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Pinsent Masons Speech

Winter of Discontent

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It is a great honour and pleasure to have been invited to give the Pinsent Masons lecture especially as I am following in the footsteps of such distinguished predecessors. I noted that Lord Hope in his speech delivered last year began with reference to a case in which he was involved at the beginning of his career that went to the House of Lords and involved an arbitration point.

I too would like to begin with a personal story because I am in a position to tie it in nicely with our hosts.

In 1965 I was what was known as “a straw junior” in a case in the Chancery Division in England before Mr. Justice Cross, later Lord Cross. The issue arose in relation to a trust and the Learned Judge asked my leader whether a particular beneficiary was represented. My leader answered negatively and they both looked at each other and then looked at me. And the judge adjourned the matter to 2.00 pm. I had no idea what was going on, but by 2 o’clock I had received a piece of paper wrapped in pink ribbon which I was told was a Brief to appear on behalf of the beneficiary. When the Judge asked whether the beneficiary consented to the Order being sought, I was pushed to my feet by my leader, bowed to the Judge and said there was no objection.

The reason I tell this story is because the Brief that was delivered to me over lunchtime was a Brief from the firm of Masons who had a small office in Fleet Street. Masons can trace its origins to 1769. The oldest person I know who was at Masons at roughly this time can only take me back to 1969. At that stage there were three partners, one assistant Solicitor, three managing clerks and three articulated clerks. The third articulated clerk was none other than John Bishop who is my informant. I think it is safe to assume that in 1965 there were the same or less lawyers and clerks involved.

Today Pinsent Masons is the result of several mergers. The firm has over 350 partners and over 1600 lawyers worldwide. It has 12 offices outside of the UK and several within the UK.

I set out these statistics not as any form of promotion for the excellent firm of Pinsent Masons – for they need none, but to point out the way in which the providers of legal services have grown so substantially in this half Century. But as the firms have increased in size, so have the clients and so have the disputes which are submitted to arbitration. It is fair to point out that society has become more complicated since those earlier days.

The title of my Lecture tonight combines the words winter and discontent. I do not want to be alarmist, but what I propose to do is to look at some of the major criticisms of arbitration today and see whether the criticisms are justified and whether I can suggest ways in which they can be dealt with effectively by more efficient procedures.

We know something is wrong when one well known commentator heads his article about arbitration with the word “autumn” in it.¹ Things must have got steadily worse when shortly after another refers to “winter” in his article.²

I spend a lot of my time in places where we have four seasons in a day so I am more optimistic.

So what is the problem? Arbitration is today the preferred method of dispute resolution particularly where the parties come from different jurisdictions. The New York Convention makes arbitration awards far easier to enforce than state court judgements. The Convention applies in 157 States and territories. The UNCITRAL Model Law has had a great effect in harmonizing arbitral laws across the globe. Judges are getting better at dealing with enforcement issues. The case load of most major centres has seen a rise over the last many years. Training for arbitration abounds. Conferences and courses on arbitration are held weekly somewhere in the world. Books on arbitration proliferate. University degrees on dispute resolution are extremely popular. The word arbitration was not mentioned once during my study of law or rather I should say that to the best of my recollection it was not mentioned as I take seriously Toby Landau’s criticism of our reliance on witnesses’ recollection.

No one today involved in international arbitration or construction arbitration would recognize what Lord Wilberforce said 30 years ago:

“The purpose of arbitration is to contribute to amicable settlement. Arbitration is not meant, like litigation, to result in a judgment. Its essence and the essence of a good arbitrator is to bring a dispute to a peaceful conclusion.”

The first Arbitration Act in 1698 was drafted by the philosopher John Locke who wanted disputes settled without legal entanglement. How disappointed he would be if he had access to my emails.

Locke, apparently with Shakespeare, had a poor opinion of lawyers and the “intricacy of law”, which he thought hindered trade. He thought his bill would sort this out. As Horwitz and Oldham put it as cited by Roebuck in his very latest edition on the history of arbitration:

“In forwarding the measure to the Privy Council, the board reiterated that its aim was to remedy the ‘great obstructions in trade arising from the tedious determination of controversies between merchants and traders in matters of account or trade in ordinary methods’. The new procedures would be accessible to others than men of trade and business but it was on the grounds

¹ William W. Park, ‘Arbitration in Autumn’, 2(2) *J. Int. Disp. Settlement* 287 (2011).

² See Alison Ross, “Game of Tribunals” – winter is coming, warns Born’, *Global Arbitration Review*, report on the *NYLAC’s Grand Central Forum* event. Available online: <http://globalarbitrationreview.com/article/1067197/-game-of-tribunals-%E2%80%93-winter-is-coming-warns-born>

of the 'very great advantage to the trade of this kingdom' that Locke and his colleagues urged its adoption".³

Paradoxically today, we tout arbitration as an aide to trade.

Parties to construction arbitrations would also be unable to recognise a process such as described by Lord Wilberforce or intended by John Locke.

I think that every criticism of the present system can somehow be traced back to speed and cost. This seems to come out clearly from surveys the most significant of which was the Queen Mary/White and Case survey last year. This identified cost and lack of speed as major problems but it also identified due process paranoia on the part of some tribunals which itself gives rise to delay and thus extra-cost.

It is axiomatic that everyone wants a quick, cheap and successful dispute resolution system. But that is not what they usually agree to and to complain after the event seems a little unfair on the process.

If disputants really want a quick and speedy process, why do they often agree on a 3-person Tribunal? Why do they insist on appointing esteemed but very busy arbitrators? Why do they agree to the use of an institution which can add to the cost and delay? Why do they appoint top class international firms of arbitration specialists who will have to charge more, throw more people on the case and take all the points reasonably available? Why don't they agree that there shall be no order as to costs or at least that recoverable costs should be limited just as they often agree to limit liability damages?

Well the short answer is that they do none of these things because they want to win and win as much as they can and get reimbursement in full for the cost of receiving justice.

Therefore, because they do all these things in order maximize their chance of success the process takes longer and costs more. In those circumstances is it fair to complain?

It is true that for example the ICC rightly takes a poor view of arbitrator's delays and will now reduce their fees if the award takes longer than 3 months absent unusual circumstances. But again, here we are faced with an illogicality.

If it takes 2 international law firms with a huge cast of lawyers and paralegals 2 years or more to plead their case with voluminous pleadings, lengthy well-crafted witness statements, huge disclosure applications, enormous and complex expert witness statements all followed by say a 2-week hearing itself followed by lengthy and detailed written closing submissions, is it not just a little bit rich to expect 3 arbitrators without much help to provide the answer within 3 months. Furthermore, if it does take them 6 or even 9 months does anyone bother to consider the complexity and difficulty of the task given them. If parties insist on throwing in the kitchen sink, they must be patient while the Tribunal goes through the trash bin looking for the good points.

³ See, pp. 434 – 435, D. Roebuck, *Arbitration and Mediation in Seventh-Century England*.

It is also not fair to compare the role of arbitrator to that of a judge in this context. If it is agreed by the parties that a case needs 16 weeks a judge will reluctantly set aside time and hear it. I doubt he would be so ready to sit 16 weeks if he were told that his salary for that period depended not on his time and effort but on a very low percentage of the value of the case as pleaded. Therefore, when agreeing to an institution which operates an ad valorem system parties have to tailor their expectations accordingly. It is not unfair to say that you get what you pay for.

As to costs let us not forget that the bulk of the costs in an arbitration are the legal costs and expenses and the experts' fees.⁴ The Tribunal's costs are insignificant.⁵ I have in the last year or so had cases where the combined costs claimed exceeded \$78m. it is not uncommon in major disputes to see both sides claiming around \$25 m each.

So I hope I have made the point that what and when comes out of this process depends very much on what goes in and that all this impacts on costs and delay.

The Answers

So what can a Tribunal do to control the process by being more expeditious and resulting in a more economical process?

It may seem a trite observation but we have to start with more case management by the Tribunal itself. I say trite because we have been talking about this for years and no substantial improvement has been made. In this respect, some court systems are way ahead of international arbitration.

Why is this so? In my view it is a combination of lack of time on the part of some Tribunals and a desire by counsel to keep in control of the process. How does this manifest itself? In my view the Tribunal too often passes the buck to counsel. Please see if you can agree a procedural way forward is the oft heard mantra. Counsel then get together and come up with a detailed procedural schedule leading to a hearing in 2 years' time. The Tribunal is then asked to give its blessing to this which in the spirit of party autonomy and the desire for a quiet life it obligingly does. This PO then governs the subsequent procedure. Of course, some Tribunals will question some parts of this PO and make a suggestion or two but the PO remains effectively in tact.

So what has gone wrong thus far? Well in my view counsel have failed to engage with the Tribunal as to their views as to how this dispute is best dealt with. Most Tribunals contain a wealth of experience and on the principle that there is nothing new under the sun is it not a shame that the combined experience of the Tribunal has not been brought to bear on the subject of how best to resolve this dispute.

⁴ ICC Commission Report, Decisions on Costs in International Arbitration, ICC Dispute Resolution Bulletin 2015, Issue 2 p.3 (“Party costs (including lawyers’ fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration) make up the bulk (83% on average) of the overall costs of the proceedings.”).

⁵ *Ibid.*, p 3 (stating that arbitrators’ fees make up only 15% of total arbitration costs in average).

All this leads to my first proposal and that is that in all but the simplest of cases where cost is a crucial factor there must be a very early meeting with the Tribunal. This should be in person if possible if not by video. As a last resort by phone.

The importance of such a meeting especially in cross cultural disputes cannot be over estimated. This is the occasion when the Tribunal can explain how they think this dispute can best be resolved. For example, this is the occasion when the Tribunal can explain to a civil law party what its disclosure obligations and rights will be. This meeting if conducted thoroughly and effectively can eliminate future surprises. This will help to limit procedural challenges.

On this occasion the Tribunal can discuss whether some points can be decided ahead of others and this may even help a future settlement. I will return later to discuss the issue of costs which needs to be addressed in some detail at this first meeting.

Two points to note about this stage. Firstly, a very early meeting is sometimes objected to on the ground of cost. This is very shortsighted. Second it is said that it is too early in the process for the parties to make meaningful observations because they need to see the other sides pleaded case.

I try to meet this objection by the following method. As soon as I am appointed (sole or Chair) I ask the Claimant to let me have a three-page summary of its case together with its views as to how it sees the case progressing procedurally. I then invite the Respondent to do likewise. Sometimes there is another round of short submissions especially if a jurisdictional objection has been raised.

In this way, I am better informed when I discuss with counsel the best way forward.

I should add that at the first meeting I do invite very senior representatives from both sides to attend to ensure that they are comfortable with procedural agreements. For instance, if there is a delay in the hearing date because of counsel's unavailability I want to know that the client appreciates that the Tribunal can give earlier dates but the delay is caused by their counsel's difficulties.

I do not propose to deal today with the sort of detail that goes into a PO. However, I do want to say something about page limits which I know are not too popular with counsel.

For those of you who have never been a judge or arbitrator you have never felt the sickening and depressing feeling that comes when you open an email and find it attaches an 800-page Statement of Case or a 350-page Rebuttal or an Opening submission of 500 pages let alone a Closing submission of 300 pages. And as for a 200-item document request. Well!

One of my arbitrator colleagues was going through a 200 page Redfern Schedule and when he got to the bottom of page 200, he noted that the only response that Respondent's Counsel could muster was 'lost the will to live'.

Judges have a bit more power, as we will see later. Judge Alley in the US District Court for West Oklahoma in February 1989 put it strongly when he dismissed a

motion for breach of the relevant County Bar Association’s lawyers’ creed. Finding it aspirational only he however agreed that the breach called for judicial disapprobation, which he expressed as follows:

“If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.”

Let us also recall the wise words of Lucy Reed in the Lecture she delivered in Hong Kong in 2012:

“In too many cases, counsel are presenting too much material to the tribunal. With flexible rules and no page limits in international arbitration, plus the (I think, irrational) fear of leaving something important out, we see records with 500-page memorials, scores of witness statements and expert reports, and thousands of exhibits. How can we expect the arbitrators to find a trail up such a mountain of a record? Most important, how can we expect them to find our trail, to our client’s win?”

I need to pause and emphasize something here. Sculpting the case, or mapping the trail of the case for the tribunal, does not mean “dumbing it down.” Our legal analysis must be first-rate and the record must support it. In complex cases, the memorials must be long and the record must be large. But quantity still is not the measure of quality. We do our clients a disservice by putting all the available evidence and law into the record, just because we have it.”

In the second Harbour Litigation Annual Lecture, Lady Justice Gloster, also talked about the problem of excessive length of, *inter alia*, pleadings, witness statements and length of arguments during the trial (and that is equally applicable to arbitral proceedings).⁶ She referred to the case of Mylward v Weldon,⁷ a case reported in February 1596. Because this case is very instructive, and I might add amusing, I shall mention it as well. In that case, the then Master of the Rolls was enraged by the plaintiff’s pleading, which I quote, *“doth amount to six score (120) sheets of paper, and yet all the matter thereof which is pertinent might have been well contained in sixteen sheets of paper.”* When the Master of the Rolls discovered that it was the plaintiff’s son, Richard (aka Alexander) Mylward, who was responsible for drafting the pleading (i.e. “replication” as the pleading was called), he made the following order:

“It is therefore ordered, that the Warden of the Fleet shall take the said Richard Mylward, alias Alexander, into his custody, and shall bring him into Westminster Hall, on Saturday next, about ten of the clock in the forenoon, and then and there shall cut a hole in the myddest of the same engrossed

⁶ See Lady Justice Gloster, Harbour Litigation Funding 2nd Annual Lecture, Commercial Litigation - the Far Horizons, 14 May 2014:

⁷ (1596) TotWill 102; (1595) EWHC Ch.1. I am grateful to Gloster LJ for this reference and note that Aikens LJ introduced it to her.

replication (which is delivered unto him for that purpose), and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders, with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the Courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall, and shall then take him back again to the Fleet, and keep him prisoner, until he shall have paid 10 pounds to Her Majesty for a fine, and 20 nobles to the defendant, for his costs in respect of the aforesaid abuse."

I have to say that I agree with Lady Justice Gloster who concluded by stating that she would love to have that power and would use it frequently!

Unfortunately, or fortunately, arbitrators do not hold the same power to deal with counsel who are responsible for excessive pleadings. However, we can encourage counsel to reduce the volume of their pleadings or if necessary introduce page limits. After all what happened to the art of précis which we all learned at school.

You will not be surprised to hear that I agree wholeheartedly with Lucy Reed, who highlighted that there is a "*need – crucial in certain types of cases – for counsel in international arbitration to focus not so much on what may go on in an arbitrator's head but more on how much can fit in an arbitrator's head.*"⁸

None of this is new as the Roman jurist Quintilian said in the 1st Century BC:

*"We must not always burden the judge with all the arguments we have discovered, since by doing so we shall at once bore him and render him less inclined to believe us."*⁹

I would like to propose various measures can be adopted in order to reduce costs and time and contribute to a better and speedier award.

Early Opening

First, early openings. I have promoted this initiative and used it for quite a long time. The early opening is a hearing held towards the beginning of a case but preferably after the first round of written submissions and hopefully the witness statements and experts' reports have been served. It may take place later if there is sufficient time before the hearing. The optimum time is about six months before the main hearing.

At the early opening hearing counsel presenting the case should appear and be prepared to open the case orally to the tribunal. They should take the tribunal to the relevant parts of the contract or treaty and advance their case by reference to the evidence filed to date. They should introduce the tribunal to the relevant correspondence. They should also outline their legal submissions. Further, at this early opening all experts should give a brief presentation of their report and expertise.

⁸ Lucy Reed, *Arbitral Decision-making: Art, Science or Sport?*, The Kaplan Lecture 2012.

⁹ Quintilian, *Institutio Oratoria*, 5.12.8.

All of this will have the effect of informing the tribunal's final preparation for the main hearing. During this short hearing, it is also an opportunity for the tribunal to discuss procedural issues that may arise at an early stage.

As explained above, one of the problems we face at the present time is that there is an absence of arbitral triage – in other words parties throw everything, good and bad, at the tribunal and leave it to them to sort out. This is a very wasteful exercise and expensive too. Tribunals must be rigorous in identifying bad points that can be decided early in the proceedings and get rid of them quickly. Further thought needs to be given to introduce into arbitration rules a system of summary judgement, to enable obviously bad claims and defences to be dealt with quickly and efficiently. The new Singapore rules do precisely that.

Another great advantage of the early opening is that it ensures that all three members of the tribunal get on top of the case at an early stage rather than just the presiding arbitrator. This meets the requirement of the Reed Retreat proposal in which Lucy Reed suggests that the three arbitrators should take time before the commencement of the hearing to lock themselves away for a couple of days and go through the issues so that they are well prepared for the main hearing.

So to recap, the advantage of this procedure is that it assists in getting the whole tribunal up to speed. It enables the tribunal to ask questions, to raise issues for example relating to missing witnesses, and to assist in attempting to reduce or refine the issues. In this way, questions raised by the tribunal will not take any party by surprise on the first day of the hearing and there will be plenty of time to deal with them.

To those who say that this procedure only serves to increase the cost I respond by pointing out the following:

- This procedure helps to achieve a quicker and better award;
- It helps ensuring that all three members of the tribunal are on top of the issues;
- It obviates the need for fuller openings at the hearing and may lead to avoiding skeleton openings;
- It provides an opportunity for the tribunal and counsel to meet early, and may lead to a refining of issues if not the compromising of some.

Closing Submissions

My second proposal relates to closing submissions. In most cases today, counsel prefer to have written closing submissions. Only in the most straightforward cases are counsel prepared to make oral closing submissions.

Written closing submissions can be a great assistance to the tribunal provided they are supplied within a reasonable time of the conclusion of the main hearing whilst the matter is still fresh in the arbitrator's minds. However, it assists no one if the closing submissions are no more than a regurgitation of everything that went before the hearing together with an analysis of everything that occurred during the hearing.

I think it is most helpful if the tribunal reserves some time before the close of the hearing to discuss with counsel what format and content of closing submissions will be helpful to the tribunal in light of the issues in the case and the manner in which the oral hearing developed.

What really assists a tribunal is an analysis of what they should take away from the oral hearing. If credibility issues are at stake, then the tribunal needs assistance in sorting out the rival versions. Obviously, if a new point came up during the oral hearing it may need to be addressed. A tribunal will not be assisted by citation of huge chunks of transcripts but will be better assisted by page and line references.

During this discussion, the tribunal can indicate which particular issues might benefit from further adumbration. In some cases, the tribunal will benefit from references to arguments in prior written submissions rather than having them repeated. Finally, the tribunal can discuss with counsel the issue of page length in light of the tribunal's particular requirements. It goes without saying that closing submissions must shoot at the same target or else they will be valueless to the tribunal.

Expert Evidence

The third proposal that I want to submit today deals with expert evidence. When one approaches the issue of reducing costs in arbitration, one has to consider the three main categories of costs: legal counsel's fees, experts' fees and the tribunal costs. Although, as I explained before, the latter is a smaller cost item when compared to the two former categories, tribunal costs are often more scrutinised. Why don't counsel's fees and experts' fees receive the same attention? It is probably because the onus of deciding to use experts lies with the parties, therefore the additional costs relating to this decision is commonly accepted and considered as reasonable. It is certainly more difficult to blame a party for doing everything possible to win a case.

However, the use of expert evidence can be pointless and even burdensome for the tribunal especially when experts are not fully aware of their role. For instance, I have seen experts acting like the twelfth man of one party's team during a hearing. This lack of neutrality is a real problem because, at the end of the day, experts are there to help the tribunal understand questions that are not in their scope of expertise. The tribunal will make no use of the testimony of a biased or seemingly biased expert. In this situation, the use of experts is just pouring money down the drain. This is why experts need to be instructed, as soon as they are appointed, that their role is not so much to help their appointed-party win at all costs but to assist the tribunal in understanding the technicality of the dispute, regardless of which party is paying them.

It is really important that the experts are asked the same question or questions. If they are asked different questions as is sometimes the case, then they are shooting at different targets and their reports will be of limited assistance to the tribunal.

I think it is really helpful if at the very least the presiding arbitrator has regular telephone calls with the experts to see how they are getting on and to head off any possible problems. This regular contact with the tribunal helps to underscore that the experts are in fact working for the benefit of the tribunal.

Post Hearing

My fourth proposal concerns the role of experts post hearing. At the end of a case where there is contested let us say accounting evidence, the tribunal is often left in a quandary. There may be ten points of difference between two highly distinguished experts dealing with say Discounted Cash Flow issues for instance. If the tribunal accepts that expert A is right on all ten, then they just have to adopt his figure. But what is to happen if they accept five propositions from expert A and five propositions from expert B and thus do not accept either expert's bottom line. This is a really common occurrence. What I have done to deal with this problem is to invite the parties and the experts to agree at the end of the hearing that once the written closing submissions have been completed, the experts will become the experts solely of the tribunal and will work only with the tribunal in a confidential manner without any reference to their former client or instructing counsel. The tribunal can then tell the experts that they want the damages calculated on the following bases and then invariably both experts will have no difficulty in coming up with a jointly agreed figure. Some of the calculations of damages, particularly of discounted cash flow analyses are extremely complicated and it is unfair and unreasonable to expect a tribunal to work it out themselves. This idea of converting the experts into the tribunal's experts in a confidential manner is a really cost effective way of proceeding with accuracy and speed. This approach works well in construction cases too. Once the experts know the decisions on principle they can usually be relied upon to attach the corresponding figures to that conclusion quite easily and non-controversially.

Tribunal appointed experts

I know that common lawyers are resistant to the appointment of a tribunal expert. They fear a loss of control in the process. However, I have come across a hybrid situation which might work in some cases. We used it in a large and complex construction case. We suggested to the parties that the tribunal and the parties attempt to agree 2 experts acceptable to all who would be engaged to prepare a detailed report as to what actually happened on site. In order to complete this task the experts who were agreed by all had the right to call for any documents they wanted and the parties were free to send whatever documents they liked to the experts to assist in this task. The experts were empowered to meet with the parties in the absence of the tribunal to further their fact gathering exercise. If issues of principle or law arose then a hearing with the tribunal would be convened.

Eventually the experts prepared a comprehensive draft report on which the parties were free to comment and to question the experts before the tribunal. The tribunal then had to decide which of the fact conclusions they accepted and to blend them into their legal findings. This process was for more effective than excellent experts appointed by the parties disagreeing on crucial issues and passing the buck on very technical issues to the tribunal. I commend this approach to you. As with all things the success of this procedure depends on finding the right experts who are able to work as a team.

Awards

Another way to expedite the process is for arbitrators to write shorter awards. Awards today are far too long. There is no need to set out the procedural history in the award. It is a matter of record that could be placed in a schedule. Similarly, far too much space is taken up elaborating the parties' respective cases. The parties know their arguments and the tribunal should be able to make it clear that they too understand the case by the way in which they express their result in the light of the parties' submissions. Awards, mostly confidential, are not court judgements and do not need to be as elaborately set out.

In some cases, it is possible for the tribunal to agree with the parties that it will give the result with detailed reasons to followed as soon as possible. This is particularly helpful where the result is urgently required and also in situations where the parties need to know whether the case is going to continue so it is particularly relevant for jurisdictional issues.

Costs

Delay and costs are essentially intertwined. The longer a case takes the more it costs. I have recently had to deal with cases where the costs of both sides ranged between \$50m and \$80 m. Whereas in litigation there are elaborate mechanisms set up to control costs in litigation but no such system exists in arbitration.

Most rules give a wide discretion to arbitrators and many state that costs should follow the event. This doctrine of cost shifting is of ancient origin. In England, it can be traced back to the statute of Marlborough 1275. In civil law, it can be traced back to the 4th century AD where Emperor Zeno decreed that a successful party should recover its costs.

Interestingly, it took a little longer for the law to recognise a successful defendant's right to costs. The statute of Marlborough of 1267 made a start but the position wasn't finally made clear until the statute of 1607 which provided that the defendant could recover its costs in all cases where a plaintiff could have done so if successful.

In the Harbour litigation-funding lecture, which I delivered last month, I raised for further discussion whether the cost shifting rule was an impediment to settlement.

In some cases, it is the amount of costs that keeps the case alive. It can be argued that the risk of having to pay the other parties' costs in addition to your own has caused parties to leave no stone unturned to ensure the other party pays them, and this leads to a hugely expensive legal system.

I could not help noting an article in the *London Times* on 5th February this year.¹⁰ It discussed a Centre for Policy Studies think tank report,¹¹ in which the billable hour

¹⁰ Jonathan Ames and Frances Gibb, '£1,000-an-hour lawyers 'restrict access to justice'', *The Times* (5 February 2016). Available online: <http://www.thetimes.co.uk/tto/law/article4683325.ece>; See also Owen Bowcott, 'City law firms charging up to £1,100 an hour', *The Guardian* (5 February 2016). Available online: <https://www.theguardian.com/law/2016/feb/05/city-law-firms-charging-up-to-1100-an-hour>

approach was referred to as “an outdated and unsustainable billing method for legal services.” It went on to claim that payment by time reveals inefficiency. All this rather echoes the observation of the president of the American Bar Association in 1975 that “[...] lawyers do not unfairly charge their clients. Rather, they simply do not dispense legal services efficiently”.¹²

But more significantly, the think tank report cited Lord Justice Jackson who had highlighted that unrestricted cost shifting leads parties to leave no stone unturned. The more the costs increase the more determined that each party becomes to ensure that the other party pays them. This is suggested leads to a justice system that is exorbitantly expensive.

Recently, the Lord Chief Justice and the Master of the Rolls issued a statement regarding the costs of civil litigation, which is equally applicable to arbitration;

*“More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. [...] Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action.”*¹³

Thus, it is often possible to get parties to compromise on the main issues that separate them. But how often have we heard in settlement negotiations something along these lines:

“There is no way I am going to pay or contribute to that person’s legal costs”

In addition to assisting the settlement of cases, would the amelioration of the practice to award legal costs to a successful Claimant also have the effect of acting as a restraint on the build up of large legal fees because there would be a fear of no recovery, even if successful. Would this in turn lead to a more cautious presentation of cases to tribunals and help to avoid the kitchen-sink approach where everything – good and bad, gets thrown at the tribunal resulting in large claims for costs and a delay in receiving an award. As I said earlier, what comes out very much depends on what goes in.

I wish to make it plain that I have no settled view on this topic, but I do think that the time has come for a debate on this issue.

¹¹ Jim Diamond, ‘The Price of Law’, *The Centre for Policy Studies*. Available online: <http://www.cps.org.uk/publications/reports/the-price-of-law>

¹² James D Fellers, American lawyer, president, American Bar Association, *Los Angeles Times* (30 May 1975).

¹³ ‘Transforming Our Justice System’, by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, 15 September 2016. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf

Now, I think that it is absolutely essential that the subject of costs is discussed at the very first directions hearing. In my view it is also essential that someone from senior management is present to hear this discussion.

The following are some of the topics that require a discussion at this very early stage of the proceedings:

- (a) now that the dispute has arisen, do the parties want to enter into a costs agreement, which might limit or exclude the recovery of costs;
- (b) would the parties like the tribunal to place a cap on recoverable costs based on the arbitrators' experience of similar cases but subject to a later review if appropriate;
- (c) would the parties like the tribunal to apply or work out an ad valorem scale for recovery of legal expenses;
- (d) would the parties agree that the maximum recovery for legal costs is the lowest of the two bills at the end of the day;
- (e) the parties should be informed that the tribunal is prepared to take into account unequivocal without prejudice written offers of settlement which exceeds the amount actually awarded.¹⁴
- (f) but above all the tribunal should make clear that the costs shifting rule will not necessarily be followed because the tribunal will take into account the parties' conduct in the proceedings. For example, unnecessary prolixity, both oral and writing, relying on obviously bad points, calling too many witnesses, not calling the right witnesses, unnecessary interlocutory applications, writing unnecessarily aggressive letters and generally behaving unprofessionally. The tribunal *may* also take into account whether the costs are reasonable/proportionate to monetary value/property in dispute and whether the amount of work done is proportionate and reasonable.

Finally, it is a good practice to include a specific clause in the first procedural order that informs the parties that they have a duty to arbitrate in good faith, which includes an obligation to co-operate with the opposing party and the tribunal. The tribunal should direct the parties to do all such things necessary during the proceedings as may be required to enable the award to be made fairly and efficiently. The tribunal should also make clear that it will not hesitate to order costs to be paid forthwith, rather than waiting to the conclusion of arbitration, in respect of unnecessarily made interlocutory applications or adjournments. In this way, the tribunal signals to the parties and their lawyers that their conduct throughout the arbitration will be very relevant to the ultimate decision on costs.

In my view it is very important for the tribunal to establish its credentials and experience with the parties at the very beginning of the proceedings and as I just said, this includes making clear to the parties that the tribunal is concerned from the outset of the whole issue of the costs of the arbitration. In other words, costs need to be dealt with upfront rather than as hitherto as somewhat of an epilogue.

All of the above having said, one must appreciate that just like the assessment of damages, the assessment of reasonable costs to be paid by a losing party is not a

¹⁴ See *Calderbank v Calderbank* [1975] 3 All ER 333.

science. As the US Supreme Court said in relation to trial courts that is equally applicable to arbitral tribunals:

*“[T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney’s time.”*¹⁵

I agree entirely with this approach. But that said, it still seems essential for arbitrators to engage with the parties early on in the process so that orders in relation to costs do not cause surprise and resentment. Surprise is often the basis for dissatisfaction with the process. It should be avoided at all cost.

At the end of the day, we will have to appreciate that we are all involved in a service industry. The client should be king. But complaints about the way lawyers conduct cases go back millennia. Let me end with the Roman poet Martial who in his Epigram complained to his advocates in the following terms;

*“My simple claims about three goats
Not civil war or poisoned throats.
My neighbour stole them so I sue
The judge thinks that is the issue too
But you describe Rome’s darkest hours
The tyrants who abused their powers
You waive your arms about and shout
How Hannibal’s campaigns turned out
There’s just one favour you can do
Mention my goats I beg of you”*¹⁶

I thank Pinsent Masons for the opportunity of speaking to you tonight and I thank you for your attendance and patience.

¹⁵ *Fox v. Vice*, 131 S. Ct. 2205 (2011), at 2216.

¹⁶ Martial, Epigrams VI. 19.