ALTERNATIVE DISPUTE RESOLUTION

The arbitration paradox

BY **JOHN WALTON**

> **When will mankind be convinced and agree to settle their difficulties by arbitration?**
> — Benjamin Franklin.

When Lord Thomas of Cwmgiedd, then Lord Chief Justice of England and Wales, observed in his BAILII lecture in 2016 that "... the UK went too far in 1979 and again in 1996 in favouring the perceived advantages for arbitration as a means of dispute resolution in London over the development of the common law; the time is right to look again ..." he was not being visionary or breaking new ground. His was a complaint echoed by many common lawyers over the years that the good cases do not get to the courts, and the law does not benefit from the development of judicial reasoning. We hear such sentiments expressed here with reasonable frequency, if not monotony, though rarely from such a senior position on the Bench.

Lord Saville and Sir Bernard Eder QC responded with some force, maintaining that parties to arbitration need finality, not lengthy court proceedings dissecting arbitral awards. When awards do come before the courts here, judicial scrutiny is robust and supportive, with very few applications for leave to appeal or to set aside resulting in judicial intervention. The few that make it into public consciousness tend to be the egregious minority.

Court intervention in arbitral awards is largely limited to appeals on questions of law, in the Arbitration Act 1996, if adopted (clause 5), applications to set aside (article 34) and refusing recognition (article 36); and such intervention is limited and typically well-reasoned when it occurs. The UNCITRAL Model Law on International Commercial Arbitration, which we have adopted with little amendment in Schedule 1 to the Act, supports party autonomy with limited judicial supervision (see section 5(d) and article 5 of Schedule 1 to the Arbitration Act).

As Robert Fisher QC points out in his article "Arbitrations and Proportionality" in *LawTalk* 932 (September 2019, page 55), "A feature of arbitration is the opportunity to tailor the procedure to the particular dispute." Aside from the principles of equal treatment (article 18), natural justice and public policy, there is considerable latitude in our Act, and little that constrains counsel and their clients from introducing significant latitude in procedures adopted to resolve their disputes.

And yet, the comfort of the familiar, and the tried and true of centuries of procedural order, seems irresistible. Therein lies the paradox.

On the one hand, arbitration is final and binding, carrying with it the undoubted obligations to follow the rules of natural justice, to treat the parties equally and give then equal opportunity to present their cases; and not to offend the broader, albeit unruly, concept of public policy. On the other we are enjoined to embrace the civil law concept of proportionality, and the law we have adopted expressly promotes such a concept. Rightly so, but concerns over procedural fairness, the health of the common law and the confidence which an established set of rules gives us can be hard to shake off.

Early identification and resolution of disputes

Nowhere is this more apparent than in the construction industry. In the majority of disputes, the parties have little interest in embarking on a costly and uncertain disputes process. They want their disagreements resolved promptly without arcane legal principles and procedures distracting them from completing the project. Early identification and resolution of disputes, traditionally by the engineer, has been the hallmark of construction contracts beyond the living memory of all practising construction lawyers.

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Yet when construction disputes go to mediation or arbitration, the advice given is frequently to await completion of the discovery process and to let the dispute "crystallise" before considering settlement or arbitration. Because it is the final forum in multi-tiered disputes resolution clauses,

arbitration is without exception sitting at the bottom of the cliff.

This may suit the needs of litigators, and free them from any criticism that no stone has been left unturned (more than once, in the words of Sir Rupert Jackson), but it is not so clear that this approach suits the needs of the disputing parties.

In the words of Robert Fisher QC, "... expedited procedures ... work well in practice despite assumptions to the contrary by much of the legal world." In the construction industry, the early adoption of expedited disputes procedures is durable and effective, avoiding the parties' positions becoming entrenched and the, at times, extravagant arguments and procedural manoeuvrings of counsel.

Sometimes the certainty which Lord Thomas sought in his 2016 lecture comes at a cost which the clients have no desire to bear.

The construction industry reveals different priorities, other than establishing legal precedent or conversely litigation settlement. Its first priority is to get projects completed promptly, efficiently and to the required standard. To do so, it has established the importance of early identification of inevitable disagreement and dispute avoidance. Over recent years, in major projects, this has been reflected in the increased use of disputes boards (for example, the Manapouri Tail Race Tunnel Project, the Cook Strait Pole 2 Project and Transmission Gully), over multi-tiered disputes clauses involving engineer's determination, mediation, adjudication and arbitration (as refined in the Channel Tunnel and Hong Kong Airport projects). Increasingly, parties have sought non-binding evaluative mediation, expert opinion and any other prompt, flexible and "non-legal" guidance on what their rights might be.

The underlying principles

The issue is less over a sum of money, payment of which may be compromised in mediation, than understanding the underlying principles by which the parties regulate their activities. It is those underlying principles that get taken to chief executives and supervising boards to approve payments or the granting of other rights they would rather avoid; payments or rights which they had previously been advised were in their favour.

The paradox is that arbitration is best suited to tailored procedures, proportionate to the matters in dispute; and it has the ability to be adopted at time which avoids escalation. Yet, it is final.

The tendency for conservative decisions about our preferred arbitrators and the process to be followed; for the familiarity of the court processes and rules which make up the majority of a litigator's practise; and to challenge the jurisdiction of the arbitrator, the process and the outcome, exhausting the appeals and other processes in the hope of setting aside unfavourable awards, is ultimately counter-productive. This may satisfy clients that everything has been done, shielding counsel from criticism, but the evidence suggests that this approach is far from satisfactory.

While I am not advocating for rough and ready justice, I am suggesting that arbitration offers far greater flexibility, and opportunities for proportionality, than most embrace. The best use of arbitration is to select an arbitrator and adopt procedures best suited to the dispute. While the outcome may be final and binding, that does not always mean that corners need be cut, or that clients will be unhappy. ■

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