



Arbitration International

The Journal of the London Court of International Arbitration

Two Faces of Progress: Fairness and Flexibility in
Arbitral Procedure

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Volume 23 Number 3

2007

ISSN 0957 0411

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Published by
Kluwer Law International
Prospero House
241 Borough High Street
London SE1 1GA
United Kingdom

ISSN 0957 0411
© LCIA

Subscription enquiries:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
E-mail: kluwerlaw@extenza-turpin.com

Frequency of publication: four times per year
Subscription prices (including postage) 2007: GBP337.00/USD574.00/EUR459.00
(This journal is also available online, please contact our sales department for further information at +31 (0)172 641562 or at sales@kluwerlaw.com)

This journal should be cited as (2007) 23 *Arbitration International*

Periodicals postage paid by Rahway, NJ, USPS No. 007-923. Mailing Agent: Mercury Airfreight International Ltd, 365 Blair Road, Avenel, NJ 07001, USA.

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Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure

by WILLIAM W. PARK*

ARRANGED IN pairs, the biographies in Plutarch's *Parallel Lives* contrast great statesmen, orators and soldiers from the ancient Roman and Greek worlds.¹ Cicero, the Roman orator, finds himself juxtaposed with his Greek counterpart, Demosthenes. The Roman general Caesar stands compared with the Hellenic military genius of Alexander. And so on.

A comparative approach might also commend itself on how arbitrations are conducted in England. The relevant distinctions, however, lie not with noble individuals (although many giants of the profession remain active), but rather relate to legislative provisions. In particular, sections 34 and 68 of the Arbitration Act 1996 provide a prism through which to examine two significant themes in arbitration's legal framework.²

The first provision, section 34, emphasises arbitrator discretion in procedural matters. The arbitral tribunal decides all procedural and evidential matters, subject only to the parties' right to agree otherwise. A non-exhaustive list of procedural matters includes language, the form of written statements of claim and defence, the extent of oral submissions, questions of document disclosure, and the application of rules of evidence.

This discretion, however, must always be exercised in the shadow of section 68, which imposes constraints related to fundamental procedural fairness. Arbitral awards may be challenged for 'serious irregularity' and set aside if that irregularity results in substantial injustice. This control mechanism permits the

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¹ A.H. Clough (ed.), *Plutarch's Parallel Lives, Dryden Translation* (Modern Library Edition, 2001). Never entirely at ease in Latin, Plutarch (who lived during the first and second centuries of the Common Era, from approximately 45–125) seems to have relied more on Greek than Roman sources. The influence of the work was considerable in North America during the early nineteenth century, with Ralph Waldo Emerson calling *Parallel Lives* 'A Bible for heroes'.

² See generally David St. John Sutton and Judith Gill, *Russell on Arbitration* (23rd edn, 2003), paras 4-116 (s. 34), 5-040 (s. 33) and 8-035 (s. 68).

judiciary to monitor aberrant arbitrator behaviour, with the aim of insuring a floor of procedural integrity in arbitration.

These provisions work in tandem to present the two faces of progress in English arbitration law. One rejects parochial application of purely local procedures. The other aims to safeguard elemental due process.

I. PROCEDURAL DISCRETION

The text of section 34 is significant less for what it says than for what it does *not* say. The statute stipulates that ‘It shall be for the arbitral tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter’. There is no hint that English trial practices apply to matters such as evidence and document production simply because the arbitral seat has been fixed in London.

Nothing prevents parties from agreeing on English rules, which in some instances might be well-suited to addressing particular questions. Moreover, arbitrators may take English procedure as a starting point for their inquiry, or adopt an English approach on a given issue. But English rules do not apply automatically as default procedures.

This discretion in procedural matters falls within a trend sometimes referred to as ‘delocalisation’, by which arbitration has become less dependent on the idiosyncrasies of the arbitral seat.³ The trend remains of great practical significance, given that most established arbitration rules provide few precise canons for the conduct of proceedings in matters such as evidentiary standards, presentation of testimony and briefing schedules.⁴

In England, the genesis of delocalisation might be traced back almost three decades to the Arbitration Act 1979, which abolished the ‘case stated’ procedure. Under prior law, the finality of commercial arbitration had been diminished through what some perceived as undue judicial intervention.

Similar principles have been adopted in other countries that often host international arbitration, such as France and Switzerland, and find themselves enshrined in the UNCITRAL Model Law as well. Particularly in an international arbitration, where the parties come from different legal cultures, an arbitrator’s knee-jerk adoption of local rules (even with the best of intentions) often runs counter to at least one side’s expectations at the time it initially agreed to arbitrate.

³ See e.g. Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Traité de l’arbitrage commercial international* (1996), ss. 1172–92 at 650–662.36; Georgios Petrochilos, *Procedural law in International Arbitration* (2004), ss. 2.05–2.07, at 20–22.

⁴ For example, the ICC Rules provide simply that the arbitrator may establish the facts by ‘all appropriate means’. Both the UNCITRAL and the AAA International Rules say that the tribunal may conduct the arbitration in ‘whatever manner it considers appropriate’. The LCIA Rules explicitly give the arbitral tribunal the ‘widest discretion to discharge its duties’. See ICC Arbitration Rules, art. 20; UNCITRAL Rules, art. 18; AAA International Rules, art. 16; LCIA Rules, art. 14.

Anecdotal evidence indicates that the lesson has been learned with mixed results. Some English arbitrators show admirable openness to different ways of doing things with respect to document production, privilege, burden of proof, pleading practices and the rules of evidence.

The new openness does not command universal acceptance, however. In at least one recent international case, an English chairman of great distinction endorsed application of the Civil Procedure Rules to document production on the basis that London had been chosen as the venue for hearings.⁵ Counsel for the British side was delighted, and confirmed that this was precisely why his client had agreed to arbitrate in London. The American party, represented by a large Midwest firm, felt profoundly misled and had to insist several times that the CPR was not part of the bargain.

In practice, much of the problem derives from a lack of clarity on what is meant by 'English procedure'. One side might contemplate the mandatory provisions of arbitration law (such as grounds for challenging awards), while the other thinks of the detailed rules on how trials are conducted in state courts (such as evidence and burden of proof). The 1996 Act, of course, imposes the former but not the latter. Mischievous counsel, however, have been known to obscure the difference.

II. SERIOUS IRREGULARITY

Arbitral discretion will always be exercised in the shadow of section 68, which permits a court to tell a careless arbitrator, 'Not so fast'. An application for challenge can be made on any of nine specified types of improper behaviour. Some items of irregularity are described with relative specificity, including excess of powers, failure to conduct proceedings according to the parties' agreement, and an award obtained by fraud or contrary to public policy.⁶

Serious irregularity also includes a catch-all failure to comply with the general duties of section 33. These relate first to due process (each party must be given 'a reasonable opportunity' to present its case) and second to efficiency (the arbitrator should 'avoid unnecessary delay and expense').

Due process and efficiency, of course, do not always marry well in practice. To some observers, the challenge of meeting both objectives simultaneously might

⁵ Some English barristers will take a more nuanced view, suggesting that for London arbitrations English procedure should be the 'starting point' for creating procedural rules. In practice, this often creates a de facto acceptance of English procedure, reminiscent of the T.S. Eliot poem 'Little Gidding' which concluded that 'the end of all our exploring will be to arrive where we started'.

⁶ The nine grounds of serious irregularity include (a) the arbitrators' failure to comply with the general duty to provide fairness and promote efficiency; (b) the arbitrators' excess of powers other than by exceeding substantive jurisdiction; (c) the arbitrators' failure to conduct the proceedings in accordance with the procedure agreed by the parties; (d) the arbitrators' failure to deal with all the issues; (e) an excess of powers by an arbitral or other institution or person other than the arbitrator; (f) uncertainty or ambiguity as to the effect of the award; (g) an award obtained by fraud or contrary to public policy; (h) failure to comply with the requirements as to the form of the award; or (i) any irregularity in the conduct of the proceedings admitted by the tribunal or arbitral institution.

bring to mind the Italian adage that a man cannot expect to have both a full wine bottle and an intoxicated wife.⁷

Proverbs aside, the provisions of section 33 touch the very heart of arbitration. In this context, many know the ancient Greek playwright Menander, who wrote a comedy called *The Arbitration*.⁸ The story begins with a humble shepherd finding an abandoned baby whose cradle included a necklace and other jewels. After giving the infant to an equally humble burner of charcoal, whose wife had lost a child, the shepherd claims the jewels. A dispute arises over whether the treasure belongs to the one who discovered the child or to the one who will raise the infant.

After a bit of arguing, the shepherd and the charcoal burner grab a man just coming out of a house, and press him into service to arbitrate their dispute. The litigants present the arbitrator with following charge: 'At all times and in all regions, it is in the common interest of mankind that all who pass should see justice upheld'. The play then goes on to illustrate the various ways in which 'seeing justice upheld' implicates the tension between due process and efficiency; between providing for each side to present its case and adopting procedures that reduce delay and cost.

Moving from the general back to the specific, section 68 has engendered a case law that increasingly contributes to a corpus of procedural guidelines on acceptable and unacceptable behaviour. The questions presented vary considerably, dealing with matters such as decisions on evidence and bifurcated hearings.

Judicial decisions under section 68 seem less focused on identifying 'best practices' than in determining what behaviour falls outside tolerable arbitrator norms. A procedural ruling might be less than optimal but not necessarily wrong.

By contrast, some practices have no place within the broad spectrum of commonly accepted arbitrator conduct. More than one arbitrator has made a professional contribution to his chosen field in the form of a not-to-be-followed example.⁹

⁷ In the original, the proverb seems to run as follows: 'Non puoi avere la botta piena e la moglie ubbriaca'.

⁸ Menander, *The Arbitration* (Gilbert Murray (trans.), George Allen & Unwin Ltd, London, 1951). Fragments of the play, consisting of about 500 lines, were enhanced by the translator who filled gaps through conjecture. A contemporary of Epicurus and Zeno the Stoic, Menander was the most famous representative of the 'New Comedy'. He was born in 342 BC, about 140 years after Euripides, 80 years after Plato, 40 years after Aristotle. Excerpts of the play can be found in (1991) 7 *Arb. Int'l* 72.

⁹ In this vein, one recent High Court decision found an arbitrator's failure to recuse himself constituted serious irregularity. The arbitrator should have stepped down for possible bias involving a key witness against whom fraud allegations had been levelled in a prior case where the arbitrator had served as advocate. *ASM Shipping Ltd v. TTMI Ltd* [2006] 1 CLC 656, [2005] EWHC 2238 (Comm.). In the instant proceedings, the complaining shipowners were held to have lost their right to have the interim award set aside, however, given the untimeliness of their challenge. The court noted that it was impermissible to maintain a 'heads we win and tails you lose' position (in which a threat of objection is held over the head of the arbitrator until a decision) which could be seen as an attempt to apply undue pressure. *Ibid.* para. 49. For earlier judicial guidelines on the circumstances that might and might not constitute bias, see the Court of Appeal decision in *Locabail v. Bayfield Properties* [2000] QB 451.

In what seem to be the majority of cases, arbitrators' conduct has been upheld. Notably, no serious irregularity has been found in respect of the following: awards in a currency other than that of the contract;¹⁰ the awarding of interest;¹¹ procedural rulings that deny a claimant the final word in arguments;¹² and interim decisions on the scope of the arbitrator's authority that overlap merits phrases of the arbitration.¹³

Perhaps most significantly (at least for this foreign observer) courts have made clear that charges of 'serious irregularity' will not serve as a back door through which to attack the merits of a decision. In this regard, one recent case proves instructive. Not satisfied with the award of compensation for the disruption of her real estate business by public works, the unhappy claimant sought more money, arguing that she was not given a 'voice in arbitration' (implicating section 68(2)(g) of the 1996 Act) and that evidence had been 'distorted' (suggesting violation of section 68(2)(e) by an award obtained contrary to public policy). On hearing the challenge, the court rejected any suggestion of irregularity, noting that each proposed ground of claim was 'not only unsubstantiated but incapable of being substantiated'.¹⁴

If the past is any guide to the future, additional disruptive tactics can be expected in the form of novel allegations related to alleged irregularity. No system remains foolproof, given that fools show themselves to be so ingenious. Thus far, however, the relevant case law justifies a robust confidence that English courts will deal appropriately with excessive challenges, striking the right balance in safeguarding procedural integrity without second guessing arbitrators on the merits of disputes.

¹⁰ *Lesotho Highlands Development Authority v. Impreglio SpA* [2005] UKHL 43, reversing the Court of Appeal decision found at [2004] All ER (Comm.) 97. The builder claimed amounts which, had they been paid when due, would have been payable largely in Lesotho Maloti. A majority in the House of Lords permitted the award in sterling and euros, 'hard' non-Lesotho currencies. While in some cases the better interpretation of the parties' intent might call for awards in the money of the agreement, the improper exercise of the statutory power to make awards in 'any currency' (s. 48 of the 1996 Act) will not constitute serious irregularity.

¹¹ *Westland Helicopters Ltd v. Sheikh Salah Al-Hejailan* (No. 1) [2004] 2 Lloyd's Rep. 523, [2004] EWHC 1625 (Comm.), reprinted in 17 *World Trade and Arb. Mat'ls* 245 (February 2005). A dispute over legal fees was submitted to an arbitration, engendering further controversy about the arbitrator's authority to award interest. Arguments were made that the arbitrator either had no jurisdiction to give interest (a matter covered by s. 67 of the 1996 Act) or had engaged in procedural irregularity under s. 68 due to inadequate submissions on the matter. Although Colman J. held that no jurisdiction existed to award interest for an earlier period (until the end of 1994), the arbitrator did have power to award interest for a later timeframe (from January 1995 forward), and that no serious irregularity had occurred in this regard.

¹² *Margulead Ltd v. Exide Technologies*, 2004 WL 1074377, [2004] EWHC 1019 (Comm.).

¹³ *Aoot Kalmneft v. Glencore International AG and Andrew Berkeley* [2002] 1 Lloyd's Rep. 128, 2001 WL 825106 (ad hoc London arbitration addressing dispute between oil trading company and oil production entity in Kalmykia).

¹⁴ *Claire & Co. Ltd v. Thames Water Utilities Ltd* [2005] EWHC 1022, 2005 WL 2407100 (19 April 2005, Jackson J.). Award by Arthur Harverd.

