"THE EFFECTIVE ARBITRATOR"[1]

DAVID HACKING[2]

Begin at the Beginning

> "'Where shall I begin, please your Majesty?' asked the White Rabbit. 'Begin at the beginning', the King said gravely, 'and go on till you come to the end: then stop.'"
> (Lewis Carroll: *Alice's Adventures in Wonderland*)

In a sense this says it all. It is what each party should be doing! It is what the arbitrator should be creating out of the arbitration!

In the welter of literature now available on the subject of arbitration and in the plethora of arbitration conferences, there is little guidance upon what the arbitrator should be doing to get the best out of the arbitration process.[3] Yes there is literature—and court cases—about arbitrators who, in the unfortunate language of the English Arbitration Act 1950, have "misconducted" themselves or the proceedings over which they have presided.[4] Yes there is also plenty of literature—and court cases—about arbitrators who have (or have not) exceeded their powers and/or exercised jurisdiction to which they were (or were not) entitled. Important though these restraints on arbitrators may be, they do not actually go to the heart of the arbitration process: how well is the arbitrator performing? Is he a good arbitrator or a bad arbitrator? If so, why? What is he doing which he should not be doing and what is he not doing which he should be doing?

1. This paper is based on the paper which the author presented at the International Construction Law and Dispute Resolution Conference at the Center for International Legal Studies in Salzburg on June 21, 1998. The author gives grateful thanks to Mr Harold Crowter FRICS, FCIArb, FFB for the ideas which he expressed in his recent article "The Pro-Active Arbitrator", *Arbitration: The Journal of the Chartered Institute of Arbitrators*, May 1998, Vol. 64, No. 2.

2. David Hacking is a Fellow of the Chartered Institute of Arbitrators and, as Lord Hacking, has been actively involved in the English House of Lords for the last 20 years in the reform of English arbitration law. He acts as an arbitrator in domestic and international arbitrations and has contributed widely in the current debate on arbitration. He was a member of the English Working Party on the 1998 ICC Arbitration Rules and is a partner of the law firm of Sonnenschein Nath & Rosenthal.

3. Good exceptions to this dearth of guidance is the good advice given in the 1998 Edition of Ronald Bernstein's *Handbook of Arbitration* and, going back a few years, the excellent Third Alexander Lecture given by Lord Justice Roskill (as he then was) in March 1977.

4. English Arbitration Act 1950, s.23(1).

The Key to the Door of Good Arbitration

The key to the door of good arbitration is that the arbitrator must have and retain the confidence of the parties. He must demonstrate he is competent and knows what he is doing. He should be confident without being arrogant. He should show he is in charge but be prepared to be flexible. He should be punctual and keep a discipline over the daily timetable. He should be approachable and demonstrate his ability to listen. He should be patient but yet firm. He should never enter into the arena and start arguing with the parties or their advisers. He should show compassion and make the witnesses feel comfortable in what to them may be a stressful experience. A gentle sense of humour helps. He should be scrupulously fair and never lose the confidence of the parties. Right to the end of the proceedings he should keep an open mind and not pre-judge the issues before him.

Yet there is more to a good arbitrator. He should, above all, run the arbitration, with the co-operation of the parties, in an efficient and cost-effective way. An arbitrator may be charming, competent, confident and approachable but if the arbitration rambles on day after day, week after week and, with bad scheduling, is lengthened by long gaps between hearings, that arbitrator will be failing and, worse still, damaging at large the arbitration process.

Revisions in the AAA, the ICC and the LCIA Arbitration Rules

Arbitration is not alone in providing a dispute resolution service. Mediation and conciliation, domestically and internationally, is gaining in popularity. In some jurisdictions, such as in England, there are serious moves to improve the Court processes. It is, therefore, timely that the AAA, the ICC and the LCIA, in the recent revisions of their Rules, have all given greater focus on the arbitrator taking an active role for the efficient conduct of the arbitration.

In Article 16.2 of the new AAA International Arbitration Rules (effective April 1, 1997) the arbitral tribunal is charged to "conduct proceedings with a view to expediting the resolution of the dispute", and in Article 16.3 it is given the "discretion (to) direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant

> testimony or other evidence, and (to) direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case".

In Article 20(1) of the new ICC Rules of Arbitration (effective January 1, 1998) the arbitral tribunal is charged to "proceed within as short a time as possible to establish the facts of the case by all appropriate means", and in Article 21(3) the arbitral tribunal is given the mandate of being "... in full charge of the hearings ..."

These repeat Articles 14(1) and 15(4) of the 1988 ICC Rules but what is new is Article 18(4) of the new ICC Rules:

> "When drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal, after having consulted the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and communicate it to the Court and the parties. Any subsequent modifications of the provisional timetable shall be communicated to the Court and the parties."

In Article 14.1 (adopting the language of section 1 of the English Arbitration Act 1996) the new LCIA Arbitration Rules (effective January 1, 1998) charge the arbitration tribunal

> "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute".

The new LCIA Arbitration Rules also give the arbitral tribunal, in Article 19.5:

> "the fullest authority to establish time-limits for meetings and hearings, or for and parts thereof".

The Construction Industry Model Arbitration Rules

At the initiative of the English Society of Construction Arbitrators, there has now appeared "The Construction Industry Model Arbitration Rules" (the "CIMA Rules") which were published in March 1997. As drafted the CIMA Rules only apply to arbitrations conducted under the English Arbitration Act 1996. I would hope, however, they will be put to wider use. It would not be a difficult drafting exercise to achieve this. If done, there would be a new set of Construction Arbitration Rules, available for worldwide use, with the object of providing "for the fair, impartial, speedy, cost-effective and binding resolution of construction disputes" (CIMA Rule 1.2).

There would also be available worldwide the other opportunities provided in the CIMA Rules for construction arbitrations, including orders for consolidation of proceedings when they arise under the same arbitration agreement (CIMA Rule 3.3),[5] orders for concurrent hearings or consolidation of proceedings when the same arbitrator has been appointed in different arbitral proceedings but involving common issues (CIMA Rules 3.7 and 3.9)[6] and orders for Short Hearings (CIMA Rule 7).[7]

The Duty to be Pro-Active

Unequivocally, therefore, the arbitrator is given, in each of these new arbitration rules, *the duty to be pro-active*. All the things, therefore, that the arbitrator should "do" or should "not do", are within the frame of his responsibility to be pro-active.

5. CIMA Rule 3.3:
   "After an arbitrator has been appointed, either party may give a further notice of arbitration to the other and to the arbitrator referring any other dispute which falls under the same arbitration agreement to those arbitral proceedings. If the other party does not consent to the other dispute being so referred the arbitrator may, as he considers appropriate, order either:
   (i) that the other dispute should be referred to and consolidated with the same arbitral proceedings; or
   (ii) that the other dispute should not be so referred."
6. CIMA Rule 3.7
   "Where the same arbitrator is appointed in two or more arbitral proceedings each of which involves some common issue, whether or not involving the same parties, the arbitrator may, if he considers it appropriate, order the concurrent hearing of any two or more such proceedings or of any claim or issue arising in such proceedings."
   CIMA Rule 3.9
   "Where the same arbitrator is appointed in two or more arbitral proceedings each of which involves some common issue, whether or not involving the same parties, the arbitrator may, if the parties so agree, order that any two or more such proceedings shall be consolidated."
7. CIMA Rule 7: Short Hearing
   CIMA Rule 7.1
   "This procedure is appropriate where the matters in dispute are to be determined principally by the arbitrator inspecting work, materials, machinery or the like."
   CIMA Rule 7.3
   "There shall be a hearing of not more than one day at which each party will have a reasonable opportunity to address the matters in dispute. The arbitrator's inspection may take place before or after the hearing, or may be combined with it. The parties may agree to extend the hearing."
   CIMA Rule 7.5
   "Either party may adduce expert evidence but may not recover any costs so incurred unless the arbitrator decides that such evidence was necessary for coming to his decision."
   CIMA Rule 7.6
   "The arbitrator shall make his award within one month of the last of the foregoing steps, or within such further time as he may require and notify to the parties."

While there is an *opportunity*, under each of these new arbitration rules, for the parties to reach an agreement with the arbitrators for time-limited arbitrations there *is not a requirement*, under any of these new rules, for arbitrations to be so conducted. With parties and their representatives, coming to the arbitral process from different countries, with different customs, styles and understandings of the arbitral process, the time-limited arbitration is not necessarily the right answer.

There are, however, all sorts of ways in which arbitrators can lead the parties into conducting before them more efficient and cost-effective arbitrations. A lot of this can and should be resolved at the preliminary hearings. The first, and most important of all, is to establish with the parties a timetable to which there must be proper adherence. Thus the arbitrator should make careful diary notes, whether manually in his diary or on computer spreadsheets, so that he keeps tabs upon the parties' adherence to the agreed timetable. Under the English Arbitration Act 1996 ("Act 1996") an arbitrator can issue a Peremptory Order against a party who "without showing sufficient cause fails to comply with any of [his] orders or directions" (section 41(5) Act 1996). If then a party fails to comply with the Peremptory Order (apart from getting the Court to enforce it) the arbitral tribunal has wide powers including the right to:

"(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject of the order;
(b) draw such adverse inferences from the act of non-compliance as the circumstances justify;
(c) proceed to an Award on the basis of such materials as have been properly provided to it;
(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance" (section 41(7) Act 1996).

I see no reason why an arbitrator, in agreement with the parties, should not vest himself with these powers. They certainly do not fall outside powers with which arbitrators, with the agreement of the parties, can vest themselves in AAA, ICC and LCIA arbitrations nor are they powers, if properly and fairly exercised, which would give grounds for an arbitrator being removed by a Court of Law or having his Award declared unenforceable under the New York Convention. Therefore my first "do" for an effective arbitrator is to establish a timetable with the parties, ensure that the parties comply to it and if they do not, without showing sufficient cause, make adverse orders against them. Of course this is not achieved by crude cracking of the whip but it can, and should be, by firm and polite handling of the timetable.

Keeping Control over the Preliminary and Interlocutory Stages

The time when it is most important for the arbitrator to exercise his authority is in the decisionmaking which should take place in the preliminary and interlocutory stages. It suffices to emphasise that the more active the part that the arbitrator takes in the preliminary hearings (relating to which party is going to introduce what evidence, when and in what form, etc.) the better prepared the arbitration will be for the effective conduct of it. The control and the use of documentary evidence is vital. During the preliminary stages, an arbitrator can be placed into difficulty when the parties, through their representatives, agree long drawn-out procedures: excessive use of written testimony, lengthy opportunities for oral examination of witnesses and discovery procedures which are as extensive and time consuming as are the worst of discovery proceedings in English or American court processes. Yet again there are ways of dealing with such situations. The parties can be warned of the cost implications and of unfavourable Awards on costs which may arise out of the adoption of the procedures which they are recommending. They can be politely asked to go away and think how their procedures can be made less elaborate and more cost-effective and efficient. The arbitrator himself can offer to substitute the proposed orders, put to him by the parties, by his own shorter and more expedient orders. The message, therefore, in the preliminary stages of an arbitration, is for the arbitrator to perform the "do" of being pro-active and to avoid the "don't" of being inactive.

Keeping Control over the Timetable

Moving on to the hearing of the arbitration, there is still a sensible role for the pro-active arbitrator. This is not the interfering arbitrator. Nothing is worse than the over-interventionist arbitrator. It is, however, the arbitrator who has agreed timetables with the parties and who presses the parties to keep to those timetables. Rather than interrupting the flow of the evidence it is much better to start the day with a quick review of the timetable and to end the day by revisiting the timetable. The lunchtime adjournment is also a useful time to remind the parties of the importance of keeping to the timetable which, in the first place, has been created out of the parties' own predictions! Another helpful way in which arbitrators can improve the arbitration process is to deal with any substantive evidential objection and motion which the parties seek to move only at the end of the day's hearing after the evidence has been closed and the witneses released for the evening. An enormous amount of time can be needlessly taken up during arbitration hearings when one counsel objects to the other counsel introducing certain evidence or when one counsel wants an Order given against his opponent's party to produce documents to which there had been reference during the hearing. It is amazing how many of these problems have gone away by the end of the day!

Time-Limited Arbitrations

While time-limited arbitrations are not appropriate in a number of arbitrations particularly when the parties, and their representatives, come from different countries and cultures, there are enormous benefits when arbitration proceedings can be conducted under strict time-limits or, as the expression goes, as "chess clock arbitrations". When, therefore, an arbitration is fixed with agreed times for every stage of it (counsel's opening and closing

statements, examination-in-chief, cross-examination and re-examination) the whole of the arbitration process has a discipline which ultimately runs to everybody's benefit. It enables parties to estimate, with much better accuracy, the extent of their liability for costs. It enables the tribunal to fix its fees and to notify the parties of them and when they are expected to be paid. It overcomes the perennial diary problems of the arbitrators, the parties and their counsel and avoids overrun hearings and/or the dislocation of delays between hearing days. It provides a date at which an Award can be expected (the arbitrator should also commit himself to a date for giving his Award within a fixed period from the end of the hearing) and enables each party appropriately to plan its affairs.

There is always a fear with time-limited arbitrations that there will be insufficient time for justice to be done to the parties' cases. Yet open-ended proceedings are thankfully not the norm in the conduct of human affairs. When we seek entertainment in the theatre or the concert hall, we like to know when we should arrive and when we can expect to leave. All sporting events are time-fixed. You either win the game in the allocated time or you do not. Courts of Law are increasingly imposing timetables. The time for appellate argument in the U.S. Federal Courts has long been time-limited. In the European Court of Justice advocates are strictly limited, to as little as half an hour, for oral submissions in cases of great complexity. Indeed debates in the House of Lords have much improved over recent years when peers are given quite tight times for making their speeches. It has even gone down to four minutes in some debates which, it has to be said, is a bit tough! Yet there is nothing that more concentrates the mind than to have to bring together all crucial argument into a 20- or 30-minute presentation. It is remarkable how well the good advocate can use this time. It also better accords with the concentration time of the listener, which is rarely good after hearing one speaker going on for more than half an hour!

I had the opportunity recently of attending a construction arbitration presided over by Mr John Tackaberry Q.C. who is one of the leading proponents in England for the "chess clock arbitration". The arbitration concerned the building of a road and the dispute was between the U.K. Department of Transport and the road contractor. If the arbitration had not been time-limited it would have lasted at least eight weeks. There were volumes of pleadings, witness statements and documents folders which, when put together, occupied most of the wall behind the arbitrator. Yet, with the assistance of two able advocates, and with thorough pre-hearing preparation by the parties, the advocates and the arbitrator, the arbitration was comfortably completed within eight days. It was a salient example of everybody concentrating on the important and discarding the unimportant. Yet important "do's" and "don'ts" arose. The arbitrator made few interventions and then only for the purpose of clarity. The advocates knew exactly where each document was upon which they wished to rely. No witness was permitted to give a long rambling answer when a short one was all that was needed. The concentration of, and the strain upon, the advocates was great but was understood and recognised by the arbitrator. All points of objections, of any substance, were dealt with at the end of the day's hearing.

Making the Arbitration Process Effective

We can all compose our own list of "do's" and "don'ts" in the conduct of an arbitration.[8] However the most important of all is that everybody in the arbitration process, but most particularly the arbitrator, must seek to be effective. We can and should improve the process of arbitration. Nobody likes to get into a dispute but, having done so, the disputant (aside from playing tactics with his opponent which, of course, the good arbitrator should stifle!) wants above all else a quick, efficient and cost-effective means of having the dispute resolved. In the international forum almost all parties, first and foremost, look to arbitration for the resolution of disputes. Here the arbitration process is unique. It is the only process which produces a reasoned decision on the merits and which is enforceable in courts throughout the world. The better, therefore, the arbitration process works, the better will be the men of business who have to resort to it. In the words of the English Chancellor in our famous (or perhaps infamous) Star Chamber of 1475:

> "This dispute is brought by an alien merchant ... who has come to conduct his case here, and he ought not to be held to await trial by twelve men and other solemnities of the law of the land but ought to be able to sue here from hour to hour and day to day for the speed of merchants".[9]

A Final Word

A final word: an arbitrator is an arbitrator. He is not a judge. He is not a mediator and, in the absence of express powers given to him, a conciliator. Similarly arbitration is not adjudication. It is not mediation and is not conciliation. However it is always helpful for an arbitrator to encourage settlement. He can adjourn arbitration proceedings for the express purpose of permitting the parties to conduct settlement discussions or to seek mediation or conciliation. While he may indicate where his mind is going, he should not, in my view, attempt to broker settlements. If such efforts fail he will be left in an impossible position. His is the art of the arbitrator. An art that the Chartered Institute of Arbitrators in London is now rightly, following through on its training programmes, according with the professional status of Chartered Arbitrator. A trained core of arbitrators, identified by professional status, can only benefit the conduct of arbitration and, one hopes, give better focus on the "do's" and more restraint on the "don'ts" of being an arbitrator.

8. See Appendix on p. 241.
9. YB Edward IV p. 96.

Appendix: the Effective Arbitrator: the Do's and Don'ts

Do's	*Don'ts*
Obtain and retain confidence of parties	Lose confidence of parties
Demonstrate competence and confidence	Be incompetent and arrogant
Be in charge but flexible	Lose control and become inflexible
Be punctual and keep discipline over daily timetable	Be unpunctual and allow daily timetable to drift
Be approachable and attentive to needs of parties	Be unapproachable and neglectful of needs of parties
Listen	Interrupt and talk too much
Be patient and keep out of arena	Be impatient and argue with parties and their advisors
Make parties and witnesses feel comfortable	Be high handed
Show sense of humour	Be a joker
To the end keep an open mind	Pre-judge issues

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Sweet & Maxwell
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Telephone **UK 0171 393 7000**
International +44 171 393 7000

Fax **UK 0171 393 7333**
International +44 171 393 7333