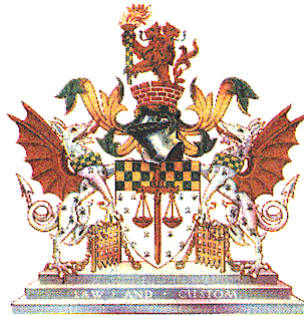


The Worshipful Company of Arbitrators



The Master's Lecture 2002

Annexures 1 to 3

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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Annex 1 – Modified Version of a section of Bernstein’s Handbook of Arbitration Practice (3RD Edition)

Specific powers of the tribunal

2-316 The tribunal

(a) may decide matters by a majority if the tribunal consists of more than one; and is not unanimous.¹ A chairman may decide alone, if there is no majority.²

(b) may rule on its own substantive jurisdiction, namely as to whether there is a valid arbitration agreement³;

(c) may rule as to whether the tribunal is properly constituted⁴;

(d) may rule as to what matters have been submitted to arbitration in accordance with the arbitration agreement.⁵;

(e) may admit objections to the jurisdiction despite the fact that they were not raised at the outset of the proceedings⁶, or, if later, as soon as the matter the subject of objection surfaced in the arbitration⁷;

¹ s.20(3).

² S.20(4).

³ s.30(1)(a).

⁴ s.30(1)(b).

⁵ s.30(1)(c).

⁶ s.31(1).

⁷ s.31(2).

- (f) may decide when and where any part of the proceedings is to be held⁸;
- (g) may decide the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied⁹;
- (h) may decide whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended¹⁰;
- (i) may decide whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done¹¹;
- (j) may decide whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented¹²;
- (k) may decide whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law¹³;
- (l) may decide whether and to what extent there should be oral or written evidence or submissions¹⁴;
- (m) may decide the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not

⁸ s.34(2)(a).

⁹ s.34(2)(b).

¹⁰ s.34(2)(c).

¹¹ s.34(2)(e).

¹² s.34(2)(f).

¹³ s.34(2)(g).

¹⁴ s.34(2)(h).

it has expired)¹⁵;

(n) may appoint experts or legal advisers to report to it and the parties, or may appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings¹⁶;

(o) may order a claimant to provide security for the costs of the arbitration¹⁷;

(p) may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings¹⁸:

for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or¹⁹

ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property²⁰;

(q) may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation²¹;

(r) may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control²²;

¹⁵ s.34(3).

¹⁶ s.37(1).

¹⁷ s.38(3).

¹⁸ s.38(4).

¹⁹ s.38(4)(a).

²⁰ s.38(4)(b).

²¹ s.38(5).

²² s.38(6).

- (s) may dismiss the claim for want of prosecution²³;
- (t) may continue the proceedings in the absence of a defaulting party²⁴;
- (u) may make a peremptory order.²⁵

Powers relating to peremptory orders for security for costs

2-317 If a party fails to comply with a peremptory order against the claiming party for security for costs the arbitrator may dismiss the claim.²⁶

Powers relating to peremptory orders other than for security for costs

2-318 The arbitrator may:

- (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order²⁷;
- (b) draw such adverse inferences from the act of non-compliance as the circumstances justify²⁸;
- (c) proceed to an award on the basis of such materials as have been properly provided to it²⁹;
- (d) make such order as it thinks fit as to the payment of **the** costs of

²³ s.41(3).

²⁴ s.41(4).

²⁵ s.41(5).

²⁶ s.41(6).

²⁷ s.41(7)(a).

²⁸ s.41(7)(b).

²⁹ s.41(7)(c).

the arbitration incurred in consequence of the non-compliance.³⁰

Power to make more than one award

2-319 The arbitrator may make more than one award at different times on different aspects of the matters to be determined³¹ and may, in particular, make an award:

- (a) relating to an issue affecting the whole claim, or³²
- (b) relating to a part only of the claims or cross-claims submitted to it for decision.³³

Power to make a declaration or order

2-320 The arbitrator may make a declaration as to any matter to be determined in the proceedings³⁴ and/or may order the payment of a sum of money, in any currency.³⁵

Powers corresponding to court powers

2-321 The arbitrator has the same powers as the court:

- (a) to order a party to do or refrain from doing anything³⁶;

³⁰S.41(7)(d).

³¹s.47(1).

³²s.47(2)(a).

³³s.47(2)(b).

³⁴S.48(3).

³⁵s.48(4).

³⁶s.48(5)(a).

- (b) to order specific performance of a contract (other than a contract relating to land)³⁷;
- (c) to order the rectification, setting aside or cancellation of a deed or other document.³⁸;
- (d) to strike out for want of prosecution.³⁹

Powers relating to interest

2-322 The arbitrator may award simple or compound interest from such dates, at such rates and with such rests as he considers meets the justice of the case:

(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award⁴⁰;

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment⁴¹;

(c) from the date of the award (or any later date) until payment, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).⁴²

Powers relating to the award

³⁷ s.48(5)(b).

³⁸ s.48(5)(c).

³⁹ s.49(3)(a).

⁴⁰ s.49(3)(b).

⁴¹ s.49(3)(b).

⁴² s.49(4).

2-323 The arbitrator:

- (a) may decide what is to be taken to be the date on which the award was made.⁴³
- (b) may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.⁴⁴

Power to correct awards

2-324 The arbitrator may on his own initiative or on the application of a party:

- (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or⁴⁵
- (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.⁴⁶

Security for costs

Power to order security for costs in an arbitration

2-325 The court has no power to order security for costs in an arbitration: but may order security in court proceedings connected with the arbitration such as appeals under section 69 or applications under section 68.

2-326 Unless the parties have agreed otherwise a tribunal has the power to

⁴³ s.54(1).

⁴⁴ s.56(1).

⁴⁵ s.57(3)(a).

⁴⁶ s.57(3)(b).

order a claimant to provide security for costs including arbitrators' or institutional⁴⁷ fees. This is a general power applicable to any claimant. The only "restriction" on it is that the order cannot be founded on either of the following matters:

(a) the fact that the claimant is an individual ordinarily resident outside the United Kingdom: or

(b) the fact that the claimant is a confederation or association incorporated or formed under the law of a country outside the United Kingdom or whose central management and control is exercised outside the United Kingdom.

2-327 In consequence the power is a much wider one than that available to the court in litigation. In principle there is no reason why, as a matter of course, any respondent should not seek security for costs from any claimant. That said, it is likely that arbitrators will take a common sense view and will tend to exercise this power only where there is a real concern that there may not be the funds to honour an award at the end of the day.

2-328 There is another important difference between the position of an arbitrator and the court when it comes to awarding security for costs. In the court, care is taken in appropriate cases to ensure that the judge who hears the application for security does not try the case. This is because it is permissible for a plaintiff resisting such an application to point to payments into court and *Calderbank* offers to argue that the application is oppressive and/or that, in a sense, there is already substantial security.

2-329 There is no reason why a claimant in an arbitration should not utilise the same response. Accordingly respondents who want security but do not wish the tribunal to know that a *Calderbank* offer has been made should where

⁴⁷Most institutional rules require payment or deposit of the institution's fees in advance. See, for example,

Arbitration Rules of the Chartered Institute of Arbitrators.

practicable apply for the security before making the offer.

2-330 The same problem arises in much more acute form when a Calderbank offer at an early stage has had, as it sometimes does, the reverse effect to that intended. It is intended to speed resolution of the dispute, by forming a basis of settlement. Only if that does not succeed is it intended to provide protection at the end of the day against the ever-optimistic or greedy claimant. However a good offer early in a long case may actually make settlement later impossible-not because the parties cannot settle the substantive claim, but because the claimant cannot bring itself to accept the offer (now seen to be a good one), and thus pay all the costs incurred after the offer. The reaction of frustrated claimants in such a situation is to seek to wear down the respondent by lengthening the arbitration.

2-331 If the frustrated claimant is also penniless, the respondent who wants security post the Calderbank will have to accept that the tribunal may learn about the offer. On the other hand if the parties agree that the tribunal shall not have the power to order security for costs, then the respondent who wants security has no other remedy. The old power of the court to order security in connection with an arbitration has gone with the repeal of Part 1 of the Arbitration Act 1950.

Determining the quantum of security to be given

2-332 A Commercial Judge, when sitting to decide a dispute as to the amount of security to be given in a court action, sometimes sits with a Taxing Master as an assessor. If an arbitrator has to decide such a dispute, and the amounts involved are large, it may well be appropriate for him to suggest to the parties that he sits with an experienced litigation solicitor as assessor appointed

pursuant to section 37.⁴⁸ Arbitrators should also bear in mind, and should not hesitate to use if applications for security are made, their power under section 65 to cap recoverable costs.

Power to order security for amount claimed

2-333 By section 39 of the Act the parties may agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award. An arbitrator has no power to order such security save insofar as such a power is conferred upon him by agreement or by institutional rules incorporated in the contract. Many institutional rules give him such powers; see, for example, the JCT Arbitration Rules (1988), Rule 10.

Powers relating to costs and fees

Powers relating to costs

2-334 The arbitrator:

- (a) may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties⁴⁹ ;
- (b) may determine by award the recoverable costs of the arbitration on such basis as it thinks fit⁵⁰;
- (c) may order that the recoverable costs of the arbitration be determined other than on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred⁵¹ ;

⁴⁸ s.37.

⁴⁹ s.61(1).

⁵⁰ s.63(3).

⁵¹ s.63(5)(a).

(d) may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.⁵²

Power of an umpire

2-335 An umpire decides matters alone as from and including the issues (whether substantive or procedural) on which the party appointed arbitrators are unable to agree.⁵³

Powers to sanction applications to the court

2-336 The tribunal can sanction an application to the court, thereby greatly facilitating the task of a party who wishes to go there. Examples include the following.

2-337 The tribunal may sanction the use by a party to the arbitration of the procedures available in court to secure the attendance before the tribunal to give oral testimony or to produce documents or other material evidence.⁵⁴

2-338 The tribunal may sanction an application for the assistance of the court in the matter of the taking of the evidence of witnesses by⁵⁵ ;

- (a) ordering the preservation of evidence⁵⁶;
- (b) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings-for the

⁵²S.65(1)

⁵³S.21(4).

⁵⁴s.43.

⁵⁵s.44.

⁵⁶s.44(2)(b).

inspection, photographing, preservation, custody or detention of the property, or ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration⁵⁷ ;

(c) ordering the sale of any goods the subject of the proceedings; the granting of an interim injunction or the appointment of a receiver.⁵⁸

2-339 Without the tribunal's permission, seeking the assistance of the court in a non-urgent case is fruitless.

Powers exercisable only if the parties consent

2-340 The tribunal will not be able to take the following steps unless the parties to the arbitration have specifically so agreed:

(a) Exercising powers reserved to the court, e.g. extending time for the lodging of a claim beyond a time bar in the arbitration agreement⁵⁹;

(b) Consolidation of the particular arbitration with other proceedings, and holding concurrent hearings⁶⁰;

(c) Ordering relief (which it would have power to order in a final award) on a provisional basis. This includes injunctive relief.

(d) Ordering the payment of costs other than in accordance with the general principles upon which costs are ordered to be paid in court.

(e) Determining the dispute in accordance with other considerations than

⁵⁷ S.44(2)(c).

⁵⁸ s.44(2)(d).

⁵⁹ cf. s.12 of the Act.

⁶⁰ s.35.

those derived from a system of law chosen by the parties to be applicable to the substance of the dispute.

2-341 In the absence of a contrary agreement between the parties the tribunal will usually have power to continue with the arbitral proceedings even if proceedings are in fact in court. Examples are where a party is seeking the determination of a preliminary point of law in court, or where a party is challenging an award on the basis of excess of substantive jurisdiction.

Specific obligations placed by the Act on the tribunal

2-342 In addition to the general obligations, particularly those imposed on the tribunal under section 33, there are some specific obligations.

(a) The obligation to hear any representative chosen by a party (the parties can contract out of this freedom of representation).⁶¹

(b) Where the tribunal exercises its powers to appoint an expert, a legal adviser or an assessor, it must afford the parties a reasonable opportunity to comment on the information opinion or advice so obtained.⁶²

(c) The tribunal must decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.⁶³

(d) If it exercises its power to make awards relating to an issue affecting the whole claim in the case, or to a part only of the claim/claims before it, it must

⁶¹ s.36.

⁶² s.37(1).

⁶³ s.46.

clearly specify in this award the **precise** issue, claim or part of a claim dealt with.⁶⁴

(e) If the dispute is settled during the proceedings by the parties the tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.⁶⁵

(f) If there is no agreement between the parties as to the form of an award, the award shall be in writing signed by all the arbitrators, or all those assenting to the award.⁶⁶

(g) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.⁶⁷

(h) The award shall state the seat of the arbitration and the date when the award is made.⁶⁸

(i) If there is agreement between the parties as to how of the award is to be notified to the parties, then that agreement must be followed.⁶⁹

(j) If there is no such agreement the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made.⁷⁰

(k) If the tribunal proposes to exercise its power to correct an award or make an additional award, on the application of one party, then it must

⁶⁴ s.47.

⁶⁵ s.51.

⁶⁶ ss.52(2) and (3).

⁶⁷ s.52(4).

⁶⁸ s.52(5).

⁶⁹ s.55(1).

⁷⁰ s.55(2).

afford the other party/ies a reasonable opportunity to make representations first. Furthermore there are strict time limits on the exercise of this power, unless the parties agree to enlarge these.⁷¹

2-343 The tribunal must avoid the following:

- (a) failing to comply with section 33 (general duty of tribunal);
- (b) exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- (c) failing to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failing to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failing to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

⁷¹ s.57.

Annex 2 – “Capping the Costs”

[from Bernstein’s Handbook of Arbitration Practice – 3RD Edition]

Capping the costs

2-806 The parties may agree as to what costs are recoverable and may agree, for example, to place a cap or ceiling on recoverable costs. The parties should be encouraged to do so. Unless the parties have agreed to exclude this power the arbitrator has the power under section 65 of his own motion to place a cap or ceiling on recoverable costs and to do so for parts of the proceedings as well as the whole. Moreover, even if the arbitrator places no ceiling on reasonable costs pursuant to section 65, and on the basis that the amount of costs recoverable should be proportionate to the amount in dispute, he can under section 63(3) limit recoverable costs to a sum or sums which the tribunal thinks appropriate. If the arbitrator does so, then he must specify the basis upon which he has acted²⁰ and the items of recoverable costs and the amount referable to each.²¹

2-807 These are new cost provisions and are potentially of great importance. First, if they are used properly, they should enable the balance which is now tilted in favour of the party with a deeper pocket to be redressed. Secondly, the new provisions should enable arbitrators to introduce some discipline in expenditure on the conduct of arbitration, so that the costs do not get wholly disproportionate to the amount in issue. There is great scope for the exercise of informed common sense by arbitrators when dealing with costs. It is quite absurd and brings arbitration into great disrepute that a claim, for example, in a construction industry dispute about 1 million, may cost more to arbitrate. Many of the procedural devices and practices discussed elsewhere in this book should help to reduce costs substantially, but there must be the sanction

that the parties should be subject to ceilings on recoverable costs. As is made clear in paragraph 272 of the Report of the DAC:

It gives the tribunal power to limit in advance the amount of recoverable costs. We consider that such a power, properly used, could prove to be extremely valuable as an aid to reducing unnecessary expenditure. It also represents a facet of the duty of the tribunal as set out in Clause 34. The Clause enables the tribunal to put a ceiling on the costs, so that while a party can continue to spend as much as it likes on an arbitration it will not be able to recover more than the ceiling limit from the other party. This will have the added virtue of discouraging those who wish to use their financial muscle to intimidate their opponents into giving up through fear that by going on they might be subject to a costs order which they could not sustain.

2-808 Obviously any cap must apply to both parties. Equally obviously, the arbitrator must retain the power to vary or renew the cap for good cause shown. Finally, a cap may work injustice where one party's representatives are working on a contingent fee basis, related to the amount of the claim. When the arbitrator knows or believes that this is or may be the case, he must carefully review the pros and cons of a cap.

Annex 3 – APPENDIX 20⁷²

[from Bernstein's Handbook of Arbitration Practice – 3RD Edition]

The Role of the Courts in Arbitration

⁷²Modified.

<u>Powers of the Court</u>	UNCITRAL Model Law Article	New York Convention 1958	1950 Act Section	1975 Act Section	1979 Act Section	1996 Act Section
Staying proceedings in court in order to give effect to an arbitration agreement.	8		4(1) 5	1		9! 10! 11! 86
Extension of time for commencement of arbitral proceedings.			27			12 ! +
Setting aside a "default" appointment of a sole arbitrator.			7(b) 10(2b)			17+
Power in support of the constitution of the arbitral tribunal including revocation of an appointment.	11(4)		10(1),(2) and (3c) 25			18+
Power to substitute an umpire for the original members of the tribunal.			8(2),(3)			21+
Power to remove an arbitrator.	12-14		13(3) 23 24(1)			24 ! +

<u>Powers of the Court</u>	UNCITRAL Model Law Article	New York Convention 1958	1950 Act Section	1975 Act Section	1979 Act Section	1996 Act Section
Powers consequential upon the resignation of an arbitrator.	14					25(3) and (4)+
Powers to consider and adjust arbitration fees and expenses.						28(2) to (4) ! +
Power to determine any question as to the substantive jurisdiction of the tribunal.		2				32! # (+)
Power to require a party to comply with a peremptory order made by the tribunal.					5	42+ *
Power to secure the attendance of witnesses before the tribunal.	27		12(4),(5)			43! *
General power in support of the arbitral proceedings	9 27	2	12(6)			44+ *

<u>Powers of the Court</u>	UNCITRAL Model Law Article	New York Convention 1958	1950 Act Section	1975 Act Section	1979 Act Section	1996 Act Section
Power to determine a preliminary point of law.					2	45* (+) #
Power to extend the time for the making of the award.			13(2)			50+ *
Power to require delivery of a withheld award.			19			56! +
Powers in connection with the determination of the amount of the recoverable costs of the arbitration and to disputes as to the recoverable costs part of fees and expenses of the tribunal.			18(1),(2) 19			63 64*
Powers in connection with the enforcement of the award.	35	3 5 6	26(1)			66!

<u>Powers of the Court</u>	UNCITRAL Model Law Article	New York Convention 1958	1950 Act Section	1975 Act Section	1979 Act Section	1996 Act Section
Powers in connection with a challenge to an award on the basis of substantive jurisdiction or serious irregularity.	16 34	5	22 23			67 ! + 68 ! +
Power to hear an appeal.					1 3	69* (+) #
Powers to order a tribunal to state reasons for its award, to vary, remit or set aside awards or declaring them to be no effect.			23(3) 22(2)		1(5),(6)) 1(8)	70! # 71!
Power in respect of challenge by person taking no part in the arbitral proceedings						72!
Powers in relation to service of documents.						77+ *
Power to extend time limits within the arbitral proceedings.						79* + 79(3) #

<u>Powers of the Court</u>	UNCITRAL Model Law Article	New York Convention 1958	1950 Act Section	1975 Act Section	1979 Act Section	1996 Act Section
Stay of proceedings in the context of a domestic arbitration agreement.			4(1)	1(1)		86
Enforcement of New York Convention awards.		1		3		101

KEY:

- ! Mandatory Provisions under the 1996 Act.
- * Power of the Court may be excluded by agreement of the parties.
- + Leave required to get to Court of First Instance.
- # Certificate required for appeal to Court of Appeal.
Leave required for appeal to Court of Appeal.
All remedies must be exhausted before seeking to invoke Court's jurisdiction.
- (+) Leave required to appeal to Court of Appeal in one subsection