect of arbitration but at the same time the raison d'etre of the entire process. It is the arbitrator's own knowledge and experience, particularly where the arbitrator has been selected by the parties for it.

The principles of natural justice require that each parry have a sufficient opportunity to present his or her case and to deal with any matter that may be against them. Not, as is sometimes said, to deal with the case of the other party, but to deal with any matter that may be against them. So, if an arbitrator is aware of something, or becomes aware of something - I say regardless of whether it is fact or law, or even his or her opinion, but not everyone agrees with that wide scope - it must be put to the parties if it is to be taken into account, and it is better that it be put to the parties in any event.

Let me be very clear about that, and give you some examples. The principles seem to me self-evident, but they are also well established. In **British Oil & Cake Mills -v- Horace Battin & Co** (1922) 13 LL LR 443, per Darling J. at *p. 444:*

> *"The people who go to arbitration desire to have arbitrators or umpires who will not decide on evidence alone, but will bring to the consideration of the case a great deal of special knowledge."*

That was about the state of things around Vladivostok during the Manchurian war. From a philosophical point of view, Darling J. may not have been strictly correct. The arbitrator's knowledge is a form of evidence, and that is something that will become clearer as we discuss it.

The theme is refined in **Jordeson & Co -v- Stora Kopparbergs Bergslags A/B** (1931) 41 LL LR *201, per* Branson J. at p. *203*

> *"Now, I think that the fact that this umpire was an expert in the timber trade and was appointed because he was such an expert should not be lost sight* of. *I think the parties must be taken to have assented to his using the knowledge which they chose him for possessing; I do not say knowledge of special facts relating to a special or particular case, but the general knowledge of the timber trade which a man in his position would be bound to acquire. "*

That is important. The Arbitrator applies his skill and knowledge, but not his special knowledge of particular matters, at least not without some precautions. A most misunderstood case is that of **Fox -v- P. *G.* Wellfair Ltd** [1981] *2* Lloyd's Rep *514,* in which the arbitrator was removed, not (as is sometime supposed) for using

---

[4] For example, Italy. The award of an *arbitrio rituale,* or formal arbitration, must be so registered. (The arbitrator used to have to pay the fee!) There is no need in *arbitrio irrituale,* or informal arbitration, which is enforced by proving the award in contract.

his special knowledge, but for doing so without notice to the party who was affected by it and by giving the parties no opportunity to deal with it.

Per Dunn L.J. at p 528:

> *"He should not act on his private opinion without disclosing it. It is undoubtedly true that an expert arbitrator can use his own expert knowledge. But a distinction is made in the cases between general expert knowledge and knowledge of special facts relevant in the particular case. "*

And at p. 529:

> " . . *If the expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties. "*

And, I say by necessary implication, a) allow them to deal with it and b) take account of what they say when making the award. The arbitrator may, therefore, be a witness, particularly an expert witness, perhaps a fairly credible one, but the arties must be able to deal with his or her evidence and the same tests must be applied when it comes to weighing that evidence.

The writer, who is an erstwhile marine engineer, was once on a tribunal that heard an expert offer evidence, about the mechanism of corrosion by salt, which was wholly misconceived. With the chairman's consent, an aide-memoire was written. It was placed in the hands of the parties, who were then given an opportunity to ask questions of the writer, one of the three arbitrators. Such a document makes clear what the arbitrator will have in mind. Open to the light of day. The distinguished American jurist, Benjamin Cardozo, once observed, in a judicial context, "Sunlight is the best disinfectant." - no doubt a slogan adopted by the soap makers, Lever Bros. - and that is the test, perhaps of all matters in arbitration - are they open to the light of day?

I have placed some emphasis on the arbitrator as a quasi-witness, because the practice in the Court, whereby a judge will withdraw at the least suggestion of a link with the subject matter of a case, is untenable in the context of commercial arbitration, where familiarity may be the very key to efficiency and to a just outcome. I hope I have indicated how the jurisprudence supports that view. Actual interest is another matter, but my present purpose is to set out the perspective within which an award is constructed.

Very well, what of the evidence - the remainder of the evidence?

At an early stage, the arbitrator will have to consider how he or she wishes to construct the Award. Broadly speaking there are two choices. One is to set out the reasoning of the Award as a flowing narrative, dealing with the evidence as it arises naturally in the sequence of things. Wherever there is evidential conflict, and often the conflict is less a matter of evidence and more a question of the gloss to be put upon it, the arbitrator will weigh the evidence and make a choice, a finding. Generally, the arbitrator will give more weight to a piece of evidence which is clearly against the interest of a witness, although he may have reservations if, for example, an apparent admission has been obtained from a witness who has been confused or misled in cross-examination. Usually it will be clear what is a true admission and what is not.

Then there will be the consideration of whether a piece of evidence is corroborated by other testimony, by documents or by logical deduction from other propositions in the case. Evidence that is corroborated by witnesses of both Claimant and Respondent is likely to be quite persuasive. Where Counsel or other representatives have discussed the evidence, the arbitrator will wish to look at it in the light of argument, to satisfy himself or herself that the argument is sound.

All this can be done, as I say, in narrative form. The findings are found throughout the narrative text and may or may not be summarised at the end. The Arbitrator may choose to deal with the propositions of law as the narrative develops, or any discussion of the law may be separated from the narrative itself. It's a choice.

The Award is not a judgement, however. The arbitrator need not, and perhaps should not, set out an exegesis of the law in the way that a Judge might choose to do. Arbitration does not set precedents, and does not contribute to the development of the Law, so the formal and sometimes detailed analysis of a judgement is not needed. Rarely will it be necessary for an arbitrator to pick his way through the cases, following this and distinguishing that. The exception may be where one or other party has argued that a particular authority or

line of authority is pivotal. It would be discourteous not to deal with it fully and to explain why that proposition has or has not been accepted.

There is an alternative to the narrative form. Where there are many issues, perhaps many disparate issues, the arbitrator may choose to write his reasoning on an issue-by-issue basis, dealing with the evidence and argument applicable to each and, perhaps, even making an Award in respect of each one, with a sum of money attached to it. Some construction cases, with a detailed schedule, lend themselves to that approach.

Whether the discussion has been on a narrative basis or on an issue-by-issue basis, it is as well to create a separate section of the Award, a dispositive section, in which to crystallise the decisions made into clear directions, setting out either precisely what has been found, if the Award is declaratory, or precisely who is to pay, how much, and when, if the award is a money Award.

How the separation is made is a matter of personal style. An example might be to write, on a separate line, after the discussion and before the disposition, words such as "And I now Award and Declare:" or "And I Now Award and Direct:" followed by the simple statements of the disposition. An Award may, of course, include both declaratory and money dispositions. A minor grammatical point - look at each disposition and read it with the introductory line so that the whole is a grammatical sentence, bearing in mind that a clause following the word "that" may need to be in subjunctive mood (because it is sub joined!).

Dispositions should not be conditional. I would discourage heartily the making of Awards for specific performance unless nothing else is possible as, perhaps, when the subject matter is a rare artefact. An arbitrator who says, "X shall rebuild this wall to my satisfaction" makes a rod for his own back. In approving or otherwise, he will not be acting as arbitrator and may not be able to rely on the immunity given by Section 29 of the Arbitration Act 1996.

I have left the beginning almost until last, because now I wish to suggest a possible structure for the document.

I repeat, this is a suggested structure. Arbitrators are idiosyncratic and have their own ways. I mentioned the cow. You could shear a sheep and write on it if you wished.

First, there should be a clear identification of the document as one made in an arbitration. In a domestic arbitration reference to the statute is probably otiose, but it does no harm, so let us begin with "In the matter of the Arbitration Act 1996"

I would put words like "In the matter of an Arbitration between CCCC -Claimant and RRRR - Respondent" at the top of the sheet.

If a specific set of rules has been adopted throughout, then it may help to vary that to say, for example, "In the matter of an Arbitration under the 1998 Rules of the International Chamber of Commerce between CCCC - Claimant and RRRR - Respondent". That may help the Court, but I have to say it is not consistently done.

Occasionally, if there is an identifiable subject, such as the name of a ship, of a building, or even of a product, then that may be something to add "Mungersthorpe Power Station" or something of the kind. It adds interest, but is not necessary. The author tries to do that, but it is a quirk.

That material, the title of the reference, could be placed at the top of the first page; some prefer to put it in a block at the top right hand comer.

Then would come the Title of the document. Examples might be

> "First Award of Bill Bloggs, a Solicitor, as Arbitrator"
>
> "Second Partial Award of. . . ."
>
> "Award of Bill Bloggs, a Solicitor, as Arbitrator - Final save as to Costs".

The structure of the Award itself will begin with recitals, as brief as possible, but recording that there is an arbitration agreement between the parties, or a contract between the parties incorporating an arbitration clause. Care should be taken to identify the parties precisely, if necessary including company registration numbers, registered addresses and places of business.

The Arbitration Award

The circumstances of the arbitrator's appointment should be given - whether by consent or by intervention of an appointing authority. The recitals, or preamble, may be a convenient place to identify the juridical seat of the arbitration, a necessary requirement of the Act.

It is not generally necessary to set out every interlocutory event, but there should be a note of any order, such as an order as to costs, which has an effect on the decisions to be made, and which may need to be remembered when finalising the Award.

Finally, the recitals should say if there was a hearing and who were the representatives for the parties. This writer prefers to identify Counsel, Solicitors and other representatives by name, and to thank them for their assistance.

It may then be useful to separate the recitals from the discussion and reasoning by a line such as "And now I make this my Final Award with reasons as follows:"

The discussion should begin with a brief description of the background. Strictly, it need contain no more background than is necessary to support the findings of the Award, but it may be appropriate to extend it sufficiently to make sense of the story. Then the arbitrator may set out those facts that are uncontested, but it is important that they are uncontested. If there is any doubt, it is better to make a fmding.

Following on from the background and the uncontested facts, the common ground, we turn to the discussion, reasoning and findings that I have described earlier, either in narrative or in item-by-item style.

At the close come the dispositions, with a signature. All the arbitrators should sign the Award, although the legislation is satisfied if only those arbitrators supporting the Award, the majority, sign. The Award should be dated.

In English Law, there need be no witnesses to the signatures of the arbitrators. Some other jurisdictions require an Award to be witnessed, some require it to be notarised. The arbitrator should ascertain what special processes are necessary. Under the old legislation, the author's practice was to have Awards witnessed by a commissioner for oaths, although it was not necessary (and cost an extra £5 - sometimes £ 10 for two copies).

The Award is the Award. The authors practice is to print two master copies, one for each party, and to provide the parties with a bound master copy and a set of loose pages for copying.

That has been an overview of the award writing process. Having discussed it at length, perhaps now is the time to return to the words of Lord Donaldson and remember that the Award is a commercial document with a commercial and legal purpose. The product of the process. No more, but certainly no less.

October 2001

Geoffrey M. Beresford Hartwell
hartwell@blueyonder.co.uk
78, Manor Road
Wallington
Surrey SM6 8RZ
Tel 020 8647 1686
Fax 020 8401 2873