

Arbitration ~ Elastic or Arthritic?

By Peter Rees QC



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. I was even luckier to work in a place called the Brewery Arts Centre. As you can gather from the name, it was a brewery converted into an arts centre with live music each evening in the bar.

My favourite was Sunday lunchtime when the guy who ran the place, Bob Dawbarn, had a jazz jam session. He had been a very well-known music journalist with Melody Maker magazine as well as a jazz trombonist. Very well connected in the music business, we saw some of the greats of jazz play or sing – George Melly, Chris Barber, Humphrey Littleton, to name but a few.

Because we never knew who was going to turn up and how many, the sign at the Brewery Arts Centre read – ‘Sunday Lunchtime Jazz with Bob Dawbarn’s Elastic Band’. I thought then, and still do, what a great play on words.

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. The Elastic Band could accommodate any number of musicians playing whatever instruments. 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 came across this thing called arbitration early on. In those days, you learned nothing of arbitration at university or law school. The partner I was working for told me to do some background

reading on arbitration. I clearly remember the list of the advantages of arbitration over court proceedings 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. 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. Certainly, speed and cost are almost ever present topics in arbitration conferences.

I want to focus on one of the other “advantages” – flexibility. 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.

Let me add a third to the signs in windows mentioned so far – one I saw in the window of a jewellers in Dublin. It said, “Ears Pierced While You Wait”. Upon analysis, it may be an even better metaphor for arbitration today than the Boston Shoemaker’s sign - especially when it comes to flexibility.

Whilst the sign gives the impression of flexibility, it doesn’t offer much flexibility at all. “While you wait” alludes to quick, immediate service, but it gives no clue as to how long you will have to wait. All it says is: if you want your ears pierced, you are going to have to come in and wait, in person, for the service to be performed. How long is not specified and the longer you need 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 users of arbitration have now seen behind the promise of the sign and understand the reality.

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.

Then there is document disclosure and the default position – “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 standard stuff. There is no flexibility. It is very arthritic.

Albert Einstein said “Insanity is doing the same thing over and over again and expecting different results”. Isn’t that what we do time and time again in arbitration?

I will not detail every aspect of arbitration 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 be more flexible - more elastic and less arthritic - it could result in saved time and cost. I will 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. You will get little or no document disclosure ordered by the court. 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 “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. 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 created prior to the contract being entered into are viewed as relevant. 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 what the contract actually meant.

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. 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? Yet, document requests ask for it constantly.

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



“ 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 believe there are a large number of disputes where - on 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.

But what about when 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, and it is not too much of a cultural leap to have no disclosure in their arbitration cases. Sophisticated in-house counsel in many common law jurisdictions may 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. 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 - 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.

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 proper consideration of the appropriateness of that dispute resolution provision to that contract.

It seems to me, 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.

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. If an institution is going to be brave enough to have such a rule, 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 refine 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 brave enough to have such a no disclosure provision in its rules? I doubt it at present, but it is worth looking at. It could be a game changer.

Expert evidence

How many times have we seen expert reports from each side addressing different issues, using different terminology and different methodology, while spending a huge amount of time setting out things that both experts agree upon? What a waste of time and money.

I am not suggesting arbitration without expert reports, but I am suggesting that techniques be adopted to make those expert reports as relevant and efficient as possible, thus saving time and money.

Unlike my suggestion about document disclosure, this should not be controversial. It is tried and tested, at least in parts of the English court system - especially in the Technology and Construction Court - but large parts of the international arbitration community still seem to view it as radical. 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 can this be achieved? The answer is simple: you get the experts 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.

They have the meeting without prejudice and without lawyers present, and 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 such a meeting the experts need to achieve several tasks 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

Having discussed all those things without prejudice, and without lawyers, they then produce a list of the agreed terminology, methodology and issues as well as a list of what has been agreed and what has not been agreed. Having done that, they can then write their reports *only* on the things they disagree on.

Already, a huge amount of time and costs has been saved and everyone knows from an early stage, what the experts really disagree about.

Sadly, this is still viewed as a radical approach in 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.

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

Some have gone further and it is especially the developments dealing with expert witnesses, that give me hope that arbitration can still be elastic and not arthritic.

Most are familiar with the concept of witness conferencing of experts: the experts of the same discipline from each side, sit together in front of the tribunal and answer/discuss questions put to them by the tribunal. The process dubbed by the Americans as “hot-tubbing” is not only a less delicate description of the process, but creates a particularly unpleasant mental picture.

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. Why should that be? Is there not some benefit, in some cases, in being more elastic? In adopting a different approach?

Having complained of arthritis and inelasticity, I end by quoting two recent examples of elasticity in the approach to the examination of experts I experienced. I take no credit for either of these examples; they were suggested by one of the other arbitrators.

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

Somewhat predictably, reports arrived from experts of different disciplines, addressing 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, could not address the theory put forward by the other side because it depended upon expert knowledge that they didn't have.

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, then 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. 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 an 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 agreement existed in advance as to the issues to be covered by the experts. This enabled a different approach. 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 each other questions to clarify or obtain further explanation opinions after which the tribunal also 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 its questions from both experts, and gave context to the subsequent cross-examination of the experts that took place. It was also clear 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 assume that arthritis is prevalent in arbitration simply by looking at the age and physical fitness of many arbitrators. As with all things, appearances can be deceptive.

Take Bob Dawbarn's Elastic Band. What looked like a wrangle-taggle bunch of disparate musicians at first sight amazed and inspired its audience 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.

Arbitration needs similar elasticity. We may 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.



Peter Rees QC
Investment Committee Member, Harbour Litigation Funding
Barrister, 39 Essex Chambers

This article is based on the keynote speech delivered at a dinner organised by Harbour Litigation Funding for leading law firms in Hong Kong on 27th March 2017. It also exclusively featured in the Asian Dispute Review, July 2017 edition.