ASPECTS OF ARBITRATION

(Falcon Chambers Zoominar, Tuesday 5 May 2020 delivered by Janet Bignell QC and Anthony Tanney)

WHY PARTIES SHOULD CONSIDER ARBITRATION IN 2020

Janet Bignell QC

1. Research by HWF and Solomonic in April is said to reveal a 65% slump in claims lodged with the commercial and Chancery courts over the previous 4 weeks. There is every reason to suppose that trend is continuing through the Pandemic.

2. There is also suggested to be an expected surge in claims issued once companies and individuals have dealt with the immediate impact of the COVID-19 crisis. As a result, speaking on Radio 4's Today programme on 27 April, Lord Neuberger, who is part of a group of senior UK Judges and academics, called for a "breathing space" in commercial contract disputes in order to avoid the courts from being overwhelmed by a flood of new cases in coming months.

3. As it is, and as we have all experienced, the court system is presently stretched in progressing the heavy caseload it has already. We have a court system that sometimes creaked pre-Pandemic, and which is now forced to reinvent its processes under great time pressure, and in unimaginable times for all involved.

4. For some clients, notwithstanding their wish or need to resolve their pre-existing or pressing new dispute, the uncertainty around litigation is necessarily too great at present. We lawyers have to explain that we

can only provide our best guess answers as to when, and how, we think the courts may progress their matter here on in.

5. For lots of clients with cases already in the system, claims have largely hit the buffers. Necessarily, there have had to be some blanket automatic extensions of time and directions imposed. There have had to be many adjournments; particularly in the county court. Not all have been wanted, but all appreciate the big picture decisions demanded by the times.

6. When the Today presenter asked Lord Neuberger about the means of providing the necessary breathing space for the courts, he referred to the research that was underway and, possibly, the increased potential for mediation. Since the implementation of the CPR 20 years ago, mediation has become commonplace. It fulfils an important role. What it does not do, however, is provide any kind of legal decision as to the rights and wrongs of each parties' positions.

7. Significantly, mediations also invariably take place at a stage after proceedings have been issued. That is, after the substantial court issue fee has been paid; when both sides have (at minimum) pleaded their cases, such that there is a full understanding of the issues; and when there has also been some form of court order putting a timetable in play. To that extent it can be a parasitic process, running in tandem with the court timetable.

8. Whilst there is much focus on what cannot be done in court at the moment, such concerns do not apply to dispute resolution through

arbitration. It is recognised that each and every form of dispute resolution has pros and cons, but there are many reasons to suggest that arbitration is simply the best route forward in 2020 for clients who need the certainty of resolution, or sure progress, for their businesses or themselves over the coming months.

9. Firstly, and chief amongst these reasons is that arbitration is not any kind of new fangled reactive response to our new normal. It is tried and tested as a means of alternative dispute resolution[1].

10. A reference to Arbitration means that an independent third party, chosen by the parties, will finally determine the parties' dispute, using a fair process[2]; in which they and their representatives are involved; and have the intention that the decision will be binding on them and enforceable in law.[3]

11. The process reflects, in private proceedings the role of a civil court of law.[4]

12. Arbitration is the dispute resolution process of choice in all kinds of commercial contract disputes and in construction disputes. Some form of arbitration process is normally the preferred recourse for public bodies when they enter contracts.

13. Arbitration is also the long standing process of choice in some kinds of property dispute – particularly rent review in the commercial landlord and tenant context - and to resolve issues relating to options in

[1] An early example is reflected in the 1468 Year Books.
[2] Enshrined in Section 33(1) Arbitration 1996.
[3] Russell on Arbitration, chapter 1.
[4] Hirst J in O'Callaghan v Coral Racing Ltd, 1998.

agreements entered by developers. In the property context, these kinds of disputes typically involve issues of contractual interpretation and legal analysis and issues of expert evidence, often valuation.

14. The reason that many disputes involving large commercial contracts, construction contracts and public authority projects go to arbitration is because the parties have chosen to incorporate a dispute resolution methodology in their initial agreements. At the outset, they have faced the fact that there may be occasion when a dispute arises and they have thought about the manner in which they consider it can best be resolved to suit their needs. Those may include the fact that the parties may continue to have an ongoing business relationship - so unnecessary personal antagonism generated by court proceedings may risk destroying that relationship when they will continue to need to deal with each other for years into the future. Probably they also recognise the desirability of knowing where they stand under their agreement; what they have to do; what they can expect to be done; and what the financial consequences will be, and of knowing this as speedily as possible once a dispute occurs.

15. We may well see many more of these clauses in future.

16. Arbitration is also the process by which many agricultural disputes are determined under statute. The use of arbitration covering a great variety of issues which turn on both law and fact and value.

17. And, to take a recent example, we have the Landlord and Tenant Act 1954 Part II Pilot Scheme whereby unopposed business lease renewals have been transferred from Central London County Court to the First Tier Property Tribunal. The Tribunal has a standard set of directions,

for use in most cases, which permit the parties to transfer the question of the rent to be paid on their lease renewal to an Arbitrator appointed under PACT if they so choose. Thus, recognising the need for specific expertise

18. Importantly, there does not however need to be any pre-existing arbitration clause in the parties' lease or agreement or the relevant statute in order for the parties to arbitrate once a dispute arises. It is possible for parties to enter an ad hoc arbitration agreement at any time to refer a dispute to arbitration, and to refer a dispute of almost any kind.

19. Indeed, even if there is a pre-existing agreement incorporating a dispute resolution procedure, the parties can agree to replace a reference in their contract to one of the professional associations with an ad hoc agreement if they are agreed on who they want or they consider the set procedure does not fit the bill. The hallmark is flexibility.

20. Parties also can – and do – apply for on-going court proceedings to be stayed in order to resolve their dispute by arbitration instead. There is no need to be stuck in the system.

21. The draw is that, like the court process, an independent third party – the Arbitrator – makes a binding decision. The role of the Arbitrator is very similar to that of a Judge, but, importantly, the Arbitrators are generally experts in the field in their own right. Some may consider that a benefit!

22. There are also very many ex-Judges who are now Arbitrators, as well as senior surveyors, solicitors and barristers.

23. If the parties identify supplemental expertise is required – a lawyer as well as a valuer or building surveyor - or the other way round - an expert

assessor can also be appointed to ensure the right decisions makers are involved.

24. From beginning to end, the procedures are bespoke. There is no one size fits all. The procedure are also less formal than court. Arbitration is inherently flexible in terms of both time and procedure. The parties need not wait their turn in the queue. The timetable can be drawn up to suit the individual parties. That may mean resolution may be far quicker, if that is required.

25. If the dispute can be resolved with rounds of written submissions and expert reports it can be a purely paper process. It is not dependent on surrounding circumstances in the majority of cases. In many arbitrations the parties normally never meet.

26. However, if oral submissions are required or witnesses must be heard, then the hearing can be conducted remotely – just as it would now be in court. Without, however, the uncertainty generated by if, and when, the case will come before a Judge, and (now) the specific technological requirements and constraints and demands of the courts which are sitting.

27. If parties want to mirror a court process they can. Typically, for example by adopting the rules of evidence. Sometimes by timetabling the exact same steps through to a final hearing.

28. Another great advantage is that the Arbitrator has personal conduct throughout. There is consistency and a minimum of administrative delay and intervention. Email contact is commonplace and applications

are normally turned around very quickly; with contact by phone or virtually as required.

29. Unlike court, the arbitral process is also confidential. Often a very significant commercial concern for parties. Particularly if they want to focus on resolving their dispute own without the issue becoming a matter for public comment and report.

30. All in all, I believe it can be said that Arbitration is a mechanism which truly suits the times. As and when clients require the actual resolution of their dispute, or the answer to a sticky preliminary legal or factual issue which is blocking progress overall (whether to the settlement or resolution of other issues), Arbitration provides a sure and certain route for parties to reach a point where they can understand their rights and obligations, and as soon as possible, in the times we presently face.

REMEDIES AND ENFORCEMENT

Anthony Tanney

PART ONE: FINAL REMEDIES

1. The governing principle regarding arbitral remedies is the autonomy of the parties.
2. Thus, s.48(1) of the 1996 Act says:

   > "The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies".

3. The arbitral tribunal also has the following remedies unless the parties agree otherwise (default powers):

- A declaration as to any matter to be determined in the arbitration (s.48(3))
- An order for the payment of a sum of money (s.48(4))
- An injunction, whether mandatory or prohibitory (s.48(5)(a))
- An order for the rectification of a document on the ground of common or unilateral mistake (s.48(5)(c))
- An order for rescission of a document on the usual grounds (eg misrepresentation; undue influence and so on) (ibid).

4. The Tribunal's default powers as regards remedies include the making of an order for specific performance of a contract, with important exception of a contract relating to land.
5. Therefore if the claim is for specific performance of a land contract, the parties must expressly confer on the Tribunal the power to make such an order as part of their agreement to arbitrate.
6. The exclusion from the Tribunal's default powers of the remedy of specific performance of a land contract dates from the 1950 Act. The intention is not to prevent claims for specific performance of land contracts from being arbitrated – because the parties can make an express agreement to do so. Instead, the idea seems to be to make the parties think first.
7. So what do they need to think about? If you go to Atkin and look up a precedent of a court order for specific performance, that will give you a very good idea of a range of points that need to be considered. But there are two matters I would like to highlight here.
8. The first point is that where the court makes an order for specific performance of a land contract, it can call on conveyancing counsel to prepare the necessary engrossments of the completion documents, if the defendant refuses. The parties to an agreement to arbitrate a claim should therefore consider giving the arbitrator power to call on a conveyancing lawyer in private practice – much better an experienced solicitor than

counsel – to prepare the engrossments if needs be. A bit like a legal assessor. How one then enforces the arbitrator's order if the defendant still refuses to execute the documents is dealt with elsewhere in the Act, and I shall come back to it later.

9. Second, the court has power to make an order for specific performance either with compensation, or with abatement of the purchase price. There are three cases where the court may do this. The first is where, after contracts are exchanged, the buyer discovers some relatively minor undisclosed latent incumbrance. This is a rare event nowadays, because of land registration, and also because under the National Conveyancing Protocol, title tends to get examined before exchange. The second case is where the seller is guilty of some relatively minor misdescription of the property – eg the acreage of development land. The third is where the seller cannot give vacant possession on completion in some relatively small respect.

10. In all these cases, the buyer, as the innocent party, can seek specific performance of the contract with compensation or an abatement of the price. But the court will grant specific performance even to a seller in default, if the problem can be addressed by some sort of monetary allowance. So parties to an arbitration agreement should consider how compensation or abatement is to be assessed, if the case is in one of these categories.

11. By way of digression, a land contract usually creates a (sort-of) trust of the land, because of the court's power to order specific performance of the contract. Query whether that remains the case if the contract contains an arbitration clause, but the parties have not expressly given the arbitrator the power to make an order for specific performance? Neither party can circumvent the problem by starting court proceedings – or at least, if they did, the other party could apply for a stay of those proceedings under s.9

of the Act (below). This may mean that the contract creates no trust of the land in such a case, but the matter is unclear.

12. The arbitrator's power to make a declaration is a very useful one.
13. Take as a common example a landlord's terminal dilapidations claim under a lease, involving a lengthy schedule of dilapidations, s.18 valuation reports and so on. Very often, the parties' respective building and valuation surveyors, if left to their own devices, would be able to negotiate the claim to a successful compromise. But suppose there is a legal issue: eg is the air conditioning part of the tenant's repairing covenant? This may have expensive implications for not only the air conditioning itself, but also for other parts of the building that might have to be opened up to get access to it.
14. The parties could choose to have the legal issue resolved in court.
15. But if the landlord issued proceedings, it would have to do so in relation to its whole case - including its case on the Schedule of Dilapidations, on loss of rent and other void costs, as well as its case on s.18 together with any other factual or expert points that may arise.
16. The landlord would have to follow the pre-action protocol; it would have to settle Particulars of Claim; it would have to pay the issue fee; the tenant would have to settle a defence on all the issues; there would have to be a CCMC, with costs budgets; and directions. And only at this stage might the parties get what they really want – a direction for the point of law to be tried as a preliminary issue. The trial itself might not then happen for many more months.
17. A much better alternative would be for the parties simply to agree to seek a declaration on the legal point in arbitral proceedings. They could then save all the other issues in the claim until after the point of law had been resolved by an arbitral award. The whole process would be much cheaper,

and quicker, and could even be done on paper, without the need for an attended hearing.

18. This example could be almost endlessly replicated – and it is the power of the arbitrator to make a declaration that makes it possible.

PART 2: ENFORCEMENT

19. A remedy is no use without a means to enforce it.
20. In theory this is a problem in arbitrations. Many of the enforcement mechanisms available to the court affect people who are not parties to the litigation – eg an order for the attachment of earnings, or a garnishee order affecting a bank account. That is not a problem with the court system, but is a potential problem in arbitration, because the arbitration agreement binds only the parties to it.
21. By the same token, an arbitrator cannot fine someone for contempt, or send them to prison. Nor can an arbitrator cannot impose a valid charging order over the defendant's interest in property. Again, these problems cannot be cured by the arbitration agreement, because they are matters that depend on the machinery of public justice.
22. But what is a problem in theory is not a problem in practice – if it was, people would not arbitrate, and that is simply not the case.
23. The main solution is found in s.66 of the 1996 Act:
    (1) an award made by the Tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
    (2) Where leave is so given, judgment may be entered in terms of the award.
    (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that

the tribunal lacked substantive jurisdiction to make the award. The right to raise such an objection may have been lost (see s.73).

24. S.66 thus provides for the entry of what is called a judgment on the award. The procedure is a summary one, commenced by issuing an arbitration claim form under CPR 62, and dealt with in most cases by a Master. The procedure is intended as close to a rubber stamping exercise: judgment will be entered without any examination of the merits, save for very rare cases where the other party is able to show a subsisting entitlement to claim that the arbitrator had no jurisdiction at all over the matter.
25. By converting the award into a court judgment, s.66 enables the winning party to access the whole range of court enforcement procedures. In practice it is fairly rare for a successful party to an arbitration award to have to actually invoke s.66. The mere existence of the s.66 power is usually enough to make the loser comply.
26. The procedure simply converts the award into a judgment of the court, without altering the award's substance, or the remedies granted by the arbitrator. Going back to the earlier point about specific performance, s.66 therefore cannot be used to grant specific performance of a land contract, if the arbitrator him/herself did not have that power. But where the arbitrator does have power to award SP, and exercises that power, s.66 enables the winning party to apply for an order that the completion documents are executed by a Master or DJ, if the loser continues to refuse to comply.

PART 3: INTERIM REMEDIES

27. Just as with final remedies, the principle of party autonomy means that parties are in general free to confer on the arbitrator the power to make whatever interim orders they want.

28. But again, sometimes interim orders affect third parties, or depend on sanctions for breach that can only be administered by the public justice system.
29. An example is a witness summons, whether to give evidence or produce documents. A witness may not be a party to the arbitration agreement, so the arbitrator cannot compel attendance. But s.43 of the 1996 Act steps in:
    (1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.
30. A further point arises in relation to interim injunctions. In court proceedings, an applicant for an interim injunction will be required to undertake to pay damages to respondent, in case it turns out at trial that the respondent was in the right and the injunction ought not after all to have been made.
31. The undertaking to the court is enforceable under the court's contempt jurisdiction – by fine or imprisonment or sequestration of assets and so on.
32. An arbitrator has no contempt jurisdiction as such and it is strictly incorrect therefore to speak of the parties giving an "undertaking" to the arbitrator. This creates a potential difficulty with regard to the grant of interim injunctions in arbitrations.
33. In cases where parties agree to arbitrate under a post-dispute arbitration agreement, this will rarely be a problem in practice – because if there is any likelihood of one party needing to seek an interim injunction, that party will not agree to arbitrate in the first place.
34. But even in the case of arbitration under a pre-existing arbitration agreement, the 1996 Act steps in, by giving a power to the court to assist the arbitration.
35. See s.44:

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) …..(e) the granting of an interim injunction or the appointment of a receiver.

36. This and similar provisions are unusual because they give the court power to make orders when there are no ongoing proceedings before the court, but only arbitral proceedings. For that reason, a claim for an order under s.44 is not made by Part 7 claim or Part 8 claim, but instead by the special arbitration claim form in CPR 62.

37. S.44 applies where an arbitration is on-going in the sense that at least some step has been taken to refer the matter to arbitration.

38. Take a different situation, where a party to an agreement has to go to court very urgently before any proceedings are issued to obtain an injunction ex parte. Say the agreement relates to the use of land, and the respondent is threatening to throw the applicant off the land – or something like that.

39. But suppose the agreement has an arbitration clause in it saying that all such disputes are to be arbitrated.

40. At first glance, this looks like a problem. The case is urgent. But no arbitrator has yet been appointed, and cannot be appointed in the urgent time frame. S.44 does not therefore apply. The applicant has to get to court and quick – but that would be contrary to the arbitration clause.

41. In fact, this problem is a complete illusion. The arbitration clause in the agreement takes effect as an obligation not to litigate in any other forum – including in court. But the remedy to enforce that negative obligation is s.9 of the 1996 Act.

42. S.9 allows the other party to apply for a stay of the court proceedings, whether arbitration proceedings have been commenced or not. The court must grant the stay unless the arbitration agreement is void.
43. But on the other hand s.9 applies only in favour of a party "against whom legal proceedings are brought (*whether by way of claim or counterclaim*)" (emphasis added).
44. To get an urgent ex parte order, the applicant will have to undertake to issue a claim as soon as possible. But at the time the court makes its urgent order, there is no claim within s.9 and therefore nothing to stay. So the applicant can proceed in the same way as in any other case. It is then up to the respondent to decide whether to apply to stay the claim once it is issued.
45. There is a number of interim remedies available in the arbitration itself, without needing to go to court. One of the more significant of these interim remedies is an order requiring the applicant to provide security for costs as a condition of the claim going forward: s.38.
46. The most usual ground for ordering provision for security for costs in court litigation is where the claimant is an impecunious company. That same ground is also available under s.38 – but the arbitrator has no jurisdiction to order security simply because the claimant is a non UK resident individual or company. The reason is that arbitration in the UK is a valuable invisible export, and if a respondent could seek security for costs simply because the claimant was not UK based, that would deter foreign entities from arbitrating here.
47. In litigation security is sometimes ordered to be provided by the payment of money into court. An arbitrator does not have that precise option. But there are lots of alternatives, also used in litigation, such as payment into a ring-fenced and controlled bank account. Those alternatives are also available in arbitration.

CHALLENGES TO ARBITRATION AWARDS

Janet Bignell QC

If you would like to read about this topic in more depth, and see what has been said in the most recent cases, please see my paper "Not So Appealing"

1. Fundamentally, remember that it is meant to be difficult to challenge an Arbitration Award. The basic principle is one of finality.

2. There are just 3 main challenge provisions in the Arbitration Act 1996. The first two Grounds are that a party to an arbitration may apply to the court to challenge an award:
   a. on the grounds that the arbitral tribunal had no substantive jurisdiction (section 67). That's rare, in a property context; and
   b. on the grounds of serious irregularity affecting the tribunal, the proceedings or the award causing substantial injustice (section 68).

   The third ground, is that it is possible to appeal against an award on a question of law (section 69). In contrast to the first two bases for challenge, permission of the court is needed to bring any appeal under section 69 unless all parties to the proceedings agree.

3. A couple of important preliminaries. A challenge can only be made to an award. There is no mechanism at all in the Arbitration Act 1996 for a challenge to a procedural order. As a result, a party may have to await the award itself before making a formal challenge on the ground that the award has been made through the use of a defective procedure. In ZCCM Investments Holdings Plc v Kanshanshi Holdings Ltd [2019], Mrs Justice

Cockerill's judgment sets out some useful guidelines to assist in deciding whether a procedural order or an award has been made.

4. There are very strict time limits to apply. The basic time limits for an appeal to the court against an award – whether jurisdictional, procedural or substantive - are 28 days from the notification of the award: section 70(3).

5. Section 54(2) provides that "the date of the award" is the date upon which the arbitrator signs the award.

6. There is an ability to apply to the court for an exercise of its discretion to extend. The test is, again, a stringent one. The court's power to extend time is contained in section 80(5) of the Act. No criteria are set out in the section, but these have been explored by the courts. The key judgment is that of Colman J in AOOT Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep 128, where the criteria are set out.

Sections 70, 57 and 68

7. Section 70(2) of the Act provides that it is a condition precedent to any appeal under section 68 that the appellant has first exhausted "any available arbitral process of appeal or review". One such route is set out in section 57 of the Act. The consequences of failing to comply with section 70(2) are automatically fatal to any s. 68 challenge where the section 57 route is available.

8. Section 57 is often referred to as "the slip rule". Application should be made back to the Arbitrator in 3 types of cases. Where there is thought to be:
    a. a straightforward clerical mistake, like a typographical error;

b. an error arising from an accidental slip or omission, like an arithmetical error;
c. a need for the clarification or removal of any ambiguity.

9. It is critical remember that section 57 includes the ability for a party to request the tribunal to make an award or an additional award on claims presented in the arbitration but not decided upon by the tribunal.

10. The court need not, and should not, be troubled in a section 57 case. The remedy is to go back to the Arbitrator first. In Gracie v Rose [2019] EWHC 1176 (Ch), Judge Russen QC provides an excellent account of the role the section 57 process plays.

11. So remember section 57 – but also remember that it only applies in accordance with its terms. If the error alleged is outside section 57, then compliance with section 57 is not a prior step to a section 68 challenge. No Curfew Ltd v Feiges Properties Ltd [2018] EWHC 744 (Ch), was a case where an arbitrator sought to correct his Award but the error did not fall within the scope of section 57.

S. 68

12. These are the key questions extracted from section 68 for answer when considering your Award and the potential for a section 68 challenge:

1. Can it be demonstrated that there is an irregularity of one or more of the kinds specified in section 68(2)?

AND

2. Will it be possible to demonstrate that the irregularity has caused or will cause substantial injustice to the applicant?

Both limbs must be satisfied.

13. As a matter of practicality, an applicant must consider the fact IF the ground is made out the default remedy is remission back to the same arbitrator for reconsideration. It is rare for an Award to be set aside.

14. Section 68(2) lists a specified series of irregularities by way of grounds. This is a closed list. When you look at them, it is critical to remember that the role of section 68 is ONLY To ensure that due process is followed. It is only where an arbitrator or tribunal fails to comply with its general duties or exceeds its powers, grounds for challenge may therefore exist.

15. This means that Section 68 does not allow a challenge based on errors in the assessment of evidence. Neither does it deal with errors of law.

16. Also remember that even if there is a serious irregularity, there can only be substantial injustice where it is seriously arguable that, but for the irregularity, the outcome might have been different.

17. In Terna Bahrain Holding Company WLL v Al Shamsi [2012] EWHC 3283, the judge said that:

"Relief under s.68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far

removed from what could reasonably be expected for the arbitral process, that justice calls out for it to be corrected."

This is a high standard.

18. The recent judgment of Teare J in UMS Holding Ltd v Great Station Properties SA [2017] 2 Lloyd's Rep 421, provides a comprehensive review of the case law regarding misconceived challenges rooted in a party's unhappiness at the Arbitrator's treatment of their evidence. His Lordship emphasised the court's well-established approach to reading and understanding arbitration awards in this regard. He stressed that when considering a challenge the courts will seek to uphold the arbitrator if possible. He quoted Mr Justice Bingham in Zermalt Holdings v Nu-Life Upholstery Repairs:

"It has long been established that "the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."

19. Classic cases where a section 68 challenge is applicable are cases of undisclosed evidence. One of the clearest grounds for challenge and one of the easiest ways in which an arbitrator can fail to hold a fair hearing, in breach of section 33 of the Arbitration Act 1996 and leading to serious irregularity under section 68, is for the arbitrator to take into account evidence upon which one or both parties have not had the chance to comment.

20. Although this should be well-known, there was a further successful challenge on this basis recently. In Fleetwood Wanderers Ltd v AFC Fylde Ltd [2018] EWHC 3318 (Comm). The irregularity had given rise to substantial injustice. The test was whether a different outcome might have resulted. In the present case the parties would have made representations, and it was realistically possible that information could have been adduced to persuade the arbitrator that the FA had considered and rejected the matter at hand and decided not to do so. The judge's clear view was that there was an arguable case that the arbitrator had as a matter of law reached the wrong conclusion.

21. P (A Company Incorporated in Country A) v D (A Company Incorporated in Country B) and Others [2019] EWHC 1277 (Comm) is one of the comparatively rare cases where a challenge under section 68 based on the ground of breach of the rules of natural justice has been upheld. The errors made by the tribunal were reliance on the lack of credibility of a key witness when there had been no cross-examination of that witness on the point; and reliance on a matter not raised by the defendant.

22. The court held that the award was tainted on the basis of two settled principles of law:

    a. First, where there was a challenge to a witness on a core issue as to credibility, it ought to be put in cross-examination to that witness, failing which lack of credibility could not be relied upon. If the evidence of a key witness was to be disbelieved, he was to be given a fair opportunity to deal with the allegation.

b. Secondly, the tribunal could not base its decision against a party on a case not argued by the other.

Sir Michael Burton was satisfied that there was substantial injustice. While it was not for the court to speculate what the result would have been if principles of fairness had been applied, it was possible that there might have been a different outcome.

Section 69

23. Challenges under section 69 must involve questions of law. This ground is so rarely successful that I deal with it briefly.

24. There are very many cases authorities where the courts have criticised parties for seeking to bring appeals under section 69 on issues of fact or evidence. The courts have made clear it is not legitimate to attempt to dress up an appeal on facts as a question of law as to whether the evidence was sufficient to justify the findings.

25. The key test under section 69 is best summed up in HMV UK Limited v Propinvest Friar Limited Partnership [2011] EWCA Civ 1708, where Arden LJ said that:

> "It is not enough… simply to show that there is an arguable error on a point of law. Nor is it enough that the judge to whom the application for leave is made might himself or herself have come to a different answer."

The error must be "obviously wrong".

26. This is a high hurdle. It is clear that this is a higher standard than, say, the test for the test for giving permission to appeal in ordinary litigation, where a real (ie not unreal or illusory) prospect of success is enough: see CPR rule 52.6.

27. For a recent discussion, see Merthyr (South Wales) Ltd v Cwmbargoed [2019]. HHJ Paul Matthews made clear in his judgment that for a decision to be obviously wrong that must be clear on the face of the award itself. He summed up the position as follows:

> "The instant case was not one where the award could be demonstrated to be obviously wrong, or even just wrong, by reference to its own terms, even when the lease was read alongside it. In order to show that the award was "obviously wrong", the claimant had instead thought it necessary to embark on a minute textual analysis of the lease, coupled with a forensic examination of the factual matrix, which had been based on evidence from witnesses which the court had not seen or heard, with a view to demonstrating a conclusion which, it was then submitted, would be a commercial nonsense. That was not what s.69 was for. The parties had chosen to arbitrate their dispute before a professional arbitrator experienced in the particular business sector concerned and there was no reason why they should not be left with his decision."

The principle is finality.

ARBITRATION COSTS

Anthony Tanney

PART 4: COSTS

48. As a result of the coronavirus lockdown, clients' litigation budgets are going to be very stretched, to put it mildly. How helpful it would be to have a cheaper alternative to court proceedings, to provide clients with a service within their budget, and win their business.
49. Arbitration is that alternative.
50. One additional expense in arbitration is the arbitrator's own fee.
51. But everywhere else, your clients will be saving money by arbitrating.
52. Costs saving is built into the DNA of arbitration in two ways.
53. The first is by explicit provision in s.1 of the 1996 Act:

> The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part.

54. See also s.33

> (1) The tribunal shall—
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(c) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

55. The second way arbitration saves money arises from the notion of party autonomy.
56. This is the principle that the parties decide what to arbitrate on, and how they want to arbitrate it. An example is the dilapidations claim, mentioned earlier, which can be endlessly replicated.
57. The philosophy of party autonomy in arbitration can be contrasted with a statement from one of the procedural guides at the front of Vol 2 of the White Book that govern court proceedings:
58. Under the heading Case Management it says:

> "Form PF52 provides a template for producing draft proposed case management directions. It is important to bear in mind that *even if parties agree directions the court manages the case and accordingly a consent order does not guarantee the adjournment of a CMC*".

59. This neatly sums up the different philosophies.
60. In court the parties' case is just one of thousands, and the courts must manage their resources in the interests of everyone. Inevitably this leads to delay and delay leads to expense. Everyone will have experience of being told just before a County Court trial that no judge is available to hear the matter, and the parties should instead provide their dates to avoid in the next 6 months. That is expensive in terms of fees, and expensive in terms

of time – and possibly even in terms of substantive justice, if the litigation was already "costs marginal".

61. Costs budgets are not required in arbitration unless the parties agree.

62. Costs budgets are surely the most baleful innovation in civil litigation of the last 25 years or more, and are an almost paradigm example the law of unintended consequences. Costs budgets have increased the costs of litigation both directly and arguably indirectly. The indirect effects are a thesis for another occasion. But the extra direct costs include the costs of preparing, discussing and reporting on costs budgets – and then a lengthy CCMC to deal with them. Also in preparation for the CCMC, the parties will have to prepare disclosure reports, expert witness summaries and much else besides – all of which is expensive, and imposed on parties whether they like it or not.

63. It is noteworthy that where people have a choice – ie in arbitration – they never provide for costs budgets or any of these innovations. And I mean "never" – I've never ever heard of it.

64. An added expense in the public justice system is court fees. Issue fees went up very significantly a few years ago – so that large fees now apply even for a relatively small claim. But there are fees for issuing interim applications, listing fees and so on.

65. But the main point to take away is that arbitration is run for and by, and is tailored to the needs of, the parties. It tends to be quicker, more agile and for all those reasons, cheaper.

66. To finish, here is a brief reminder of the arbitrator's substantive powers relating to the costs of the arbitration.

67. Who is liable to pay, is a matter dealt with by s.61 of the Act.

(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.

(2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

68. That is broadly the same discretion as the court. So unless the parties agree that he cannot, the arbitrator can make issue based costs awards, or a global award that reflects success or failure on particular issues – or an order that reflects the parties' conduct. One factor that is unlikely to feature is the failure of one party to agree to mediate. That is a factor in public justice, because every contested hearing uses public resources. Parties can still mediate a claim that has been referred to arbitration: they are different processes with different advantages and are not mutually exclusive. But if one party refuses to mediate, there is no public resource implication that might sound in an award of costs.

69. Note that "without prejudice" privilege applies in arbitrations. Therefore so too do Calderbank letters, written "without prejudice save as to costs".

70. The basis of assessment of costs is dealt with in s.63 of the Act. The usual rule equates to taxation on the standard basis – but the arbitrator can adopt the indemnity basis in an appropriate case.

71. Finally, the arbitrator has a costs capping jurisdiction – see s.65:

> Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.

72. So if you want to exclude costs capping, remember to say so.

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Falcon Chambers

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