4 An approach to decision-making

4.1 Background

Comments and illustrations relate to English law and are on the basis that, unless stated otherwise, all 'default' provisions of the 1996 Act apply without alteration and that there are only two parties.

The previous chapter has in general terms considered a possible format and sequence of an award – the *how?* and *where?* Before moving to illustrations of awards, one must consider means of arriving at the *what?* – i.e. the decisions which are to be set out in the award. This chapter looks at possible procedures or tasks involved in that decision-making process, i.e. the *management* of decision-making relating to the substantive issues and to matters which stem directly from those decisions. If the decision-making process is well-planned and logical, it should lead to a well-planned and logical award.

Any substantial excursion into the law of contract, of tort, of evidence, of the law relating to interest and to costs, and other legal matters, would stray from the purpose of this book. Those topics should be studied separately. However, in order to put some of the decision-making tasks into context and to give them substance, part of this chapter briefly expands upon those subjects.

As a starting point for that part of the decision-making process addressed here (i.e. that which principally relates to the substantive issues and VAT, interest and costs), it has to be assumed that except where the context indicates otherwise:

(a) the parties' submissions are clear, unambiguous, well cross-referenced, and whether by common consent or by order of the arbitrator, precisely identify the issues and the contentions of the parties;

(b) the arbitrator has so indexed his evidence books as to enable him rapidly to turn up his notes on any issue or sub-issue, i.e. his notes recording the oral evidence of each witness (indicating whether this was in examination-in-chief, or cross-examination, or re-examination), any oral submissions by the advocates and any relevant interventions or applications;
(c) the arbitrator, whether manually or by the use of information technology has, issue by issue – and in a complex case, sub-issue by sub-issue – collated the location of oral and documentary evidence and submissions, including opening and closing addresses (see under 4.3.1.2 and Appendix 2).

If that has been done, the arbitrator is in a position readily to re-absorb and to compare all relevant matters submitted to him on each individual topic.

4.2 Underlying matters

The underlying requirement is that the decision, and the subsidiary decisions leading to it, must be the arbitrator's own. He cannot delegate that judicial function. If, for instance under section 37 of the 1996 Act, he has appointed an assessor to assist him on technical matters he must:

(a) give the parties a reasonable opportunity to comment 'on any information, opinion or advice offered by . . . such person'; *and*
(b) having considered what the assessor has had to say and the parties' comments, make up his own mind. In doing so he must avoid giving himself 'own evidence' (i.e. he must not use his own knowledge or expertise without notifying the parties and giving them an opportunity to address him on the points identified).

Matters on which the arbitrator must be clear and, to the extent that they are relevant, should list for his own guidance before he starts the decision-making process include, but are not restricted to:

(1) Is the arbitration subject to any institutional or other rules? If so, do such rules impact upon the nature of the award and/or on the decision-making process? Do they impose limits of any kind? Or restrict the nature of submissions? Do they expand or restrict the powers of the arbitrator? Do they make provision relating to costs of the arbitration? And so on . . .
(2) Have the parties by agreement expanded or restricted or removed any of the default powers of the arbitrator under the 1996 Act?
(3) Has there been any challenge to jurisdiction? If so, has this been resolved, or is it to be resolved in this award?

(4) Have the parties under the autonomy provisions of that Act made any agreement as to procedures? Or as to the nature and interpretation of submissions (for instance, is silence in a response to a statement of case to be deemed to be acceptance of a contention)? And so on . . .
(5) Have the issues been pre-defined? (For instance in the wording of a 'submission agreement', i.e. an agreement referring an existing dispute to arbitration, or in a joint invitation to act, or in an application for an institutional appointment.)
(6) Are the strict rules of evidence to apply (at this stage regarding the use the arbitrator makes of and weight given to the evidence)? If not, have any criteria been established (other than the section 33 requirement of fairness and impartiality)?
(7) Is the determination to be based upon other than a stated law? If so, is the basis that of equity, trade practice, or something else? If something else is that within the bounds of section 46(1)(b) and the 'public interest' provisions of section 1(b)?
(8) Have the parties pre-agreed the form of the award and/or whether there is to be more than one award?
(9) Have the parties in any way expanded or restricted the arbitrator's default powers:
    (a) regarding remedies, under section 48?
    (b) relating to the award of interest, under section 49?
(10) Have the parties made any valid agreement regarding liability for costs of the arbitration under section 60, or as to the principle to be applied in determining liability under section 61(2), or as to what are to be recoverable costs under section 63?
(11) Has any limit on the amount of recoverable costs been imposed under section 65?
(12) Have any 'costs in any event' orders been made?
(13) Are there any other factors which do, or might, affect the nature or preparation of the award?
(14) Are all the original matters referred to arbitration in this reference still in issue; have any further issues been incorporated into the arbitration by party agreement; have any been withdrawn or settled?

There can be other factors too, both in general and within any particular area of commerce or other relationships.

The arbitrator must give full effect to all of these and any other underlying matters when addressing the issues before him. They arise again in the 'tasks' listed under Sections D to G of an award later in this chapter.

17 **Relating to sub-issues (a) and (b):**

(Was the disputed work included in the Respondent's letter of enquiry dated 1st October [*year*]? If not, was it specifically included in the Claimant's quotation dated 10th October [*year*]?):

The Claimant contends that:

(a) the backstage redecoration, not forming part of the sets as such, was not referred to in the letter of enquiry upon which the Claimant's tender was based, nor was it included in that tender; further, that such exclusion was apparent on the face of the tender;

(b) the Respondent was at all relevant times aware that the said works of decoration constituted work of a nature not normally executed by the Claimant;

(c) whilst pre-invitation there were wide-ranging discussions between the parties concerning the whole of the stage area and its equipment, only the mobile sets were mentioned in the letter of enquiry;

(d) the said works of redecoration were not a necessity for the proper functioning of the mobile sets.

and so on, briefly setting out the claimant's contentions, then:

The Respondent contends that:

(a) it was at all times clearly understood and acknowledged by the Claimant that the Respondent required the backstage areas to be decorated at the same time as the installation of the sets, and there was never any question of that work being done by others;

(b) there was no specific exclusion of that work in the Claimant's quotation dated 10th October [*year*];

(c) there was a necessary inference to be drawn that the said works of redecoration were an essential prerequisite for the functioning of the mobile sets.

followed by the remaining issues and related contentions (again here combined):

18 **Relating to sub-issues (c), (d) and (e):**

(If neither, did the Respondent subsequently order that work? If so, did the said work constitute either extra work or a collateral or other contract entitling the Claimant to extra payment? If so, what amount was a fair charge for that work?)

The Claimant contends that:

(a) the Respondent's agent, Mr Hyram Trimble, who had signed the letter of acceptance of 5th November [*year*], gave clear oral instructions for the execution of that work and when so doing was aware that the Claimant's

schedule of work included in the accepted quotation made no reference to that work;

(b) it is entitled to extra payment for the said work;

(c) the amount claimed represents a fair quantum meruit evaluation.

The Respondent contends that:

(a) whilst acknowledging that Mr Trimble was its accredited agent, his comments to Mr Amble had constituted nothing more than clarification, not intended to be an order for extra work;

(b) in consequence no extra payment is due therefor;

(c) if contention (b) is rejected, a fair figure is little over £10,000.

See 6.4 for counterclaim illustrations.

5.3.6.2 Opening and closing submissions [C(b)]

The parties' contentions are usually supported by submissions of law (or such other basis, if any, as is relevant under section 46(1)(b)) and by oral submissions by Counsel or other advocates. If the award is to have a separate 'Submissions and evidence' section, then to the extent that it is necessary to summarise those submissions (but only to that extent, i.e. without at that stage considering them), that can be done here. Otherwise these matters can be incorporated in the later 'Analysis and decisions' section, as is done in this illustration.

5.3.6.3 Witnesses and evidence, if not covered in Section B: [C(c)]

(1) Identification of witnesses [C(c)1]

If not done in Section B3 (as was done in this illustration) this could be dealt with here. If the arbitration was conducted on a 'documents only' basis, and if such documents included witness statements, those witnesses might well not have been identified in Section B3. If not dealt with there, that too can conveniently be done here. If such statements were by way of sworn affidavits, that should be stated.

(2) Précis of relevant evidence [C(c)2]

If there is a hearing, a précis of evidence can conveniently, as here, be incorporated under Section D. The précis should be restricted to that which is essential to the comprehension of the award.

If on a 'documents only' basis, it can be helpful to include a short précis of the relevant evidence here, by way of background to what follows in Section D. Alternatively, if desired or more convenient in the particular circumstances, that too can be incorporated in Section D. In a documents-only situation of substance the equivalent of 'admissions on cross-examination', is admissions resulting from answers to

If it fails, and here assuming that it was one of several issues, the relevant part of paragraph 48 could be:

> 48 I AWARD AND DECLARE THAT the contract did not incorporate a term . . .

or in some circumstances it could be appropriate simply to award and declare that the respondent's claim (identified) fails.

Scenario 2
The same as Scenario 1 but STL, rather than a blank denial, allege that provision of service under such a term was conditional upon it being satisfied that there had been 'substantial malfunction' of a set, that being a condition precedent – and that there had been no such malfunction.

One of the possibilities could be:

> 48 I AWARD AND DECLARE THAT:
>
> (a) the contract incorporated a term that the Claimant (TGP) would provide the services referred to in the Respondent's [Statement of Defence] at paragraph [*number*];
>
> (b) such provision was conditional upon proper notice of material malfunction of one or more set(s); *and*
>
> (c) there had been no such malfunction; and in consequence
>
> (d) the said term is inapplicable.

6.6 A performance award

A brief explanation of a performance award, and a caveat, is set out in Chapter 2 at 2.2.3.

Scenario
STL contends that TGP undertook under the contract to provide an operator's manual explaining the computer software which controlled certain aspects of the operation of the sets and that TGP had failed to supply such a manual. STL seeks a performance award requiring TGP to remedy the deficiency.

This illustration assumes that the arbitrator had ensured (preferably as soon as possible after this issue arose in the arbitration) that, in the event of alleged subsequent failure to comply with such an award if issued, he was empowered to order appropriate further submissions

and, if he found it appropriate, issue a monetary award to resolve the matter.

If the application for a performance award was successful, the equivalent, or relevant part, of paragraph 48 might be (the first part of the illustration applying only if the existence of such a provision was denied):

> 48 (a) I AWARD AND DECLARE THAT the contract incorporated a term that the Claimant (TGP) would on commissioning the sets provide the operator's manual referred to in the Respondent's Statement of Defence at paragraph [*number*]; *and*
>
> (b) I AWARD AND DIRECT THAT the Claimant shall [*by when*] deliver such manual to the Respondent;
>
> and in the event that there is alleged failure so to do or to meet the contractual requirements therefor, I reserve to my future order(s) and Award such damages as might be appropriate in the circumstances;

6.7 An injunctive award

An injunctive award is referred to briefly at 2.2.4.

Scenario
TGP had temporarily retained a mobile workshop in the theatre car park. The contract terms made provision for that facility and included a requirement that 'neither the workshop nor its use should be allowed to interfere in any way whatsoever with the use and operation of the theatre' (the 'non-interference condition'). The workshop was equipped with a radio link to TGP's development department; the radio was known to be faulty. The mobile sets housed equipment which relayed signals from actors' radio microphones. On several occasions during rehearsals the theatre sound system had picked up transmissions from the workshop which were audible over actors' voices. STL sought an injunctive award requiring TGP to take such steps as were necessary to prevent its radio equipment from causing interference to that of STL. TGP admits the existence of the contract condition.

If the application for an injunctive award was successful, the equivalent, or relevant part, of paragraph 48 might be (again with the safeguard in event of non-compliance):

> 48 I AWARD AND DIRECT THAT the Claimant (TGP) shall forthwith refrain from acting in breach of the admitted 'non-interference condition', specifically that it shall take all necessary steps to prevent radio interference caused by its equipment to that of the Respondent;

(3) On appointment of experts etc. [B2(c)3]
A situation relating to the scenario in the Chapter 6 illustration at 6.7 could have been that it was in issue as to whether or not TGP's radio link was capable of causing, or was in fact causing, the alleged interference. However, the arbitrator had neither radio nor electronics experience. The appointment *by the arbitrator* of an expert (section 37(1)(a)(i)) should be recorded, e.g:

[B2(c)3]

[*no.*] Having given the parties an opportunity to object to such proposal (at which time they concurred with it), I appointed Ms Dianne Farlington, an acknowledged expert in these matters, to consider and report to me and the parties on the linked matters of (a) whether the Claimant's radio link was technically capable of interfering with the audio function of the mobile sets, and (b) whether in fact, under test conditions, it did so.

[*no.*] Ms Farlington reported to me in the presence of the parties, and Counsel for the parties commented upon her findings. I adopted those findings and they form an element of the matters leading to my decision on the radio issue (see paragraph [*number*]).

(4) Relating to property . . . [B2(c)4]
An illustration, linked with that at (3) above, might be (and could conveniently be interjected between the two paragraphs):

[B2(c)4]

[*no.*] In order to facilitate that consideration, I ordered that such experiments as were reasonably necessary be carried out on the equipment in question (and the Claimant gave consent that such experiments should incorporate the use of its radio as such).

(5) On preservation of evidence [B2(c)5]
Linked with the two immediately previous illustrations could be:

[B2(c)5]

[*no.*] Mr Blackwelle, having told me that the stage crew maintained a timed diary of all problems with equipment and of disruptions to performances, expressed concern that the radio log apparently kept by the Claimant's site staff might, accidentally or otherwise, be disposed of before the two could be compared. I directed that the said radio log be preserved in a secure location on site until such time as I gave directions otherwise.

9.3.4.3 Use of 'uncommon' powers [B2(d)]
Whilst not necessarily an uncommon power, an example might be:

[B2(d)]

[*no.*] The parties agreed in writing that I should take the initiative in ascertaining the facts and the law in respect of such matters as in my discretion I considered to be appropriate. I opted so to do with regard to those issues which I was to decide on an equitable basis (being Issues [*number(s)*]). In so doing I notified the parties in advance of (a) questions which I intended to pose, and (b) information I should require, regarding the said established [*trade*] practice.

9.3.4.4 Meetings: . . . pre-hearing review [B2(h)]
In the illustration at 5.3.4.8 (B2(h)), brief reference to the procedural order(s) issued in consequence of the preliminary meeting were combined with the simple reference to the meeting having taken place.

Assuming that the arbitration was of sufficient magnitude or complexity to warrant a pre-hearing review meeting, an illustration could be (but this would often be better included at a later stage of the award):

[B2(h); B2(i)]3]

[*no.*] A pre-hearing review meeting was held on [*date*], attended by the respective Counsel and decision-making representatives of the parties. As a consequence of applications at that meeting following alleged default by the Claimant, I issued a peremptory order requiring the Claimant to comply by [*date and time*] with my Order No [*number*] relating to disclosure of a specified record of staff time expended on contract and extra works.

9.3.4.5 Consequent and subsequent applications and orders [B2(i)]
The Order to which reference has just been made could equally have been recited here. Similarly, the initial recital of such meetings as warranted mention could be restricted to the bare fact of such meetings having taken place. If necessary, that could also list who was present, leaving details of any orders or other action to be incorporated in the award at the most appropriate place for that particular award.

(1) Attended hearing or 'documents only'? [B2(i)1]
Depending upon the nature of the case, an illustration where there was to be no hearing might be: