UNIVERSITY OF GLAMORGAN
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Preparing to Write an Award

Burden of Proof; Factual and Legal Analysis

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The arbitrator is employed by the parties to perform two tasks. The arbitrator has to find the facts. Having found the facts, he or she has to make the decisions the parties could not make themselves. Those decisions will become enforceable at law, so they must be in accordance with law. The arbitrator applies the law to the facts in making his or her decisions. They will be expressed in an Award. Writing the Award is the way in which the arbitrator discharges his task; the Award is the arbitrator's end product.

The hearing, if there was a hearing, is over. The evidence has been heard or seen, the submissions heard or read. It is time to start work.

One of life's most daunting prospects is that of the blank sheet of paper, or the blank word processor screen, staring you in the face, accusing, challenging you to put pen to paper or commence with the keyboard.

There is a mountain of material before you: Sometimes dossiers submitted in a reference on document; Sometimes the documentary evidence of a long hearing; Your notes; Perhaps evidence or argument on computer disks or on video tapes; Expert's reports; textbooks to which reference has been made; The legal authorities; Your own knowledge and understanding, as it was made known to the parties during the reference; Your own appreciation of all that you have heard and seen. Where do you begin?

I think it was at one of the Institute's Bernstein Lectures that Lord Donaldson criticised Lord Denning in these terms:

"It was always said of Lord Denning" said the Master of the Rolls as he was at the time, "that he claimed to decide intuitively what should be the outcome of a case and then to go on to analyse the law in such a way as to justify his intuitive decision."

"Of course he was wrong to say that" continued Lord Donaldson, "Quite wrong. Most of us do exactly that, but we would not dream of saying so."

Well that was an interesting observation. Not strictly sound. Nevertheless, if Law is to be respected, it must be reasonably predictable and should coincide approximately with what people think right. Otherwise, it is plain bad law. Law is for the people, not the people for the law.

We have closed the reference and the next job is to prepare for writing the Award.

Now, there is an old story from Ireland. A man and his companion stopped an elderly man, who seemed to be a farm worker, at the side of the road in Kilmacow, which is near Waterford. "Please tell me the way to New Ross" said the traveller. "Well Sir," came the reply "You shouldn't start from here." The man then turned to his companion and said "This man is a fool", upon which the local intervened with the comment "Maybe, but I am not lost."

Is that relevant? Yes it is. You should not start from here. The point I wish to make is that a skilled arbitrator is preparing to write the award from the moment of accepting the reference. He or she is gathering the necessary information and making the necessary decisions, albeit provisionally, throughout the entire process. The justification for everything done or said in the course of the arbitration must be that it assists with the decision making process. Nothing else is relevant. This paper assumes that everything has been done; the arbitrator is about to begin writing the award.

Preparing those few paragraphs called my attention to a practical wrinkle. An Award may be approached like an examination question. Put down what you know. You will need to write it anyway and the process will give you time to clear your mind for what is to come. I will return to the relevance of instinct later, but now is as good a time as any

to discuss the formal requirements of an award, not in detail, that is for another time, but in the context of their relevance to what now has to be done.

Let us go over what has to be achieved, before we think about preparing to achieve it.

The award, when it is written and published, will dispose of all the issues in the reference. It will not deal with matters that were not issues in the reference. It will not deal with the liabilities of third parties.

It ought to be capable of execution and it ought to be capable of enforcement. There is a limit, however, to how far the arbitrator may enquire into aspects of law that have not been canvassed by the parties.

It will have to be precise in its wording, because an award ought not be open to the criticisms that would invalidate a contract, uncertainty, ambiguity or impossibility of performance. It will have to be final, because the issues with which it deals cannot be raised between these parties again. Its decisions will have to be in accordance with law.

Now to achieve that, where to begin?

English Lawyers set great store by recitals. English Lawyers set great store by formality and appearances generally. Recitals however, are only a brief record of how the reference commenced, who is party to the reference and therefore to be bound by the award, how the arbitrator comes to have the authority he is now asserting and what, if any, special steps of procedure need to be remembered as you make the award. By special steps, I mean whether there was some event on the way to the award, an application for a special order for example, perhaps associated with an order for costs in any event, which needs to be noted so that financial or other adjustments can be made to the award.

Mustill and Boyd, the leading authors in English practice, seem to have mixed feelings about recitals. On the one hand, they say, robustly, that they may be ignored[1]. On the other, they say that the material that formerly was included in "Recitals" ought to be set out[2]. I will not get involved in that debate. You must refer to the original text. My point is that, by starting to write the award in a more or less formal way, by setting out the parties' names and identifying the formal circumstances of the reference, you may direct your mind into the shape it requires before working on the award.

The new Arbitration Bill, that of the current Parliament, specifically sets out, as a ground for remission, a failure to deal with all the issues. One may expect English lawyers and English courts to handle such a provision as if it were a rigid formula, rather than according to the spirit of the legislation. For that reason, I suggest, it may be good practice to set out, in the award, a schedule of the issues it addresses. It may become practice to draft such a schedule before the hearing. Alternatively, it may become practice to invite the parties to agree upon a list of issues or to submit their own lists before or after the hearing.

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1 "Awards often contain recitals, in which the arbitrator sets out the nature of the dispute and the circumstances in which he comes to be adjudicating upon it. From the point of view of the English court, these recitals add nothing; and indeed they may be a source of confusion and dispute, if they are inaccurate. The most that can be said for them is that they may serve to persuade a foreign court that the award is prima facie within the arbitrators jurisdiction. We suggest, however, that they should be kept short, and an arbitrator would not be wrong to omit them altogether." - *the Law and Practice of Commercial Arbitration.* Sir Michael J Mustill and Stephen C. Boyd, Second Edition, Butterworths 1989 at 383. There must be some doubt about this robust approach, particularly since the New York Convention of 1958 lays down some minimum requirements for an arbitral award which has to be recognised or enforced in a foreign jurisdiction and it is therefore helpful to have a self-contained award, which demonstrates that correct methods have been employed, to lay before the enforcing court. It is submitted that, at the least, the identities of the parties and the basis of the arbitrator's appointment are required for purely practical reasons.

2 *Op.cit.* At 379: "It must, however, be borne in mind that although the shape and mode of expression of a reasoned award under the new system [the Arbitration Act 1979] may be different, the content of a reasoned award will not differ substantially from that of a special case. For example, although the award may no longer have a separate section headed "Recitals", the material which was formerly grouped under this title ought nevertheless to be set out. Thus, the awards ought to give particulars of the contract from which the dispute arose; of the arbitration agreement; of the arising of a dispute which fell within the agreement; of the manner in which the arbitrators were appointed, or (if the award is made by an umpire) of the fact that the arbitrators have disagreed and the umpire has entered on the reference; of the proceedings in the reference, whether they were written or oral, whether oral evidence was given, and so on. If the award has to be enforced abroad, the inclusion of at least some of these particulars may be essential. Even if not, they ought to be included in order to foreclose disputes about jurisdiction, and to give the Court an immediate picture of the type of dispute in respect of which leave to appeal is being sought." A footnote to the text develops the point further.

Whether or not the award includes such a schedule, it is a good mental discipline to list the issues and then to reread the pleadings, the submissions and your own notes to see if the issues are addressed and if any further issues need to be included. At this stage, you may find yourself able to take two important steps. You may be able to identify, not merely what the parties have said is common ground, but other points which have turned out, on the evidence, to be common ground. You may also be able to begin dismissing such evidence from your mind and, indeed, such argument as has no bearing upon the issues you have to decide.

At this stage, the arbitrator should address his or her mind to the logical framework of the task ahead. It is as well to review the aspects of the reference in reverse. Like the trial in Alice in Wonderland - sentence first, verdict afterwards. This is analysis, working backwards from the desired construct, to see if it can be sustained. The arbitration commences with a claim or claims and it ends with the arbitrator awarding or not awarding what has been claimed. I will leave to one side the complications of counterclaims and the like, because the logical treatment of them is exactly the same.

So look first at the relief that the Claimant seeks. Look at the legal reasons he offers to show why he is entitled to that relief. Look at the facts he asserts as foundations for his legal reasons. Then turn to the Respondent's case and see whether the defence is a defence of law, with admitted facts, a denial of the alleged facts or a combination of the two. That material is set out, or ought to be set out, in the pleadings, although a modern arbitrator would be unwise not to keep the pleading, if pleadings there were, in context. There may be no formal pleadings - so much the better, because they are not the best vehicle for keeping an arbitration simple - there may be letters or statements which set out the issues - and the issues can change.

Subdivide the legal question. The forms of action may be dead, but they certainly rule us from their grave. Examine whether the Claim lies in tort or contract. Particularly if it lies in tort, then look again at the arbitration clause or agreement to be sure that it encompasses the dispute. Now is not the time to discuss pathological arbitration clauses, but not all words give the same scope.

It may be useful to remind you of the claim that is required in each instance. If the claim is in contract, is there a breach or is the claim merely for payment of amounts due? Has the Claimant demonstrated that there was a breach, that loss or damage resulted from that breach and that it did so directly or at least that the damage was not too remote? You know the principles, my purpose is to remind you that now is the time to get them in focus.

If the claim is in tort, the sequence of logic is similar. First a link between the claimant and the alleged tortfeasor. If there was a contract that may not be too difficult. The question "who is my neighbour?" may have to be asked, however, in references on *post hoc* agreements to arbitrate. The Claimant has to show that the Respondent owed him a duty, that he did something (the alleged tortious act) contrary to that duty, that damages resulted and that it was foreseeable that such damage would result. Again, this is not a lecture on the law of torts.

An arbitral award, like a judgment, requires the facts to be found and the law to be applied to those facts. That is a very practical way of proceeding, because it narrows the application of the law and, generally, subject to one proviso to which I will return, there is no need to consider what law might have been applied had the facts been otherwise. It is a reminder.

There is a subtlety about English procedure which ought to be borne in mind when analysing the material submitted by the parties and it concerns the distinction between formal pleadings and other methods of setting out a case. In general, pleadings are no more and no less than a declaration of intention, usually not by the litigant or the party concerned, but by their advocate. The words of a formal pleading are not, therefore, evidence of what they say. Admissions become binding upon the party who makes them, not for any evidential reason but because the parties are to be bound by their declared intention. A statement of case, on the other hand, may be made in such a way that it becomes evidence. The difference is, in practice, that a general traverse is sufficient to join issue with formal pleadings but, at least in theory, the detailed and particular allegations of a statement of case each ought to be addressed in any reply.

That may mean that an assertion made in a formal pleading, if generally traversed, may become disregarded if no evidence whatsoever has been given subsequently, while a similar assertion in a statement of case might stand in the absence of contradiction. That is clearly a very fine technical distinction and might turn on the circumstances and wording of the respective documents. For the outcome of a reference to turn on such an unmeritorious point would be profoundly unsatisfactory and the opportunity should have been taken at the hearing, or in the correspondence, to bring the matter into the open. If it is not touched on by either party, say in lists of issues, then that may be an end of it. Arguably, lists of issues refine and supersede pleadings and indeed statements, insofar as the identification of issues is concerned. If that does not resolve the point, then the parties should be told "You have said nothing about ..." and an answer invited. In that way, the arbitrator may be content that the topic has not been overlooked. That does not amount to entering the fray. The arbitrator has a duty to deal with all matters in the reference. That is his (or her) job.

The classic summary of the decision making task is "Find the facts, apply the law". That is right, of course, but it omits the important details. There must be a continuous chain of justifiable inference which links the evidence itself to conclusions of fact. That chain must connect the conclusions of fact with the relevant considerations of law, which themselves must be logically inferred from the principles of law the arbitrator holds relevant, and the whole must then be connected to the decision and to the remedy or to the refusal to grant a remedy.

There are several ways of analysis and reasoning. What I suggest is at first sight a little like the method of Lord Denning, mentioned earlier, save that it will have to keep a little closer to the law as we know it. It is a three-pass process, each pass progressively of greater rigour than that before. As a matter of semantics, the first two passes are not analytical at all. One is an overview and intuitive, the second a synthesis. Only the third correctly could be described as analytical and it is essentially a checking process. The advantage of this approach is an economy of thought and effort. The disadvantage is that it may not alert the arbitrator to the full possibilities of lateral thought. To allow those possibilities, I will suggest that the final product is left to mature on the shelf, so to speak, for a day or so (depending on the magnitude of the issues).

In the first two passes then, we construct the award. Then we analyse what we have produced.

I will pray Lord Denning in aid for the first pass. That is the intuitive pass. Reflecting on the hearing, aided by the notes and by re-reading those documents which appear to have developed particular relevance, the arbitrator reviews the facts, notes where there is conflict and where there is not, satisfies himself as to what has turned out to be common ground relevant to the issues and forms a provisional view as to the likely outcome. Based on that review, he then begins to write, in plain English (or in the language of the arbitration), an account of the facts. With the specific issues in mind, he then sets out his findings of fact, inferred from the evidence. Having set out the findings of fact, he then considers the principles of law discussed in the hearing or in the written submissions he has been given, decides which is correct in the context of the facts he has found and applies those principles to make decisions, for now provisional decisions, as to what the parties are to be told to do.

That is the first pass. The Denning pass. It involves decision making about differences in evidence, it involves decision making about differences in legal submissions. Having made those provisional decisions intuitively, we now have to fill the gaps by repeating the process from the beginning, asking and answering, for each logical proposition, the three questions: upon whom was the burden of proof for this proposition; have they satisfied that burden of proof, in what manner has the burden of proof been satisfied.

The burden of proof lies, in a general sense, at two levels, although a strict analysis would reveal it to be complex and intertwined at many levels of a complex matter. The fundamental and unchanging proposition is that a claim made in a reference must be proved by the person making the claim. That proof is not absolute; it is not the standard of proof required to found and verify a scientific theorem from a scientific hypothesis. Nor is it the standard of proof required to establish criminal liability "beyond a reasonable doubt" or "so that you are so sure as to be certain". A claim made in an arbitration has to be proved on the balance of probabilities. One might debate the meaning of that at length, but it may suffice for the moment to say that, as the law does not concern itself with trifles, the arbitrator need not strain his mind, in weighing evidence, to find the inconsequential thread of gossamer that might tip the balance. The claim must be shown

to be favoured by a commonsense view of the balance of probabilities. There is no quantitative way of expressing the concept, not least because the degree of probability, as a matter of commonsense, needs to be coloured a little by the circumstances and the consequences (but only a little - consequences must not be allowed to determine the issues). It may be that balance of probabilities means 51% and not 50%. Less likely that 50.01% is a sufficient balance, but the question is really one of impression and judgment, not formulae.

The same standard is to be applied to any assertion upon which either party relies. It is often described as a principle of law. Equally, it is a principle of commonsense. Assertions, if questioned, have to be proved by the person who makes the assertion. In the context of an arbitration, they have to be proved on the balance of probabilities. I say that means on a reasonable balance of probabilities. The arbitrator has to be satisfied that the matter asserted is more probable than not.

There is a useful case in which I was myself the Arbitrator, which illustrates the principle of the burden of proof rather well. It concerned some machinery which was purchased by a vehicle builder from a machinery manufacturer, under a contract which provided for defects to be rectified if they occurred during the year after delivery. There were failures. The machines were returned to the manufacturer, who repaired them. He subsequently claimed the price of repairing them because, he said, the buyer had caused the damage by abuse. Both parties argued the case on that basis. They were represented by very senior counsel, one silk, the other of the same quality. Counsel were first class and the expert witnesses included professors of engineering and a former President of a major Institution. Heavyweights.

The claim was for payment for repairs. The Claimant, as I have said, claimed that the repairs were necessitated by the buyer's abuse. In that premise, the Claimant had the burden of proof. As arbitrator, I found that abuse had not been proved (the machines failed for other reasons) and found for the Respondent. On appeal, the learned Judge found that it was not a matter of abuse, the issue was one of fitness of purpose. He said that the Respondent's defence could have been argued as asserting that the goods were not fit for their purpose and that the burden of proof therefore passed to the Respondent who was so asserting. He accepted that neither counsel had so argued at the hearing (although I had, in fact, invited them to address that very point) but he felt that they ought to have done so. The judge remitted the Award to me; I allowed a day for argument on the point, but then found the existing evidence sufficient to support a contention that the goods were not fit for their purpose, so that the substance of the Award was unchanged.

The original burden of proof was upon the Claimant. As originally argued, he had to prove what he said, that the Respondent had damaged the goods.

As re-argued on remission, the burden of proof started with the Claimant but he merely proved that the work had been done and not paid for. When the defence became one that the goods were not fit, the burden of proof passed to the Respondent who then had to prove the goods unfit.

There is a lesson to be learned from that incident. In writing the original Award, I neglected to record that I had invited Counsel to address the question of Burden of Proof. Had I noted that invitation in the Award, it is unlikely that the Learned Judge would have thought remission necessary.

Now, having formed a view as to the burden of proof, we are into the business of making judgments about the evidence. There is a lot said nowadays about the psychology of the parties and their witnesses. It is said that one may tell whether or not people are lying by their behaviour, their body language and the like. That is dangerous. More than dangerous, it is capable of being positively misleading. The same people who teach the meaning of body language for tribunals to understand also teach others how to use body language in presentation so as to influence others. In the modern world, there is a risk, albeit a remote one, that a witness will either have been trained to act in a particular way

or that the process of interview, leading to the production of a proof of evidence, may have become very near to a rehearsal. Indeed, some advanced lawyers, in some jurisdictions, hire retired judges and counsel specifically to enable witnesses to be rehearsed. I do not suggest that happens in arbitration, only that you cannot be sure that a witness is being entirely natural. The confident witness may be a confidence man or he may be right; the nervous witness may be nervous because he is wrong - he may just be nervous. "There's no art to find the mind's construction in the face" - or the body or anything else. Particularly dangerous is cross-examination. An admission may be a serious revelation, it may be no more than the weary response of a tired witness or the result of misleading questions put by counsel, intentionally or otherwise. When that happens, there may or may not be re-examination; many counsel take the view that re-examination makes the matter worse. The absence of re-examination may not mean very much.

There are two ways of approaching the evidence. One is to consider each witness in turn. Identifying the issues. Better in arbitration is to look on witnesses as a part of the process of answering the question posed in each issue, to consider an issue and see what witnesses have addressed it.

In my experience, which is not as extensive as that of a judge, non-criminal witnesses rarely lie, if by lying, we mean knowingly uttering falsehood. Very few are reckless as to the truth. Most do their best within the scope of their recollection. And there's the rub. The best of men and women may be under a misapprehension. Certainly, of what may have been said or agreed, they remember what they thought they, or others, said or agreed. Of incidents and accidents, they will have turned them over in the mind time and time again, perhaps trying to "make sense" of what happened. During the hearing, the arbitrator will have looked out for the tell-tale answers which need to be made quite clear. "I would have done that" does not necessarily mean "I did that", "I must have done" does not mean "I did". That does not mean such answers have no probative value. It does mean that they may not be direct evidence of a fact, although they may be evidence of usual habit or of that witness's inference from his or her own knowledge.

All this suggests that oral evidence is less helpful than is commonly thought. I think that is right. Worse than that, documentary evidence may not be all that one would wish.

Some documents may have been written with one eye on the future litigation or arbitration. Assertions such as "This has happened and you are responsible" look impressive, but they are evidence only that those words were written. For any greater effect, they have to be in context. That brings in the concept of corroboration. I am not going to touch the question of corroboration in Criminal practice. What I would like to discuss is the ordinary logical concept of corroboration and it is this: A single piece of evidence on its own may be insufficient to establish a fact with any certainty at all. To the extent that it is consistent with other evidence, *a fortiori* from other sources, it gains weight so that the combination of evidence may become sufficiently convincing, even though no single part would suffice.

For all those reasons, I think an arbitrator would do well to hesitate before using words like "I believe the evidence of Mr X" or "I prefer the evidence of Mr Y". Neutral references are less likely to disturb the *amour propre* of the reader.

Most of the time, the arbitrator has to form his or her view of the evidence given, doing his or her best, in the absence of certainty. There are keys. Corroboration, as I have said, is one. General consistency with other evidence is another, particularly if that consistency is not limited to one party's witnesses. If they all say it, it is very likely true, at least for practical purposes. The quality of a witness's evidence, its cogency and apparent strength, are also factors.

What can be very satisfying to the decision maker, the arbitrator, is to find that the evidence of one party can be corroborated firmly by reference to the evidence of the other. That may be direct corroboration, almost common ground, or it may be that there is some inference that reasonably can be drawn from a consideration of the evidence of both. I suppose that it goes without saying that it is more comfortable to find against a party on the basis of what he himself has said, but even that needs to be approached with caution.

I ought to touch on the Expert Witness. The only distinguishing feature of an Expert Witness is that his evidence of his own opinion and of his view of the opinion of others may be admissible at the discretion of the arbitrator. He is not an advocate, but that does not mean that an excursion into advocacy necessarily invalidates his evidence. He may

be, but as a matter of law need not be, independent. He may himself give evidence of fact, " I saw that, I did this test, I made those measurements". The boundary between some such facts and opinion may not always be clear. Watch out also for a tendency, with the best of Expert Witnesses, to slip into stating, as fact, the lawyer's or his client's instructions as to the background. Qualifications may or may not be significant - a man who has done the work for years may be a better guide than another with a dozen degrees or the doyen of the profession who is too arrogant to admit the possibility of a different view.

In a complex matter, much of the evidence will be in documents. Here there is an important technical point that requires consideration. Obviously, the documents that have been addressed by witnesses are in evidence. That is probably true whether or not the old strict rule has been observed and a witness has attested the documents. Documents to which Counsel have referred and which have been disclosed are also in evidence, although the arbitrator is entitled to bear in mind, when considering their weight, the extent to which they have been discussed and whether witnesses have dealt with them.

The technical issue is whether or not other documents in the bundles are in evidence. Arguably, they would not be in evidence before the Court. Equally, it could be said that the arbitral tribunal has been given those papers by the parties and it is the practice for arbitrators to read the papers, or to attempt to read them, before the hearing. Moreover, many arbitrators give directions that the parties shall furnish copies of documents upon which they rely, a proposition which immediately gives status to the documents so furnished. To resolve this potential anomaly, I offer two suggestions: First, the arbitrator should have mentioned, in the course of the arbitration, any document which, so to speak, takes his fancy. He may say "What about the letter of X" or "Should I look at the letter of Y". This writer feels that the arbitrator would be bound by the answer unless a clear injustice would result.

Undoubtedly, if the arbitrator is to rely upon a document to which no reference, or insufficient reference, has been made, he must alert the parties to that possibility and invite their comments. Even if the hearing has closed.

In passing, I should call attention to two evidential matters which require comment. First, if there is a document which the arbitrator has seen and which he has put out of his mind, he should say so, either at the time or in the reasons for the Award. Then, there is the question of evidence which may have been admitted *de bene esse,* that is to say for what it is worth, during the hearing. The arbitrator has to decide what it is worth before using it. I think he would be well advised, if the point about admissibility had been contentious, to say whether or not he was relying on that evidence.

Having said that, the arbitrator is not a judge and does not set out and review the evidence as in a judgement. There would be no point in his doing so, as his findings of fact, which are the reasons for the award, are not themselves appealable. Similarly his reasoning, his process of thought is not required. All that is necessary for the award is that there should be findings of fact and conclusions of law which themselves explain the decision in the Award. Nothing more but nothing less. A professional, however, would normally wish to satisfy the readers of the Award that it was soundly based, on consideration of both facts and law, and would set out the motivation of the Award as fully as the circumstances of the reference dictated. How much one puts into the Award, beyond the essential motivation is a matter of judgment.

All this is not law at all. It is the logical selection and synthesis of the evidence to support the conclusions that will be drawn. Each step must be secure. As you develop the synthesis, think of the mountain climber whose safety depends upon the pitons that he hammers into the mountain face and the security with which he secures each clip and ties each knot. He finds the crevice, he drives in the piton. He tugs it to test it. Sure of the piton, he now attaches the rope. He tugs it and tests it before he transfers his weight to it. He makes a little progress and repeats it, tugging and testing every time, so that he proceeds only on a series of points which he has tested rigorously, step by step. During the first pass, the Denning pass, we may have made some intuitive leaps. Now we cannot rely on those. We must be secure every step of the way. If that means that one or more of those intuitive leaps cannot be supported by logical synthesis, then they will have to be abandoned. Many a judge finds that he has to change his mind when he writes the judgment. It is the hallmark of a competent decision maker that he or she is not blinded by his own first impressions, right though they often may be. Test every step as you go forward. The peak of this particular climb is a plateau which consists of one or more

findings of fact. You have a duty to be especially careful with it, because there is no appeal against a finding of fact.

Now, the distinction between fact and law is not quite as clear cut as might be supposed. By kind permission of the publishers, I have copied from the first edition of Mustill and Boyd[3] a list of cases in which the courts have considered whether a particular conclusion was a finding of fact, a conclusion of law, or a mixed conclusion of fact and law. I am not at all sure that it should be read other than as illustrating the point that while a matter may be of fact or of law, or conceivably both, an intuitive decision as to which may not always be correct.

How then do we analyse law for the purpose of an Award? It is said that one essential difference between English Law (and other Common Law) and Civil Law is that the Common Law is established by precedent, the principle of *stare decisis,* while Civil Law follows its written codes. As a matter of simple fact, that is a false distinction. For one thing, the Common Law is substantially consolidated or codified in statute - in England for example, the Sale of Goods Act, the Unfair Contract Terms Act, innumerable others. For another, in France, Germany and other Civil Law countries, there is a substantial body of law developed in the Courts, and subject to as much commentary and academic analysis, if not more, as is the case in the Common Law system.

Moreover, in complex contracts of the kind which arbitrators see in some industries (construction and maritime cases are examples) the legal environment is largely an environment created by the parties themselves in creating their contracts which often are close to a form of private law, whose interpretation may owe as much to the practice within the trade as it does to any Court.

Thus it is suggested that, although the arbitrator needs to work within the confines of the law applicable to the issues, the approach will be much the same in any jurisdiction. There is a question as to the extent to which the arbitrator ought to research the law

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[3] *the Law and Practice of Commercial Arbitration.* Sir Michael J. Mustill and Stephen C.Boyd, First Edition, Butterworths 1982, Appendix 5 at 707 *et seq*. Why this intriguing survey was not continued into the later edition must be a matter of conjecture. Arguably, it is less to do with Arbitration Law than with Substantive matters.

himself or to apply law which has not been argued by the parties or their Counsel[4]. It is not as clear-cut an issue as one might suppose. Now is not the opportunity to analyse that question at length. The safe answer is probably that it is as well for the arbitrator to indicate the way his mind is working and to give parties an opportunity to deal with it.

What, then, does the arbitrator have to do in the analysis of law?

He has to consider and decide each issue of law in the context of the case set out by each party and in the light of the facts found. That will be done by reference to the submissions of the parties. In the event that there is an issue of law which the parties have not addressed, the arbitrator will have to decide whether to ignore it (if it is of little importance), whether to bring it to the parties' attention (almost always the best course) or to adopt it, using as reason the fact that the law is self-evident and the parties must have intended the arbitrator to consider it in any event (only a valid approach in the most obvious cases). The arbitrator's decision will have to be reasoned, and he will have to bear in mind that a decision in the context of one issue may have a bearing on others.

Let us look at the practical aspects. The authorities offered by the parties will be offered in support of the parties' various propositions. Beware of extracts from judgements. They may be out of context and it has not been unknown for an extract from a dissenting judgment to be submitted without the majority view, a practice which, if unnoticed, might throw one a little off course. Beware that, even in the leading texts, there may be author's views that have been included as a polemic or to promote discussion. Beware of, but do not disregard, foreign judgments, which may be persuasive. Published and unpublished arbitral awards are interesting but not authoritative. That does not mean that an arbitrator may not himself adopt the same view, provided he does not abdicate from his own responsibility in doing so. Expert arbitrators in particular should ensure that they are given full reports of every authority cited, so as to develop their own understanding of the issues in the reference. If one is not a practitioner of law, then the appropriate law must be made available. If it is not, there is a right to ask the parties for it.

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[4] In *Eco-Suisse China Time -v- Bennetton,* the European Court of Justice found that the tribunal had a duty to apply the law (in that case, European competition law) whenther or not it had been raised by the parties.

Ultimately, and this is unlikely to be a course adopted by an experienced or trained arbitrator save in very special circumstances, there is the right of an arbitrator to seek legal advice. If that is solely as to form, it need not be discussed with the parties. Anything else must be put to the parties for their views. With the new English legislation, even matters of form may have to be disclosed for comment.

In the English practice, the analysis of a judgment involves distinguishing between the *ratio decidendi*, the reason for a decision and *obiter dicta*, or remarks by the way. The *ratio decidendi* is the basis of the law of precedent, although you will find commentators disputing what is and what is not the *ratio* of this case or that. Put simply, if a *ratio decidendi* can be shown to set out a principle, than it is the law, subject to what a superior Court may decide. I will not go into which Court can bind itself and how one Court treats another. For an arbitrator, that is what the law is. The great American Jurist, Oliver Wendell Holmes jr. once said that law was no more and no less than the prediction of what a Court would do.

Obiter dicta are another matter altogether. They may be pious wishes as to what the law ought to be. They may be suggestions as to what it would be were the point to require determination on another occasion. They ought not be disregarded; they are part of the debate. Nevertheless, they do not bind anyone and may be wrong or irrelevant. It is perhaps a pity that judges do not follow the example of the American Humorist, I think it was Artemus Ward, who wrote in his material, from time to time, "NB, this is a goke" - like the studio manager with his placard "Laugh". Judges, however, do not say "This is the *ratio decidendi*, these are *obiter dicta*. Commentators do that later.

Interestingly, the judge concerned is the one person who will not tell you which is which. Moreover the leading case, the case which creates it, is the one case where the *ratio decidendi* is not defined, examined or tested. In practice the *ratio* commonly is found by *post hoc* analysis of the decision.

One of the tasks which is treated as a matter of law is the interpretation of contracts. The rules of construction you have dealt with elsewhere, but there is one citation you would do well to remember. Lord Diplock, I think it was who said that, where there was some doubt and a literal interpretation of the words of a Contract were contrary to business

common sense, then business common sense should prevail. There can be no doubt that the principle applies *a fortiori* in arbitration, historically a commercial process decided by commercial men.

The final stage in preparing to write the award, my third pass, the quality control pass, is to deconstruct the product of the second pass, the detail pass. Beginning with the dispositive section of the proposed Award, the arbitrator now goes over each decision to check that it is clearly and unequivocally motivated by a finding of fact or a principle of law that is itself set out in the Award. For each such finding or principle, he checks again, to see that it in turn is so motivated. For every logical proposition in the text of a reasoned award, there must be a logical chain which runs back either to the evidence or to an identifiable principle of law. Continuous at every link.

As part of this quality check the arbitrator should look to see what, if any, logical chains of thought there may be that do not lead either to a finding of fact or to a disposition. He should then either ensure that the Award contains some explanation which ties those chains or say that they do not lead to a decision in the Award (usually because, upon examination, the arbitrator has not found them relevant to the decisions that are required by the issues). The classic phrase is, "nothing turns on this aspect of the matter." or something of the kind.

Finally, the draft Award should be allowed to mature, as I have said already. Like good cheese. It should be left for a time, while the arbitrator gets on with something else. Before printing out the final version, he should read the entire Award and satisfy himself either that it is in line with his intuitive view of the reference, or, if it is not, that he understands fully, and any reader will understand, why it is not.

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