

Arbitration

Arbitrator's power to procure third party assistance

by Julian Critchlow

In *Colt International v Tarmac Construction Ltd* (1996) CILL 1145, it was held that legal representatives have an obligation to assist arbitrators; they may not observe him flounder in unfamiliar territory and then apply to the court alleging that he has proceeded irregularly. However, not all parties will choose legal assistance and even where they do, the efficient conduct of a reference may require the provision to the arbitrator of more consistent, thoroughgoing and independent assistance than may be available from the parties' representatives. Arbitrations can be complex, involving difficult questions of fact, substantive law and procedural law. The availability to the arbitrator of legal assistance may reduce the incidence of legally erroneous awards and, similarly, technical assistance may reduce technically or factually erroneous awards.

The concept of an arbitrator obtaining independent legal advice is not new. Indeed, historically, the judges would sometimes, with the consent of the parties, leave technical matters, especially the taking of account, to a referee (see Mustill and Boyd, 2nd ed, at p. 441). Of more direct significance, RSC Order 40 empowers the court to appoint an expert or experts:

'... to enquire and report upon any question of fact or opinion not involving questions of law and construction.'

The commentary contained in RSC Order 40/1–6/1 states:

'The object of the Order is presumably to enable the parties to save costs and expenses in engaging separate experts in respect of technical or scientific questions which can be resolved fully, quickly and comparatively cheaply by an independent expert appointed by the Court, and also possibly to prevent the Court being left without expert assistance in cases which the experts of the parties may well be giving entirely contradictory evidence on technical or scientific questions.'

It should be noted that the provision can only be operated where a party applies to the court: it is not exercisable by the court of its own motion. However, there has been much debate as to whether the court should have that power irrespective of the wishes of the

parties. In his interim report *Access to Justice* (June 1995), Lord Woolf states:

'The appointment of a court expert or, as the London Solicitors' Litigation Association has pointed out to the Inquiry, more appropriately an 'independent expert', is one solution which has been extensively canvassed. It is, however, a solution which attracts strong criticism ... The Official Referees are at present engaged in an experiment to ascertain whether greater use can be made of Order 40 ... the question to be asked was "whether it is likely to assist in the just, expeditious and economical disposal of the action."' (ch. 23, para. 20, p. 186)

The unwillingness of parties to take advantage of a court-appointed expert is in sharp contrast to the position in civil law jurisdictions, where this is the normal course.' (ch. 23, para. 186, at p. 20).

The court is perfectly capable of deciding which cases would be appropriate for a court expert and then of appointing an expert with the necessary qualifications and ensuring that he is used effectively.' (ch. 23 para. 23, at p. 187)

Again, in Scotland, it is common practice for a legal assessor to sit with a lay arbitrator.

There are provisions (referred to below) in the *Arbitration Act 1996* in respect of the arbitrator taking advice. This paper considers the extent of any need to allow the arbitrator to take such advice, and whether the Act's provisions satisfy any such need.

OBTAINING ADVICE

Turning again to the *Colt v Tarmac* case, referred to above, it is stated at p. 1146 of the CILL report:

'A dispute arose in the arbitration as to whether Tarmac had complied with the arbitrator's discovery order ... The arbitrator indicated that, if Colt persisted with their discovery application against Tarmac, which involved the question of waiver of privilege, he would wish to take advice from Queen's Counsel.'

'Colt suggested that the discovery application merited the appointment of a legal assessor to sit with the arbitrator; the arbitrator gave an indication that he doubted

whether it was necessary to have a QC sitting with him, and that if Colt insisted then the costs would have to be borne by Colt in any event. Colt complained that the arbitrator had pre-judged that issue, where - upon [sic] the arbitrator indicated that he would review the position in the light of submissions made to him at the forthcoming hearing. In the event, the arbitrator embarked upon the application without a QC sitting with him, but it became apparent that he did need legal advice upon the submissions made to him. Colt complained that the terms upon which the arbitrator sought that advice were too wide, and applied for his removal for misconduct.'

In the event, the application failed. However the arbitrator's difficulties in that case would not have arisen if he had had an unequivocal power to obtain independent legal advice. Without that power it can be open to a party to drive the arbitrator towards an inefficient procedure or an award which fails to reflect the true merits.

A potential problem with that view is that the parties have agreed that a specific individual or individuals should decide their dispute, or at least agreed or assented to the mechanism for the tribunal's appointment; and it runs contrary to that agreement for the arbitrator to subcontract his personal obligations (see *Threlfall v Fanshawe* (1850) 19 LJQB 334; *Giacoma Costa Fu Andrea v British Italian Trading Co Ltd* [1961] 2 Lloyd's Rep 392). However, it is suggested that there is a fundamental distinction between an arbitrator subcontracting the decision to a third party, and merely extending his knowledge so as to increase his ability to arrive at a decision which is accurate within his terms of reference; there is no objection, for example, to an arbitrator undertaking private research to facilitate his legal or technical understanding, and it is suggested that to seek the assistance of a qualified individual is simply an extension of that exercise. That distinction is emphasised if party autonomy is preserved so that the arbitrator may obtain third party advice or assistance 'unless the parties otherwise agree'.

EXTENDING THE ARBITRATOR'S KNOWLEDGE

It is suggested that there is a fundamental distinction between an arbitrator subcontracting the decision to a third party, and merely extending his knowledge so as to increase his ability to arrive at a decision which is accurate within his terms of reference; there is no objection, for example, to an arbitrator undertaking private research to facilitate his legal or technical understanding, and it is suggested that to seek the assistance of a qualified individual is simply an extension of that exercise. That distinction is emphasised if party autonomy is preserved so that the arbitrator may obtain third party advice or assistance 'unless the parties otherwise agree'.

It would reduce any concern the parties might have that the arbitrator was devolving his decision-making onto the third party if the parties were informed of what questions were put to the legal or expert adviser and the nature of the advice. However such a formal method of proceeding could reduce the efficiency of the mechanism. Thus it would be likely to inhibit the free flow of information and advice between adviser and arbitrator and there would be a severe risk that a party disenchanted with an award would seek to expose inconsistencies between the advice and the award in order to impeach it.

RISK OF SUBCONTRACTING

However it is suggested that, in practice, the risk of the arbitrator subcontracting his responsibilities is slight, for the following reasons:

- (1) The appointed arbitrator faces the parties at preliminary meetings and at the main hearing, so except where the dispute does not require such processes, it is likely to become apparent to the parties if the arbitrator is adopting a position which he does not in truth understand and support;
- (2) It is doubtful that there is much profit to be made by arbitrators in accepting appointments and subcontracting much of the work; arbitrators are likely to seek legal or expert advice only where issues arise in respect of which they require clarification, and to the extent that they have been appointed because of their suitability to decide the dispute, such issues are more likely to be subordinate than dominant. Certainly,

an arbitrator who subcontracted his appointments wholesale would severely imperil his reputation;

- (3) The arbitrator's entitlement to obtain advice could be made subject to the parties' agreement to the contrary. As such, a single party could not disrupt the operation of the mechanism as in *Colt International*, but the parties jointly could restrain its inappropriate use by the arbitrator.

Undoubtedly there are dangers inherent in such a system. Arbitrators must take care not to substitute the unchallenged views of the expert adviser in place of the expert evidence or legal argument advanced by the parties. To do so would be to fail to act fairly and impartially, allowing each party a reasonable opportunity of putting his case and dealing with that of his opponent. (The pre-1996 position (which it is suggested is still and should remain good law, subject to s. 34 of the 1996 Act), respecting the arbitrator's wrongful reliance on his own evidence, is expounded in *Fox v P G Wellfair Ltd* (1981) 19 BLR 52 CA; [1981] 2 Lloyd's Rep 514.) Ultimately the issues in dispute must be determined by the arbitrator and not the expert.

CHOOSING AN ADVISER

Accepting, on the above analysis, that the mechanism is desirable in principle, further questions arise concerning its operation in practice, specifically whether the adviser should be selected by the parties, and whether he should attend hearings. It is suggested that, in the model considered above, the arbitrator should not be obliged to approach an adviser chosen by the parties; the arbitrator himself will be best placed to know his own requirements, although he may wish to ask the advice of the parties jointly. However, it is suggested that the parties should have the opportunity to oppose the use of a particular expert where there is the possibility of bias and, for this reason, the identity of the expert should be disclosed to the parties before the advice is sought. While it may be desirable to embody in statute the requirement to pre-disclose the identity of the intended adviser (see later in this section) it is probably unnecessary to legislate, in a common law jurisdiction at least, for an adviser to be unbiased; whether an adviser should be debarred from any particular reference could be

adequately dealt with incrementally in case law, probably using the same criteria as currently exist in English law respecting the bias of arbitrators, i.e. 'real likelihood' or 'reasonable suspicion' of bias (for example, see *Hagop Ardahalian v Unifert International SA 'The Elissar'* [1984] 1 Lloyd's Rep 206, affirmed [1984] 2 Lloyd's Rep 84).

An alternative mechanism could involve the use of a legal or technical assessor integrated into the process to a much greater degree and sitting through all, or much of, the entire reference – along the lines of the Scottish model (a close analogy where the adviser proffers legal advice is the system of magistrates' clerks in England). The theoretical distinction between a mechanism of this kind and the former sort is not easy to draw: it might be argued that the question is only one of degree and the latter type is merely the former taken to its logical conclusion. However it is suggested that there is a fundamental difference between, on the one hand, the arbitrator privately briefing and taking advice from the adviser and, on the other hand, the adviser appearing at hearings where he or she can hear the evidence and arguments of the parties direct and possibly participate, e.g. by asking questions for clarification. For in the latter case, the adviser forms a direct relationship with the parties and becomes more a limb of the arbitrator himself, rather than a wholly independent source of assistance. As such it is suggested that this mechanism should only be operated if both parties agree.

The relationship of the arbitrator and the parties is a personal one and a participating assessor intrudes upon it. He is also more likely, because of his deeper involvement in the arbitral process, to influence the arbitrator in decision-making. It follows that the appointee should be nominated or at least approved by the parties, rather than being selected entirely at the discretion of the arbitrator. As in the earlier scheme, the arbitrator relies on the expert to the extent he considers appropriate and he retains responsibility for each decision. Therefore it also follows that the arbitrator must also agree to the procedure: to oblige the arbitrator to accept an adviser where he considers it inappropriate and does not intend to take notice of his advice would achieve nothing.

EFFICIENT USE OF ADVISER

The use of a participating adviser is likely to be particularly efficient where a lay arbitrator is appointed to decide the dispute because of his highly specialised technical understanding, but the disposal of the issues requires equally specialised legal analysis or, in particular, a highly developed understanding of procedure. Thus such an assessor could assist the arbitrator in deciding whether to order particulars of case or statements of case, or explain to him the factors legitimately to be taken into account on an application for security for costs. Yet because the participating adviser is not a decision-maker, his appointment need not be automatic on the commencement of an arbitration: he need only be called upon if required. This reduces the likelihood of costs being incurred unnecessarily as would be possible if he were appointed as a joint arbitrator. Indeed, if a spread of expertise were sought to be achieved by enlarging the tribunal, at least three arbitrators would need to be appointed so as to ensure that a decision could be reached by a majority in the event of disagreement. (The very significant costs sometimes incurred by three member tribunals is evident from *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* (1991) CILL 664, being £1,500 per day (for the tribunal as a whole) during 1990, £1,750 per day during 1991, and £2,000 per day during 1992, with a commitment fee of £67,750.) Because the adviser's appointment can be made at any time after the commencement of the reference, he can be selected according to the known requirements of the case.

APPROVAL BY THE PARTIES

The relationship of the arbitrator and the parties is a personal one and a participating assessor intrudes upon it. He is also more likely, because of his deeper involvement in the arbitral process, to influence the arbitrator in decision-making. It follows that the appointee should be nominated or at least approved by the parties, rather than being selected entirely at the discretion of the arbitrator.

The disadvantage is that where such an appointment seems desirable, one or other party may withhold consent for strategic reasons. However, as observed above, it is necessary that such an

appointment should be consensual. Nevertheless, in cases of substance and complexity where an appointment is more likely to be efficient, each party, or his representative, may perceive a mutual advantage in proceeding in this manner, knowing that even if they withhold consent, the arbitrator will nevertheless be able to obtain advice privately under the first method set out above.

Operating method

It is suggested that the costs incurred in operating either method would be a proper cost of the reference.

Both methods are broadly enacted by s. 37 of the 1996 Act. However, on the basis of the above analysis, it is suggested that an amendment of the Act is desirable so that:


- (1) Subsection 37(1) (b), which states 'the parties shall be given a reasonable opportunity to comment on any information, opinion or advice ...', should be omitted. The arbitrator's obligations to decide fairly and impartially, giving each party a reasonable opportunity to present its case and test the opponent's (as set out in s. 33 of the Act), and the subjection of his s. 34 powers to party autonomy, are sufficient protection for the parties; and an obligation on the arbitrator to identify specifically to the parties the deliberations of the adviser is undesirable for the reasons set out above;
- (2) Subsections 37(1) (a) (i) and (ii) need to be distinguished so that an 'expert' or 'adviser' does not attend the proceedings, but an assessor does. Appointment of an expert or adviser should, as currently provided, be by the arbitrator unless the parties agree otherwise, but the arbitrator should be obliged to notify the parties of the intended identity of the expert or adviser;
- (3) Appointment of an assessor should be expressed to occur:
 - 'If agreed by the arbitrator and the parties, and the assessor shall be entitled to play such part in the process as the parties may agree including:*
 - (a) attending preliminary meetings and final hearings;
 - (b) asking questions of the parties or their representatives, parties' experts, and witnesses, attending inspections;
 - (c) any other function that may assist him in

advising the arbitrator as to either procedural or substantive issues; save that only the arbitrator may make and shall be responsible for any decision in the arbitration.'

To enable an assessor to make decisions is to confer on him an arbitrator's role. To allow him to make decisions without appointing him arbitrator would be to cause confusion as to where the arbitrator's role ended and the assessor's began, and the enforceability of awards could be called into question.

CONCLUSION

In many respects the task of the arbitrator is more exacting than that of the High Court judge. Whereas the judge is entitled and obliged to follow the well-trodden paths of the *White Book*, the arbitrator (subject to the contrary agreement of the parties) has an extremely wide discretion as to procedure, and must exercise that discretion so as to minimise the time and cost of the reference without doing damage to the fairness of the award; and if he is a lay arbitrator he may have to do this without the benefit of a detailed knowledge of the procedural possibilities. Where he is a legally qualified arbitrator, his situation may more closely parallel that of the judge, i.e. whilst thoroughly versed in procedural matters, he may have to resolve highly specialised technical issues and, where those issues are the dominant feature of the reference, his lack of technical expertise may divest the process of any advantage over litigation.

Such difficulties may be mitigated by the introduction of a greater entitlement on the part of the arbitrator to have recourse to specialist assistance, and it is suggested that the 1996 Act, while partly meeting the case, does not go far enough and fails to emphasise sufficiently the provisions it does make. Thus it is suggested that the Act could be amended, with profit, so as to facilitate the arbitrator's access to independent advice and to popularise the use of this procedural mechanism. 

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