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PAPER

"AN OVERVIEW OF ARBITRATION"

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Introduction

In my study I have several shelves of books on Arbitration and other methods of dispute resolution. One leading textbook [1] has 830 Pages, another is in two volumes.[2] I find that frustrating, because commercial arbitration is the simplest and most obvious of solutions to problems between traders and their customers; as old as trade itself.

I won't attempt to distil all those books, not even the 830 pages, in this short talk. What I will try to do is explain the nature of Arbitration and discuss its application in the construction industry world wide.

First, however, it is important to understand what arbitration is not. It is not a process at law. It is not a legal process, in the strict sense. Of course it not illegal, it is a legitimate process, a licit process, but not a process at Law. By that I mean that the authority of the state is not invoked, the authority of an arbitral tribuna, such as it is, is no more and no less than the authority the disputing parties agree to give it. Of course, the Courts of the Land, whatever land that is, are available to enforce the outcome of an arbitration, but only then as any contractual arrangements fall to be enforced when parties disregard them. Arbitration is a private process and not a derogation of any Sovereign power[3].

I say that because there is a lot of misunderstanding. People talk about 'taking someone to arbitration' even about 'threatening arbitration', in much the same way as they talk about threatening a Court action. But that is nonsense, especially in construction. Arbitration is built into most forms of contract. It is a natural way to resolve issues that arise and the parties to a construction contract must have in mind that arbitration, or something like it,[4] is how they will resolve matters.

Arbitration is a method whereby the parties to a contract, or any parties in dispute, resolve their differences themselves, with the help of a third party[5] they engage for the purpose.

For a stricter definition, I refer you to the Shorter Oxford English Dictionary.

Arbitration: The settlement of a dispute by one to whom the parties agree to refer their claims in order to obtain an equitable decision.[6]

In the note to that definition, the compilers refer to a definition by Blackstone:

Arbitration Bond - a bond entered into by two or more parties to abide by the decision of an Arbitrator.

That is all there is to it. Two definitions. The first a simple statement which defines the process, the second a statement of the means which gives binding effect to the result. As it happens, modern legislation has made it unnecessary, in most countries, for there to be a formal bond. Generally a written agreement will suffice and that may be an express agreement or an agreement by reference.

Let me look at that definition again:

"The settlement of a dispute by one to whom the parties agree to refer their claims in order to obtain an equitable decision.". Note the emphasis on agreement. No Courts, no judges, just "one to whom the parties agree to refer". Note also the "equitable decision". That is reflected in the English Arbitration Act 1996 in Section 1 " the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" The key word is "fair" . Some restrictive lawyers may argue that the Act requires only a fair process, but the English is crystal clear. The Act requires a fair resolution, a fair outcome. And that must be right. The Act was purported to be a consolidating act and the ordinary meaning of the language is unchanged.

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1 *The Law and Practice of Commercial Arbitration in England*, Sir Michael J. Mustill and Stewart C. Boyd, Butterworths 1989, ISBN 0 406 31124 2.

2 *Arbitration Law*, Robert Merkin, (looseleaf) Lloyd's of London Press, 1991 (first published) ISBN 1 85044 367 X.

3 *Arbitration and the Sovereign Power*, Geoffrey M. Beresford Hartwell, Journal of International Arbitration 17(2) 11-18, 2000.

4 In the United Kingdom, Adjudication, under the Housing Grants, Construction and Regeneration Act 1996, has become the principal means of determining disputes in construction.

5 A Third Party who may be a group of three or some other number, but the principle remains the same.

6 Shorter Oxford English Dictionary 1634

And, in case any one doubts the freedom from procedural restraints of all kinds, the English Act goes on to state that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". I should say that many countries include provisions for arbitration within codes of civil procedure, but the common feature is this essential freedom of the process.

The reason behind this approach is the arbitration is of prime importance in enabling disputed matters to be resolved by private determination without Court intervention; that is to say without State intervention. Moreover, arbitration can be truly international. Neither party has to be subject to the Courts of any State, not even the State in which the transaction is made or where one or the other party is domiciled. The New York Convention[7] enjoins signatory states to observe arbitral award made in other countries and there are some 130 or so countries who have signed the Convention. The only grounds upon which such enforcement may be refused are the common-sense grounds that there was no arbitral agreement or that the arbitration was carried out unfairly, or that the subject matter either is not amenable to arbitration or is contrary to public policy in the place where enforcement is sought.

What is the background of this state of affairs, and how is it relevant for building and engineering, for construction?

As I said when we started, the history of arbitration is as old as the history of trade itself; probably older than Law, if by Law we mean the Laws of Nation States and the apparatus for imposing them. Its roots lie in the power of humankind to communicate and interact socially. Interacting socially involves making bargains, whether in trade or in more general relationships. Implicit in the idea of a bargain is that the parties to it may or may not comply with their bargain and that there may come times when it is not equally clear to both whether the bargain has been kept or not.

For example, I grow apples on some ground I have enclosed, and you grow peaches in a similar piece of ground. An apple orchard and a peach grove. In Arcadia.

You and I agree to exchange a bag of apples for a bag of peaches. Maybe we do that every year, I don't know. Let us assume this is the first time.

Now, peaches bruise more easily and ripen and decay more rapidly than apples, and I don't think you have given me the 100% quality of peaches that I had a right to expect, that would be customary, perhaps.

We aren't going to fight over it, and the nearest Court is miles away and a thousand years in the future.

What we will do is go to our neighbour and mutual friend, whom we trust, and ask him or her to help us to find a way to settle our differences. And we can agree, if it becomes necessary, that we will comply with whatever he or she decides.

And that is all it is, or was. Arbitration. And it worked. If either you or I failed to obey our friend and refused to honour the "Award", it would become known and others would not trade with us any more. No need for enforcement by a Court, no need for the decision maker to have any special authority, we gave him or her all the authority necessary.

Nowadays, Arbitration is recognised by the legal system of almost every country. And it is more or less integrated into the systems of nation states by legislation of various kinds. So, in England, we have the Arbitration Act 1996. If you study arbitration in England and Wales, that is where you will begin.

In construction, it has been the custom for a long time that standard form contracts should include arbitration clauses.[8] Some will provide that, before arbitration, a decision must be obtained from an Engineer, Architect or other supervising officer. The use of such a supervising officer has changed over the years, but it remains the first point of decision in many forms of contract.

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7 United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958). The Convention went into force on 7 June 1959

8 But the Housing Grants Construction and Regeneration Act 1996 has made a provision for compulsory adjudication a part of every British domestic construction contract. Adjudication is also used extensively in international contracts such as those of FIDIC. Adjudication is very like a kind of rough and ready arbitration and is binding unless further steps (arbitration or litigation) are taken. A complete discussion is a necessary part of understanding the whole topic, but there is no time for it here.

The typical arbitration clause will provide that, if there is a dispute (and it remains after the supervising officer has made whatever decision he has to make) one party or the other must give notice of arbitration, usually, but not always, within a prescribed time. Sometimes, If there are to be three arbitrators for example (as in an international context) the party giving notice will nominate an arbitrator. Then it will be up to the other party to nominate another arbitrator and the process to find a third arbitrator or chairman will begin. If there is to be a sole arbitrator, he or she must be agreed.

On the face of it, you might think that the need for agreement could enable a reluctant party to avoid the arbitration altogether. However, the arbitration clause will provide for an appointing authority - sometime a national technical institution, some times an arbitration centre, to appoint if there is default.

Moreover, legislation, such as the Arbitration Act 1996, provides powers for the Court to make an appointment if it becomes necessary.

So when we say arbitration is consensual, it is only consensual in the sense that the original agreement is made by consent. A bit like marriage, but any contract is a bit like a marriage. All that follows is based on that first agreement.

A good arbitrator will want to know something about the dispute before making any directions. That is so he or she can decide upon an appropriate process for the particular dispute. Some disputes, especially in construction, require the arbitrator to inspect the site. Some concern interpretation of clauses and can be done completely on examination of papers. Some (not many, if the truth be known) require the oral examination of witnesses.

The arbitrator or arbitrators will never deal privately with one party only. At every stage they will write to both (or to their representatives). Each party must know what the other is saying and what the arbitrator is saying. It is one of the fundamental principles of natural justice, and supported by legislation.

Often, if the amount in issue justifies it, the arbitrator will call a preliminary meeting. The purpose of that will be to meet the parties and any representatives they may have and discuss the case sufficiently to decide upon the best directions. The purpose must always be to control the process so that it is both efficient and fair. It is a way of finding a fair answer to the dispute, not a way for professionals to make money out of the misfortunes of others.

Sometimes, the other party may not respond at all. If that happens, the arbitrator may use his powers to warn that party that he will proceed without him. He may call a preliminary meeting, to discuss with you both, or with your representatives, how the arbitration should be conducted. If one party is not responding, the arbitrator may serve a peremptory notice, saying that he will hear representations at some time and place, proceeding whether or not all are present. The sanction of course, is that he may proceed *ex parte*, that is, hearing one side only. He must be very careful about that, of course, but if he has given every opportunity, he may go on to the next stage and even to the hearing. If there is any doubt about that, the Court may give him specific powers to enable him to proceed (Arbitration Act 1979, S5).

As he is bound to make his award on what is submitted to him in an argument or presented as evidence, it follows that any arbitrator is likely to issue an award against a wilfully absent party. If the proper procedure has been observed, and the arbitrator has clearly been as fair as could be in the circumstances, that award will be as binding as the judgement of a court of law.

An arbitrator may not use his own knowledge to supply evidence which the parties have not submitted; but he will, of course, use his own skill and knowledge in interpreting the facts and in reaching his conclusion, because that is why a commercial arbitrator is used at all. It will be seen, therefore, that the arbitrator can do little or nothing to assist a party who fails to appear before him or fails to produce any evidence.

However, let us assume that both parties come to the preliminary meeting, if there is one. The arbitrator will introduce himself and invite the parties to consider how to go about things. He may remind the parties that they are about to enter on a serious judicial proceeding to determine their dispute. He will want to know if there is only one claim of if there is to be a counterclaim. He will want an idea of how much preparation is needed by each side.

At the preliminary meeting, the arbitrator may issue an 'order for directions'. That will tell everyone what to do next, generally so that each side knows what the other side is going to allege at the hearing. Depending on the circumstances, there may be formal pleadings or he may invite each of the parties to state his case in a circumstantial letter. Nowadays, the claimant often is directed to submit a written statement of his case, accompanied by any documents on which he needs to rely. Then the respondent would give his statement in the same way. That may include a counterclaim if there is one, and the original Claimant will then have an opportunity to give his defence to that.

The directions may be given 'by consent', that is to say that the parties agree to the arrangements. In the absence of agreement, the arbitrator will decide what is to be done. He will be flexible, but his order does bind the parties to do what he requires and sanctions are available if they fail to do so.

There really is no scope for a would-be Perry Mason in an arbitration, nor in a civil court for that matter. Every step is designed so that the parties know what is claimed against them, what is agreed and what is denied. Once the claim is made, and served on the other party, it cannot be changed without the arbitrator's permission, and he will hear the views of both sides before giving that permission. Not only is that necessary fairness to the parties, but also it helps to avoid time wasting and delay. Perhaps more important, when the parties see their differences clearly set out, they may find it easier to agree to some settlement, which will save them the expense of continuing to the hearing.

Formal pleadings will involve a claim, the defence and any counterclaim, a reply to the defence and a defence to the counterclaim and sometimes a final reply. Their function is to set out the issues which are to be tried. Often they give the parties an opportunity to see the matter more clearly, as a result of which some or all of the issues may be settled, a good arbitrator will always be glad to find himself redundant as the result of a settlement, even if his fees are thereby rather less. Then there will be the process of discovery and inspection, whereby each side tells the other what documents he has which relate in any way to the dispute. When disclosed, those documents must be shown to the other side, unless they are privileged, such as letters between the party and his solicitor in contemplation of the proceedings. Sometimes that stage may be unnecessary; sometimes it may be limited in some way.

When all the interlocutory exchanges are over, there sometimes, but not always, may be another meeting to prepare for the hearing. The arbitrator needs to know how long each side will need for presenting its arguments and examining its witnesses. Everyone needs to agree on when the hearing is to be and on the venue. The arbitrator may weigh up the relationship between the parties. If it is generally amicable, he may suggest an information venue, perhaps his own office or somewhere near the site in dispute. If relations are strained, he will suggest more formal impressive surroundings. There is a lot to be said for a table, at least a metre wide, to separate the two sides!

There may be, in exceptional cases, other things to do before the hearing, such as obtaining depositions from witnesses overseas. A technical dispute will often require an inspection by the arbitrator, or he may decide that operational tests are to be conducted, under his control and in the presence of both parties. Again, if anything needs to be done which requires the assistance of an order of the court, application may be made under the 1979 Act.

I refer again to the advantages of an 'administered arbitration' and, particularly, to the role of the registrar and his staff. Such administered arbitrations are handled by the London Court of International Arbitration, by the Court of Arbitration of the ICC in Paris and by other bodies of the kind. The case will be decided at the hearing. Nevertheless, there is a great deal to be done in the interlocutory stages, and, particularly when the parties are not legally represented, they may find themselves arguing with the arbitrator about what can or cannot be done. Clearly, that is much easier when the parties deal not with the arbitrator, but with the registrar, because it is not the registrar who will have to decide on the case itself. In addition, the cost of administrative work is somewhat cheaper if the registrar and his team look after it. Also, most formal arbitration rules clarify a number of points on the arbitrator's powers, and that can lead to major simplification -- worth bearing in mind.

The Institution of Civil Engineers has devised and published its own rules of procedure. They include some interesting ideas, one of which is the examination of experts, one by the other, without lawyers, arbitration is much used in building and civil engineering and many building professionals become concerned with it. I do not propose, however, to concern myself with that aspect in this article.

The hearing

In the ordinary way, then, we now come to the hearing itself. Each party presents his case and examines his witnesses before the arbitrator. Not every arbitrator takes evidence on oath. It is probably best, except in the simplest of cases, that he should, not because people tell lies, but because like an examination paper, the oath has the advantage of concentrating the mind on the matter in hand. The general rules of evidence apply, although they can be dispensed with, but time can be saved, for example, if documents are agreed, rather than read aloud. Often, where the matter has a technical content, the arbitrator can understand what a witness is saying, even though the lawyers may be having difficulty. He can save time by asking his own questions, but he must be careful not to introduce new arguments by doing so. There will be times when progress can be made by permitting leading questions; that is, questions which contain the information sought. It is important not to introduce, by leading, matters which are actually disputed, particularly if one of the parties is not represented by a lawyer, and thus may not know when to make an objection. It is not always obvious what is a leading question and what is not. However, little harm results from leading something already written in a statement.

During the hearing, the arbitrator takes notes of what is said. Some like to use a portable tape recorder as well, but only to help in the reading of those notes. If the parties require transcripts to be made, then a professional court shorthand writer is engaged. After all the evidence has been given, each party summarises his case and makes any points of law arising from it. Costs may be argued then or later. The arbitrator then closes the hearing. Within a reasonable time after the hearing -- a week or so, longer in complex cases -- the arbitrator prepares his award.

The award

In the past, a good award simply said what was the result -- who should pay and how much. Reasons were not given or, if they were, were given as part of a separate, informal document, not part of the award. That was to avoid, by a technicality, any scope for setting aside an award 'for an error of law on its face'. Clearly, the less said, the less chance of setting aside. Nowadays, things have changed. Under the 1996 Act, the appeal procedure first introduced in 1979 is developed. Effectively, if the parties have not agreed to dispense with reasons, even nominally separate reasons become part of the award and will be considered by the court when any application is made for leave to appeal. The reasons may not be all that detailed. They need only be sufficient to explain why the arbitrator had decided as he has. In many cases, like those of quality arbitrations, where the arbitrator takes a look and says 'That isn't coffee' or whatever, reasons are unnecessary and will not be given. For most cases in the construction industry, however, one can expect the arbitrator to give his reasons in some detail, if only to satisfy the parties that they have been heard and understood.

It is the right of an arbitrator to write his award and to leave it on the mantlepiece until someone pays for it. Usually, he will advise the parties (some only advise the successful party) of the arbitrator's fees, and often the parties will pay jointly. In major cases, it is likely that some arrangement will have been made to meet the arbitrator's fees as the case progresses. Of course, the payments will have to be adjusted afterwards, according to any order for costs, but the arbitrator os not concerned about that, because the parties are both jointly and severally liable to him for his own costs. There are circumstances in which the court may order him to deliver his award, but conditions may be attached to that. Again, when the arbitration is an 'administered' arbitration, the registrar will deal with the issue of the award once the arbitrator has prepared it.

An award almost always states who is to pay, what amount and to whom. That will include any damages, the balance of any account between the parties, the parties' legal costs (if any are to be awarded) and the arbitrator's own fees and expenses. It should also say when that sum is to be paid. There is an exception to that, in that the parties' costs may be 'to be taxed if not agreed', in which case it is for the parties or their lawyers to argue out the costs between them or, failing that, for the costs to be 'taxed', that is to say assumed as to what has been properly incurred in the conduct of the case, by the arbitrator or by a taxing master in the High Court. In either case, further delay and expense will result. Even if the award is to be the subject of an appeal, it becomes payable when it is issued. If the terms are not met, then the award may be entered as a judgement for execution, just as any judgement of the court. That means that the whole apparatus of the State is available to enforce the award, and similar facilities exist for foreign arbitrators or foreign parties. There is scope for declaratory awards which declare findings of fact or law, but they are not often sought.

What are the advantages of arbitration?

Arbitration has some advantages over court proceedings. Perhaps the most obvious example is in an international dispute, where one party does not wish to submit his arguments to the jurisdiction of a foreign court. The reason may be political, or a party may be a government agency in a country where the judiciary is not independent of government. In one such case, one party was British and the other was an agency of an Eastern Bloc government. The tribunal sat in Switzerland under a Swiss chairman. It was a proceeding under the rules of the International Chamber of Commerce Court of Arbitration. Moreover, as I said to begin with, The New York Convention ensures that awards are enforceable in most jurisdictions.

Another important reason, in domestic and foreign disputes, is that the proceedings are private. The outcome is private, any evidence remains confidential to the parties and the arbitrator, and thus arbitration is particularly useful where the parties do not want others to know their business. Conversely, the findings of one arbitration will not bind the courts or another arbitrator considering another case on similar facts; so arbitration may not be a good way of dealing with a 'test' case, although it could be a useful guide to what might happen in other, similar, cases.

The main practical advantage of arbitration, however, is that it can be conducted more or less to suit the parties involved. The hearing can be wherever suits everyone. There need not be a formal hearing if the parties and the arbitrator think that written submissions will do. The arbitrator can go to the site, if the dispute is about something fixed. Expert witnesses may not be needed.

Parties need not be represented by lawyers; they may appear themselves or they may be represented by lay advocates, a practice which is increasing in the area of building cases. A lay advocate is someone, not a lawyer but usually with some other expertise, who can present a case and question witnesses. Generally, though, I think anyone entering a modern arbitration should do so with legal advice.

If a substantial sum is involved, it is probably as well to engage the services of counsel. There is more to the conduct of a complex case than knowledge of the law, and few lay men have that combination of tactical experience and a touch of showmanship which may be required to present a case at its best. Counsel's role is more than a little like that of an orchestral conductor -- superficially easy, but all we see is the performance and not the legally skilled preparation and arrangement. Nevertheless, there are cases, usually straightforward, matters of fact, which parties may present themselves, and there are others which can be conducted perfectly well by experienced solicitors or lay advocates.

There are other ways in which an arbitration can be simplified. The arbitrator is said to be 'master of his own procedure', and he can cut across many of the usual formalities of court procedure, provided that he does so without restricting the parties' right to a fair hearing. If the parties make full use of this versatility of procedure, arbitration can be swift, effective and economical.

At a time when the courts are very busy, it often will be possible to have a matter settled by arbitration very much more quickly than could be done in the courts. That can be a major advantage, although it may not appeal to a party whose chances of success are not great. It is important that anyone concerned with appointing an arbitrator makes sure that his appointee is reasonably available.

Finally, there is one point which must be emphasised. Although the arbitrator has a great deal of freedom as to procedure, he must make his decision according to law. That means that he cannot just split the difference. It also means that he must listen to both sides and confine himself to considering what they put before him. Although he has been chosen for his general competence, if he proposes to use some special knowledge, he must let the parties know, so they cannot comment on it.

It is sometimes said that an arbitrator will produce a fair result, even if it is not strictly in accordance with law. I am afraid that is not true. If it were, then we would be living under two separate systems of law, with all the uncertainty that would result. Moreover, the courts would not be available to enforce the awards of such arbitrations, which would be of little value. There is an exception to that.

There are arbitration clauses which provide specifically that the arbitrator or arbitrators shall act as *amiable compositeur(s)* or that the award shall be made *ex aequo et bono*. They are more commonly used outside the Common Law jurisdictions. In rough terms, they do allow the arbitrator to achieve a fair result, not disregarding the law, but rather disregarding any palpably unjust effect of legal technicality. Proceedings under these terms will be directed towards the intentions of the parties, to the consequences of their conduct and to a fair result if external circumstances have intervened to cause the difficulties which led to the dispute. In many ways, the concepts adopted, when arbitrators act as *amiable compositeurs*, can be compared with the concepts of equity, linked with the so-called law merchant, the private international law of traders' custom and practice, which is itself undefined in any strict legal sense.

In asking a tribunal to act in this capacity, the parties are effectively throwing themselves on the mercy of the tribunal in the hope that the tribunal will resolve matters to give a reasonably fair result. Even if it is not law, that result will be enforceable as the product of the parties' agreement. The procedure is rare and, in England, almost unknown. Indeed, one may argue that the fusion of equity and law, in the English system, means that any decision, made in accordance with English Law, should be both just and equitable.

Arbitration will not be the answer to every problem. Consideration should be given to the appointment of conciliators or investigating experts when there is some prospect of success in a less formal approach. Nevertheless, in engineering, submission to arbitration is very much a matter of trial by one's peers and has become an established and settled way of dealing with many kinds of disputes. It is to be hoped that is to the advantage of all.

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