

## Arbitration – Elastic or Arthritic

### Introduction

When I was a student, I financed my way through college by working as a barman and, for 18 months, I was lucky enough to work in Kendal in the English Lake District. A beautiful location and I was even luckier to work in a place called the Brewery Arts Centre.

As you can probably gather from the name it was a brewery which had been converted into an arts centre and the great thing, so far as I was concerned was that on each evening they had live music in the bar.

On Monday it was folk music, Tuesday was country & western night, Wednesday was jazz, on Thursday – believe it or not- there was a German oompah band, and Friday was rock.

However, my favourite was Sunday lunchtime. On Sunday's the guy who ran the place had a jazz jam session. His name was Bob Dawbarn, and, prior to running the Brewery Arts Centre, he had been a very well-known music journalist with Melody Maker magazine as well as a jazz trombonist.

Bob was very well connected in the music business – especially in jazz, and we were lucky enough, on Sundays to see some of the greats of jazz play or sing – George Melly, Chris Barber, Humphrey Littleton, to name but a few.

Because you never knew who was going to turn up for the Sunday jam session and how many there would be on stage, the sign at the Brewery Arts Centre always said – Sunday Lunchtime Jazz with Bob Dawbarn's Elastic Band.

I thought then, and still do, what a great play on words.

But, even more importantly, you could always be sure, no matter how many musicians there were on stage, no matter how stretched the elastic band was, the quality was always there. It was seriously good jazz, no matter whether the Elastic Band was large or small.

You see the Elastic Band could accommodate any number of musicians playing whatever instruments. It didn't matter whether there were 3 double bassists, or more trombones than trumpets, or no saxophonist - the band was truly elastic. It would adapt its style, change its focus and still deliver.

When I became a lawyer, and being at the bar took on a different meaning, I fairly quickly came across this thing called arbitration. In those days you learned nothing of arbitration at university or law school, so it was all a bit of a mystery to me. I was told by the partner I was working for to do some background reading on arbitration, so that I would be more familiar with the process and I clearly remember the list of the advantages of arbitration over court proceedings that everyone quoted at the time: speed, flexibility, confidentiality, cost, enforceability, expertise and informality.

Those seven “advantages” were the promise of what arbitration would deliver and, in many cases, in those days, arbitration did deliver most, if not all of them. But that was the past and, as we all know, things changed.

The arbitration community is familiar with the story that Professor Rusty Park tells of the sign in the window of the shoe repairer's shop in Boston – “*Fast Service, High Quality, Low Price – pick any two*”.

Rusty uses that sign as a metaphor for the problems we appear to have in arbitration. We don't seem to be able to provide all three - fast service, high quality and low price. And, certainly, speed and cost are almost ever present topics in arbitration conferences.

However, in this discussion I want to focus on one of the other “advantages” – flexibility because it may be that we are losing sight of the need for flexibility in arbitration and that may be causing some of the problems we regularly encounter with speed and cost.

If we can be more flexible, more elastic, like Bob Dawbarn's Elastic Band we may just confound the Boston shoe repairer and provide fast service, high quality and low price.

I have already mentioned a couple of signs in windows – Bob Dawbarn's Elastic Band and the Boston shoe repairer, so let me add a third of my own. This is one I saw in the window of a jewellers in Dublin. It said, “*Ears Pierced While You Wait*”.

Yes, the sign is amusing, unintentionally amusing I am sure, but if you consider it more deeply, I think you will see that it is an even better metaphor for arbitration in today's world than the Boston Shoemaker's sign– especially when it comes to flexibility.

You see, whilst the sign gives the impression of flexibility – you can call in any time you like to get the service that is being offered - it doesn't really offer you much flexibility at all.

“*While you wait*” gives the impression of quick, immediate service, but of course, in reality, it gives no clue as to how long you will have to wait and, quite frankly, all it says is, what should be obvious anyway, if you are going to get your ears pierced you are going to have to go to the jewellers and you are going to have to wait, in person, for the service to be performed. Your ears are not something that can be left at the jewellers to be collected later.

So, whilst your ears will, undoubtedly, be pierced while you wait, how long you have to wait is not specified and the longer you have to wait, the more dissatisfied you will be, especially if what lured you into the shop in the first place was the expectation of fast and flexible service.

One of the promises that has, in the past, lured users into the arbitration shop, has been speed and flexibility, but, as we all know, users of arbitration have now seen behind the promise of the sign and understand the reality.

There would be no humour and, certainly, much irony, if arbitrators were to put up a sign saying “*arbitration awards while you wait*”. Bitter experience would remove any impression of speed and flexibility that might be created by such a statement.

### **Arthritis and Arbitration**

Moving slowly, stiffness, lack of flexibility, difficulty in grasping things firmly, trouble in changing direction and altogether a painful experience. These are some of the things that users of arbitration and sufferers with arthritis have in common.

Elasticity has gone and everything takes much longer to achieve and involves severe pain in getting there.

We are all familiar with the “standard” approach to an arbitration and how long it takes.

The tribunal is established – which in itself usually takes at least 2 to 3 months in an institutional arbitration.

Then the chair of the tribunal takes out his tried and trusted Procedural Order No 1 and directions are made for service of submissions – sometimes simultaneous with attached witness statements and expert reports and sometimes consecutive – in more English style. However, there are still directions as to witness statements and expert reports which usually say no more than they shall be submitted and a time for doing so.

And then there is document disclosure and the default position now – “the tribunal will be guided by Article 3 of the IBA rules on the Taking of Evidence in International Commercial Arbitration” – and so we get Redfern Schedules, Document Production Requests, Objections to Produce and, almost inevitably, decisions sought from the tribunal as to whether documents should be produced.

It is all very standard stuff. There is no flexibility. It is very arthritic.

Albert Einstein, always a good man to listen to, said “*Insanity is doing the same thing over and over again and expecting different results*”

And isn’t that what we do time and time again in arbitration.

This discussion will not look in detail at every aspect of arbitration that could be made more flexible but, simply touch on two areas where, if users, counsel and arbitrators were to be willing to abandon their formulaic approach, adopt new ideas and, generally, be more flexible, more elastic and less arthritic, it could well result in saved time and cost.

I intend to focus on document disclosure and use of experts.

### **Document Disclosure**

Imagine you are the General Counsel of a French company and you are about to commence court proceedings against a German company. The one thing you can be certain of is that you will get little or no document disclosure ordered by the court. And yet does that, somehow, invalidate the German or French court process? Have cases been wrongly decided in German or French courts for centuries?

Has the General Counsel of Total, Alstom, Siemens or Bosch been heard to say “*Gee, I wish we had disclosure of documents in our legal systems*”?

And yet, the moment a case goes to arbitration, disclosure of documents is assumed. The Anglo-Saxon, common lawyers have foisted onto a previously quick and flexible system the whole paraphernalia of document disclosure. But why?

Have you ever considered the illogicality of document disclosure – especially in arbitration, and especially when it is a common law, and particularly when it is an English law, arbitration?

By definition, arbitration is a contractual dispute. With some minor exceptions, there has to be a contract for there to be an arbitration and, in the vast majority of cases the arbitration is all about construction of the contract. What do its provisions mean; was it breached?

In most civil law systems the documents that were created prior to the contract being entered into are viewed as relevant. They express each party's subjective intentions in entering into the contract. Previous drafts of the contract can be used, in civil law systems, to help interpret what those subjective intentions were, and how the contract should, in consequence, be interpreted.

Further, in most civil law systems, post contractual actions of a party can be used as an aid to interpretation. If a party acted as if the contract meant this, then that is evidence that can be used to support a claim that that is actually what the contract meant.

So you would have thought, having access to those documents, both pre and post-contractual, in civil law systems would be vital. They are necessary for proper contract interpretation – and yet disclosure of documents is not a feature of most civil law systems. Crazy isn't it – and yet they have managed for centuries without it.

And yet even crazier is our obsession with disclosure of documents.

In English law, at least, and there are variations of this in most common law systems, the individual subjective intentions of the parties are irrelevant to contract interpretation. Contracts are interpreted objectively. What the parties thought they were entering into, as evidenced in all those internal e-mails (that are always asked for on disclosure), is entirely irrelevant to the interpretation of the contract.

Of course we have the pre-contractual factual matrix as an aid to contract interpretation, but to qualify as an aid in contractual interpretation something in the matrix has to be known to both sides; so both sides are likely, already, to have the documents which show that they both had that knowledge anyway.

Equally, post contractual behaviour is, subject to a few exceptions, irrelevant to contractual interpretation under English law, so, again, what is the relevance of all the internal correspondence which the other side have, and which took place after the contract was entered into, saying what they thought the contract was all about? And yet you constantly see document requests asking for it.

In the light of all of this I would ask you to reflect, what documentation, particularly internal correspondence, is truly going to be relevant to the interpretation of the contract which is the subject of the arbitration.

It seems to me that, looking at things logically, if disclosure of documents is needed at all in arbitration, there is a strong case for severely restricting it in common law arbitrations and, perversely, being more expansive in civil law arbitrations.

### **No Disclosure**

So am I really suggesting no document disclosure in arbitrations – yes I am. Not in every arbitration, of course. I wouldn't want to be accused of being inelastic, but I do think there are a large number of disputes where, on a proper analysis of the law, and what is needed to

establish each side's case, each side has all the documents it needs and document disclosure is a time-consuming, and expensive, luxury.

Of course, agreeing no disclosure of documents is never going to happen once a dispute has started. Human nature being what it is, each will assume there is something, that the other side has, that they will keep hidden, because it will irrevocably harm their case. However, what about at the time the arbitration clause is being prepared?

Entities based in civil law jurisdictions are used to having no, or relatively limited, disclosure in their court cases, so it is not too much of a cultural leap to have no disclosure in their arbitration cases, and sophisticated in-house counsel in many common law jurisdictions may well be willing to consider it for certain types of contract – especially where sums in dispute are likely to be relatively low.

From the client's perspective, particularly that of the in-house lawyer, having the discussion about whether or not disclosure of documents should be included in any future arbitration, at the time the contract is being drawn up, is exactly the right time to have it. This is because, at that stage, the in-house lawyer can explain to his business colleague who will be performing the contract, the impact (both positive and negative) of having such a provision and the risks (again both upside and downside) that having no disclosure would entail.

Businessmen, and their in-house counsel, are used to evaluating and taking risk, and it is at the time of entry into the contract when they do that. The risks can be considered, weighed and a view taken on whether the possible downside of not being able to obtain documents from the other side if there is a dispute, is justified by the upside benefits, in the form of significant savings in time and cost.

Of course, we all know that carefully considered and bespoke arbitration clauses are a relative rarity. Often, they are simply cut and pasted by the transactional lawyers into the contract from another agreement, without any proper consideration of the appropriateness of that dispute resolution provision to that contract.

It seems to me, therefore, that the best way of including a “no disclosure” provision in an arbitration clause is to include it in the institutional rules to which that clause refers.

Again, let's not be too inelastic about this. Let's have institutional rules that allow the parties to choose between having disclosure of documents and having no disclosure. But if an institution is going to be brave enough to have such a rule, then let it be an “opt in” to disclosure rule not an “opt out”. In other words, if the arbitration clause simply provides that the arbitration will be conducted in accordance with the rules of that institution, the default position is no disclosure and it is for the sophisticated contract draftsman to put into the arbitration clause that notwithstanding the rule of the institution that provides for no disclosure of documents, the parties agree that there will be.

Is there an institution out there brave enough to have such a no disclosure provision in its rules? I doubt it at present, but I do think it is worth looking at. It could be a game changer.

### **Expert Evidence**

How many times have we all seen expert reports from each side that address different issues, use different terminology, use different methodology, and spend a huge amount of time setting out things that both experts agree upon. What a waste of time and money.

I am not going to suggest arbitration with no expert reports, but what I am going to do is to suggest that techniques be adopted to make those expert reports as relevant and efficient as possible, with the consequent saving of time and money.

Unlike my suggestion as to document disclosure what I want to suggest now should not be controversial. It is tried and tested, at least in parts of the English court system, and especially in the Technology and Construction Court, but it still seems to be viewed as radical by many parts of the international arbitration community.

It is one of those rare areas where civil lawyers and US lawyers seem to be on the same side in resisting any change to the way in which experts are handled.

How do you prevent experts from addressing different issues in their reports, using different terminology, using different methodology, and spending a huge amount of time setting out things that they both agree upon? The answer is very simple – you get them to meet first, before they have put anything in writing, before any report has been drafted, before they have committed to specific terminology or a particular methodology.

Yes, you have a meeting of experts, and you have it without two things. You have it without prejudice, and you have it without lawyers present. And you have it as early as possible in the proceedings. Certainly before any expert reports are written and, in some cases, but again not all – we don't want to be inelastic - ideally, before detailed submissions have been filed by the parties. At that meeting the experts are tasked with doing a number of things but, principally:

(i) agreeing what terminology they are going to use – pounds or kilogrammes, miles or kilometres, Fahrenheit or Centigrade, €/MWh or \$/BTU or whatever is needed for the particular case.

(ii) agreeing methodology – whether it is accounting methodology, or the methodology for carrying out experiments or conducting analyses or making calculations.

(iii) agreeing those issues upon which they can agree and those issues upon which they cannot agree

And, having discussed all those things without prejudice, and without lawyers, they then produce a list of the agreed terminology, methodology and issues and a list of what has been agreed and what has not been agreed. Having done that, they can then go and write their reports only on the things they are in disagreement about.

As you can see, already, a huge amount of time and costs has been saved and everyone knows, from as early a stage as possible, what the experts really disagree about.

Sadly, as I said earlier this is still viewed as a rather radical approach in many parts of the international arbitration world, but, perhaps as a sign of improving elasticity in arbitration, it is slowly gaining some traction – although it usually has to be seen in action first by sceptical counsel.

Again, as with document disclosure, we need to be careful not to fall into the arthritic trap of saying this procedure should be applied to all cases regardless, but arbitration practitioners should, equally, not dismiss it just because they have not seen it used before.

Not all arbitration practitioners are arthritic when it comes to experts. Many have adopted this approach, which is set out in much more detail in a protocol produced by the Chartered Institute of Arbitrators which goes under the snappy title of “*The Chartered Institute of Arbitrator’s Protocol for the Use of Party-Appointed Experts in International Arbitration*”.

### **Elastic Experts**

Indeed, many have not only adopted this approach, but some have gone further. And it is developments of all kinds, but especially in dealing with expert witnesses, that gives me hope that arbitration can still be elastic and not arthritic.

We are all familiar by now with the concept of witness conferencing of experts, which was introduced several years. Basically, it involves having the experts of the same discipline, from each side, sit in front of the tribunal together, and answer and discuss questions put to them by the tribunal.

The process was dubbed by the Americans as “hot tubbing” – which is not only a less delicate description of the process but, frankly, can create a particularly unpleasant mental picture.

However, even with this concept, there is a risk of getting arthritic. The convention has grown up that hot-tubbing should only take place after both experts have been cross-examined. But why should that be?

Is there not some benefit, in some cases, in being more elastic? In adopting a different approach?

So, having complained of arthritis and inelasticity, I will close by giving you two recent examples I have experienced, of elasticity in the approach to the examination of experts.

I take no credit for either of these examples, they were suggested by one of the other arbitrators in each of the two tribunals.

In the first case, the tribunal, had already tried, at the case management stage, to persuade the parties (or more accurately counsel for the parties) to adopt the procedure described above for the production of expert reports, but they resolutely refused to allow their experts to meet in advance of reports being written and insisted on expert reports being exchanged simultaneously.

Somewhat predictably, expert reports arrived from experts of different disciplines, addressing rather different issues and putting forward completely different theories as to what had caused the problem which had led to the arbitration.

Furthermore, their rebuttal reports, also exchanged simultaneously, by and large could not address the theory put forward by the other side, because it depended upon expert knowledge that they didn't have.

Accordingly, rather than permit counsel to launch straight into cross-examination of the experts, the tribunal decided to put the experts together, in the hot tub, right from the start and as counsel finished a particular topic of cross-examination, and before he went onto the next, the tribunal intervened and asked questions of the expert on that topic and, following his answers, the tribunal turned to the other side's expert, who had been sitting alongside the expert being cross-examined and asked, "so what do you think?"

That way the tribunal received the experts' views on each topic at the same time, and encouraged dialogue between the experts on the particular topic

It made the experts focus on what they had to say, and helped the tribunal enormously as there was no time gap between receiving one expert's view on a topic and receiving the view of the other. It also identified, up front, whether one expert actually had the expertise to comment upon what the other was saying on a particular issue.

The second case did have experts of like discipline and there had been agreement in advance as to the issues to be covered by the experts. This enabled a different approach to be taken. Again, the experts were put together, in the hot tub, right at the beginning of the expert testimony and each gave a 20-minute presentation of his expert opinion, one straight after the other.

The experts were then invited to ask questions of each other in order to clarify or obtain further explanation of the other expert's opinions and, after the experts had questioned each other, the tribunal asked questions of each expert, and asked the other expert to comment on what had just been said in response to the tribunal's questions.

Counsel then cross-examined the experts in the usual way, with the tribunal again intervening with questions at any stage.

The process worked extremely well. The tribunal was able to get the answers to the questions it had from both experts, and gave context to the subsequent cross-examination of the experts that took place. It was clear, as well, that it actually saved a lot of cross-examination from counsel, as particular areas of enquiry that they were going to pursue in cross-examination had already been dealt with.

Importantly, it encouraged the experts to be open about what they did agree upon and to highlight, specifically, what they didn't agree upon. Although provision had been made for a traditional hot-tubbing of the experts, in the end it proved unnecessary.

Each of the approaches I have just described worked well in the context of the particular case and it was reassuring to see that in this area of arbitration which, in many cases can be totally arthritic, elasticity could still be found and applied.

## **Conclusion**

It is probably fair to say that the impartial, objective observer could well assume that arthritis is prevalent in arbitration simply by looking at the age and physical fitness of many arbitrators. But, as with all things, appearances can be deceptive.



That was the case with Bob Dawbarn's Elastic Band, what looked like a wrangle-taggle bunch of disparate musicians at first sight could amaze and inspire once they started to play. It was the quality of the product that shone through. The band was elastic enough to be adaptable, and to cope with whatever circumstances threw at them.

What is needed in arbitration is similar elasticity. We undoubtedly will struggle with physical elasticity, but mental elasticity and agility is what is required. All involved, whether arbitrators, counsel, clients or institutions need to ensure that they don't simply take a standard approach to every case, that they don't become arthritic.

Flexible approaches will produce tailored procedures which, in turn, will ensure that, like good old Bob Dawbarn's Elastic Band, no matter how big or small, no matter what the components, everything can be accommodated and the quality still shines through.