

**The Arbitration Act 1996 – 10 Years On**  
**Preliminary Observations of a Major Survey of Users' Views**  
**on the Act**

*by*  
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**Introduction**

When it was passed, the AA 1996 was, and has since been generally acknowledged as an exceptionally well-drafted piece of legislation. On the whole, there has been no great suggestion that it has not worked perfectly well. Nonetheless, because it was so different from its predecessors in many respects, a number of bodies and individuals began to think, as the 10<sup>th</sup> anniversary of the Act hove into view, that it would be worth trying to find out how in fact it is perceived as working by those who, in one way or another, have occasion to work under it, to apply it or to consider it.

Perhaps unsurprisingly, the government had no intention of conducting a review itself. So, some three years ago, I was asked – by the Commercial Court Committee, amongst others - to set up a committee to look into the Act's workings. We discussed how to go about this, bearing in mind that no funding and no manpower beyond that which the committee might provide was available (and those of you who know how these things work will appreciate that, in this context, "the committee" largely means the chairman). We took advice from Professor Dame Hazel Genn QC, as she now is, and settled a questionnaire that we thought would address the enquiry we needed to make.

The questions were related to matters that had come before the courts, matters with which the Act had not dealt, and one or two points that some of the committee thought might be interesting. We might have asked more questions, but experience suggests that people answering questionnaires get tired or bored very quickly, so they are best kept short; and anyway there did not seem to be any point in asking about matters that appeared uncontroversial.

Care was taken to ensure that, so far as possible, the questions were framed neutrally. Certainly, although in some instances particular answers may have been expected – a topic to which I shall return – we did not seek to get any particular answer to any particular question.

In the absence of any manpower, and indeed in any event, it seemed clear that the way to conduct our survey was to put the questionnaire on line, and then to send a link to it by e-mail to as many relevant players as we could; whilst urging them to tell anyone they thought might be interested but who might not have been on our list. That list had been compiled from as many other lists of people and organisations interested in arbitration across the world as we could lay our hands on. At the end of the day it contained over 2,200 addresses; but it has also to be remembered that many of those were of trade or arbitration organisations who will have consulted their members (in certain cases, hundreds or thousands of them), and in some instances will have passed on the link to members.

Even using technology to the full, this was a pretty demanding logistical exercise, and it could not have been done without the tremendous help provided – thanks to Arthur Marriott QC – by LeBoeuf, Lamb, and by the International Dispute Resolution Centre.

Indeed, the production of the report of the committee, which is due to be published at the end of the month, is being organised by the same forces. I want to take this, the first public opportunity, to say how grateful the committee and I are, and how grateful I think everyone in the world of arbitration has to be, to Arthur, LeBoeufs and the IDRC.

This is not the occasion to pre-empt the publication of the report, which will come out, as I say, at the end of the month to coincide with the IFSL conference that is being held on 1<sup>st</sup> December. But I can fairly, this evening, look at a few of the questions we asked and tell you what the responses were, and give an impression of the overall view of the Act which the survey reveals.

In summary, the outcome of the survey is a yet further tribute to those who put the Act together. I speak in particular of Lord Saville of Newdigate, Toby Landau who assisted him so much throughout his chairmanship of the Departmental Advisory Committee, and Geoffrey Sellers, the Parliamentary Draughtsman, whose plain-English legislation is a joy to read.

Let me turn to look at some of the questions we investigated. These are all set out in the handout you have been given. Some of the early ones were included simply because, Professor Genn advised, if it was desired to press government for any changes to the Act, it would be highly desirable to be able to show how important arbitration is to this country. Because of restraints of time I shall look only at four of the areas we covered: those which I suspect are of the most interest generally, namely the question of arbitrators determining their own jurisdiction; consolidation and confidentiality; and appeals. If there are specific questions about other matters I hope there will be a chance to deal with them afterwards.

### **Q.7: Kompetenz-Kompetenz**

I pass over the preliminary questions, as I do over the first substantive question (6), and move to question 7, on *Kompetenz-Kompetenz*. The committee thought that there was some feeling around that perhaps the fact that the court can review totally arbitrators' decisions on their own jurisdiction had not been fully appreciated when the Act was passed, and that this was, perhaps, not widely desired. So we asked whether respondents to the survey thought that position should be maintained, or whether maybe tribunals should be able to decide upon their own jurisdiction finally; whether there might be a halfway house, with tribunals deciding the facts whilst the court could still review the law; and so on.

There was virtually no support for the idea that tribunals should have absolute power. Most people either voted for the *status quo*, or for arbitrators deciding the facts finally: indeed 40% voted for each.

Now of course the DAC had fully considered this question when drafting the Bill that became the Act, and had firmly decided that arbitrators could not pull themselves up by their own bootstraps, and therefore the court had to have full powers of review. Very commonly, of course, the question of a tribunal's jurisdiction depends on the prior question whether a contract was concluded at all. Then it seems plain that only a tribunal whose jurisdiction does not depend on consent can properly decide the question. That argument, if it holds, seems to me equally applicable to the idea that arbitrators might have the final say over findings of fact in relation to their own jurisdiction.

I do not know, and would very much like to learn, the approach to this question in other jurisdictions where similar provisions are in force. It may be that some research can be done on that question, and if anyone here is prepared to undertake that I shall be glad to be told!

***Qs 15 and 17: Consolidation and Confidentiality***

I link these because, to an extent, they raise certain common issues, at least in terms of the survey. Although the DAC had not felt itself able to draft a satisfactory provision concerning *consolidation*, leaving parties to make their own arrangements in this respect; and although it had concluded that the question of *confidentiality* was one that was best left to the courts to work through, we thought it right after 10 years to ask whether these positions should be changed.

Taking consolidation first, there was almost equality of votes as to whether the present position should be maintained, on the one hand, or whether it should be changed, on the other. But, perhaps not surprisingly, no one amongst those who favoured change could come up with any new or persuasive arguments to counter those that led the DAC to conclude as it did in paragraphs 179 and 180 of its February 1996 Report. The main difficulty it saw concerned party autonomy in the choice of tribunal, though it also mentioned other problems such as those that might arise in relation to disclosure of documents.

Of course, in many situations consolidation is highly desirable, and this was emphasised time and again, just as examples were given of certain other countries' laws and certain arbitration rules that provide for it; but no one could say how to overcome the conceptual

difficulties which the DAC outlined, let alone how that might be done satisfactorily.

***Q.17: Confidentiality***

The response to our enquiry about confidentiality was, in terms of percentages, not entirely dissimilar. One of the interesting features of the answers from those who thought there should be some kind of statutory regime, but with certain exceptions, was that there was no agreement amongst them as to what limits or exceptions there should be. In addition, there were proposed a large number of different situations in which it was thought that there should be no right to confidentiality. And of course, if any legislation were put forward on this topic, it would have to cover each exceptional case.

This consideration of course militates strongly against any attempt to codify rules on confidentiality. Any legislation must be of general application. It is simply not practical in an area such as this to think of every possible case in which there ought to be some exception to obligations of confidentiality, and to write those all out in the Act. In just the same way, any provisions about consolidation would have to be of universal application, because it would just not be possible to legislate for every different type of situation that might arise; yet it is impossible to see what general provision might be universally acceptable, let alone desirable.

***Qs 19 and 21: Appeals***

The last area I want to deal with tonight concerns appeals from arbitrators' awards. It was in this area that I think some of us had expectations as to what the survey would reveal, but in fact have found ourselves surprised. If there was an expectation, then at least amongst many involved in my area of professional life, namely shipping and related activities (including commodity trading, which

also produces a large number of arbitrations), it was that we would find real pressure for change, particularly in relation to the tests for obtaining leave to appeal under s.69. Many of us had heard what seemed to be a prolonged and loud chorus proclaiming that the approach was far too stringent - that the mesh of the net was too small - and that consequently there was no longer a satisfactory flow of cases which would enable the courts to continue developing commercial law as they have done in the past, to meet the needs of changing situations and to keep commercial and contract law up to date.

What does the survey show? That overall, 60% of respondents think that the *possibility* of appealing should be retained on the current basis, whilst only 15% think that it should be abolished and 20% think that the basis for appealing on a point of law should be changed. That last figure needs, perhaps, to be seen in the light of responses to the next question I consider **(21)**: *Do you think that the tests for obtaining leave should be changed?* Despite what we thought we had been hearing, 57% of respondents thought there should be no change. And perhaps even more surprisingly, and certainly interestingly, 54% of all shipping and commodities respondents thought that way.

Not all of those who thought that the basis for appealing or, more particularly, the tests for obtaining leave to appeal should be changed thought that the present approach was too narrowly focused, though most did.

What is the explanation for this disparity between what we thought we had been hearing and the actual results of the survey? My belief, and this is based on my own observations, is that, in truth, the numbers of those who were campaigning for change may have been

very limited, but their voices were loud and they encountered many audiences in which to express their views, some of whom would then repeat those views in other milieux. As the process continued the views would eventually be repeated back to the same people, giving the impression of a widespread groundswell of opinion.

I recall, for example, turning up at Guildhall for a dinner and being accosted by a Greek shipowner noted for his tendency towards contention who immediately said to me "Now, Bruce; what are we going to do about s.69?". But on reflection, he is the only shipping party I have personally heard express concern in this area. So it is quite possible that it was a small number of vociferous individuals who made some of us expect that there would be a considerable pressure for change.

On the other hand, it is right to say that, although the requirements for giving leave to appeal have not changed substantially between the 1979 Act and the 1996 Act (if anything they are slightly less rigid following the *Northern Pioneer* decision), it is clear that leave is being granted far less often. A review of Lloyd's Law Reports for 1986-1988, i.e. a three-year period that falls well within the 1979 Act's era of operation; and for 2003-2005, i.e. a three-year period under the 1996 Act, shows that whereas over 50 appeals from arbitrators were reported in the first period, only 19 were in the second. I do not know why this is, but it does not seem to have anything to do with the Act itself.

May I mention a couple of points that, it seems to me at least, are worthy of note in relation to the approach the courts take to applications for leave to appeal, though these may or may not find complete favour with the judges who have to decide such applications.

The first is that under s.69(3) a judge has to be "satisfied" as to various requirements before granting leave, and it seems to me that, like it or not, satisfaction inevitably involves a substantially subjective judgement. Thus, if it is felt, or if there is evidence to show, that the mesh being applied is too fine, it is at least conceivable that the judges might allow themselves to be more easily satisfied, in some cases at least.

If an award is not obviously wrong, then under s.69(3)(c)(ii) the court has to be satisfied not only that the decision is open to serious doubt, but also that the question is one of general public importance. I have a suspicion that in some quarters "general public importance" is thought to refer to the general public at large. If so, it is worth remembering that in *The Nema*, Lord Diplock plainly accepted that a public whose interest was recognised by s.4 of the 1979 Act, which was in similar terms so far as relevant, included "other parties engaged in the same trade". So I would suggest that any idea that regard must only be had to the general public at large under s.69 is out of place. In this context I know that some of the commercial judges, at least, welcome statements from commercial arbitration tribunals as to whether questions are seen as being of general importance within a particular trade.

### ***Different constituencies***

Before I close, let me touch on a question that may have arisen in your minds. The figures I have presented are, by and large, overall figures. But what happens when we look at individual constituencies? Do the responses from lawyers differ from those given by arbitrators or parties? Do construction people have different views from those in shipping and commodities? The answer, broadly speaking, is "No". There are some mild,

insignificant levels of variation throughout, and these are more pronounced where one might expect them to be. Thus, because of their experience with overseas respondents who fail to participate in arbitration, people in shipping are noticeably more interested in changing the position referred to in question 6, about appointing sole arbitrators in default. Similarly, arbitrators are rather more enthusiastic about being able absolutely to determine their own jurisdiction than are lawyers. But even in such areas, the differences are not large, and certainly do not affect the conclusions to be drawn from the survey.

### ***Conclusion***

I have already indicated that the overall response is generally highly supportive of the Act and is a great tribute to its authors. The committee will set out its conclusions based on the survey in its report, to be published at the end of the month. It is not, I think, likely to prove explosive. One or two of those who seemed to want a different answer on the question of appeals may suggest that different methods might have produced different results. That may be so, although given the number and distribution, both geographically and professionally, of those who responded, I doubt it. In any event, we have done what we can with limited resources – indeed, I think we may mildly congratulate ourselves on the breadth of the response – and the fact is that there was and is no sign of any other resources – of whatever nature – being available to do anything more.

15<sup>th</sup> November 2006