

ARBITRATION: IS IT STILL FIT FOR PURPOSE? (arbitration)

KEYNOTE SPEECH BY SIR RUPERT JACKSON AT THE 11th INTERNATIONAL CONFERENCE ON CONSTRUCTION LAW AND ALTERNATIVE DISPUTE RESOLUTION IN MAURITIUS ON 23rd MAY 2018

1. INTRODUCTION

- 1.1 This lecture.¹ The challenging title of this lecture has been set by the conference organisers. I will address the topic from the point of view of a lawyer who has spent the last twenty years sitting as a judge and now returns to the terrain of arbitration with fresh eyes.
- 1.2 Abbreviations. In this lecture I use the following abbreviations:
“England” means England and Wales.
“ODR” means on line dispute resolution.
“QM” means the School of International Arbitration at Queen Mary University of London.
“QM 2018 survey report” means QM’s 2018 International Arbitration Survey, entitled “The Evolution of International Arbitration”, published on 9th May 2018.
“TCC” means the Technology and Construction Court in England.

2. MY EXPERIENCE

- 2.1 As a barrister: 1973 to 1998. I practised at the English Bar from 1973 to 1998. I appeared as counsel in many arbitrations both domestic and international. The tribunal was usually a single arbitrator. Sometimes he sat with an expert assessor. All the arbitrators before whom I appeared were men. I sat as arbitrator on occasions, but always as sole arbitrator.
- 2.2 As a High Court judge: 1999 to 2008. I served as a High Court judge from 1999 to 2008, often in the TCC. This work included hearing appeals from arbitrators and other applications concerning arbitration. I was judge in charge of the TCC from 2004 to 2007 and made some significant reforms to the management to construction litigation. These reforms were designed to improve and expedite the process.
- 2.3 As a judge in the Court of Appeal. I served as a lord justice of appeal from 2008 until March 2018, taking the lead on most TCC appeals. During this period, I was heavily involved in civil justice reform and was responsible for a package of measures known as ‘the Jackson reforms’.
- 2.4 Upon returning to the world of arbitration. In April 2018 (i.e. last month) I returned to my former chambers (4 New Square, Lincoln’s Inn, London WC2A 3RJ) to start practising as an arbitrator. For obvious reasons, all of the arbitrations in which I am instructed are still at an early stage, but I can already see that the arbitration world is very different from that which I left in 1998. For example:
(i) There has been a proliferation of arbitral institutions. The arbitral institutions administer a greater proportion of arbitrations than previously, although there are still a substantial number of ad hoc arbitrations.² Apparently, during 2017 there were 810 new cases registered with the ICC and 233 new cases issued in the LCIA.

¹ A revised version of this lecture, taking into accounts points raised during the conference, will appear on the 4 New Square website

² QM survey report, page 15 column 3

- (ii) A greater proportion of arbitrations involve a three-person tribunal.
- (iii) There are more women arbitrators and it is clear that the gender balance will continue to improve.³
- (iv) In England, most of the construction arbitration work now is international rather than domestic. London is an attractive centre for international arbitrations. At the same time there are fewer domestic arbitrations than in the 1990s for two reasons: First, adjudication now leads to the resolution of most construction disputes. Very few cases go on to any further proceedings after there has been an adjudication. Secondly, improvements in the court process often make litigation in the TCC more attractive than arbitration.

3. GENERAL OBSERVATIONS

3.1 Volume of construction and engineering arbitrations. Construction and engineering disputes form the largest category of arbitrations brought under the aegis of institutions.⁴ In 2016 these accounted for:

193 new cases in the ICC

55 new cases in SIAC

49 new cases in the LCIA.

It is therefore most appropriate that this seminar is focusing specifically on construction law.

3.2 Enforceability. One huge attraction of arbitration in cross-border disputes is the fact that awards can be enforced under the New York Convention. Most countries – including the UK, Australia, Hong Kong and Singapore – have enacted the Convention as part of their domestic law.⁵ These benefits are well known and do not require exposition in this lecture.

3.3 Complexity and simplicity. One thing which strikes me forcibly on moving from judging to arbitrating is the difference in procedural rules. I have been working for the last twenty years with the White Book⁶ at my side. Indeed I have been editing the White Book for the last seven years. That is over 7,000 pages long. By contrast the rule books of the arbitral institutions are a fraction of that length. The LCIA Arbitration Rules are some 25 pages long, if printed out on A4 sheets. The ICC Arbitration Rules are some 50 pages long. In the world of arbitration, rules are far less complex and far less prescriptive. They leave much to the discretion of the tribunal.

3.4 A user-friendly service. Another key feature of arbitration is that it is designed to provide a user-friendly service. Courts should also be providing a user-friendly service to litigants, but they are subject to inhibitions which do not affect arbitration. A judge may have to go off and try criminal cases for six weeks or may have to start another case straight after a long trial – thus preventing him or her from judgment-writing while the arguments and evidence are fresh. Judges have very little control over which cases they do.⁷ Arbitrators, by contrast, have much more control. They decide which cases they are prepared to do. They should only take on work which they have the time and ability to do properly. They can and must keep their diaries clear after any long hearing, so that they can write their awards while all the arguments and evidence are fresh in their minds.

³ QM survey report, pages 16-19

⁴ Steensma & Bell, 'Expedited arbitration and the future of international construction disputes', [2018] *JCLR* pp. 251-260 at 257

⁵ See generally Bailey, *Construction Law* (Informa Law, second edition, 2016) chapter 25.

⁶ *Civil Procedure*, the bible of civil procedure in England, which most practitioners use on a daily basis.

⁷ For example, when I was in the Court of Appeal I would be sent a list of cases for the following week and would then settle down to reading the papers – usually at the weekend. There would be no question of me ringing up the listing officer and saying that I don't want to do this or that case.

3.5 Courtesy. It must be admitted that judges can sometimes be grumpy. Usually this is because they are overstressed or over-worked. Time wasting by counsel can be infuriating, when the judge is hard-pressed with other work. Arbitrators, by contrast, do not have any of those excuses. They are being paid by the parties to provide a courteous and efficient service. That is precisely what they should do, even in cases where they conclude that one or other party has been fraudulent or dishonest.

3.6 Need for supportive courts. Every arbitral regime needs to have a supportive judicial system in the background. The courts must step in to enforce arbitration awards, but otherwise should operate a policy of self-restraint in relation to appeals and challenges after the event. If the parties have agreed to refer their disputes to arbitration, the courts should generally hold them to that agreement rather than ‘second guess’ arbitral decisions. In Western Australia and England, courts have marked their disapproval of parties litigating in breach of arbitration clauses by making indemnity costs orders.⁸ England has had a regime strongly supportive of arbitration ever since the Arbitration Act 1996 came into force.⁹

3.7 Preliminary decisions by courts. One important way in which the courts can support arbitration is by resolving challenges to jurisdiction or (when asked to do so) preliminary points of law, before the arbitration gets under way.

(i) Many jurisdictions allow preliminary challenges to an arbitrator’s jurisdiction. For example, the Indian Arbitration Act 1996, as amended in 2015, enables challenges to the jurisdiction of an arbitrator to be brought at the outset. During 2017, such challenges were brought in *HRD Corporation v GAIL* (unsuccessful) and *TRF v Energo* (successful).¹⁰ This is much fairer and more efficient than postponing the challenge until after the award.

(ii) Preliminary points of law are a different matter. These are permitted under section 45 of the English Arbitration Act 1996. The parties will usually want their chosen arbitral tribunal to decide such points. But sometimes they agree that the court should resolve pure points of law. In such a case the judge and the arbitrator should try to fit in with each other’s timetables. See, for example, *Taylor Woodrow v Barnes & Elliott* [2006] EWHC 1693 (TCC). The court gave judgment on the preliminary point of law within two months from the issue of the claim form. The arbitrator set a timetable for his proceedings which dovetailed in neatly with the court’s timetable, as noted in paragraph 79 of the judgment.

3.8 Multi-party disputes. Multiple parties can present problems in arbitration, in the absence of co-operation between the parties. In their paper on ‘Organisation of Proceedings in Construction Arbitrations’¹¹ Chelmick and Spalton state:

“By contrast with litigation in domestic courts, it can be very difficult to join parties in ongoing proceedings and it can be very difficult (if not impossible) to consolidate separate sets of proceedings.”

The parties therefore need to address this before any dispute arises, possibly by means of a bespoke arbitration clause. Alternatively, they should consider whether any of the standard conditions of contract or the standard rules of the institutions are adequate for the multi-party disputes likely to

⁸ Kwok, ‘Breach of arbitration agreement and its costs consequences’, *Arbitration International* 34 (2018) pp 149-153

⁹ For a recent example of the Commercial Court robustly rejecting a challenge to an arbitration award, see *Orascom v Veon* [2018] EWHC 985 (Comm)

¹⁰ There is a helpful discussion of both cases by Folkard in ‘Interlocutory judicial challenges to arbitrators in India’, *Arbitration International* 34 (2018), pp 155-165.

¹¹ In Brekoulakis and Thomas (eds), *The Guide to Construction Arbitration* (Law Business Research Ltd, 2017)

arise from their project.¹² Interestingly, after acknowledging the difficulties with multi-party disputes, Chelmick and Spalton add:

“Despite these difficulties, arbitration continues to be the preferred means of resolving disputes between international parties.”

- 3.9 The courts also have a role to play here, by construing consolidation provisions in accordance with their obvious commercial purpose. In *City & General v AYH* [2005] EWHC 2494 (TCC); [2006] BLR 55 the project manager’s deed of appointment included the following provision:

“17.2. If the dispute to be referred to arbitration under this Deed raises issues which are substantially the same as or are connected with issues raised in related disputes between either party to this Deed and any other person, and if the related dispute has already been referred to determination to an Arbitrator, the parties to this Deed agree that:

17.2.1 The dispute under this Deed shall be referred to the Arbitrator appointed to determine the related dispute, except that either party to this Deed may require the dispute under this Deed to be referred to a different Arbitrator (to be appointed under this Deed) if the party reasonably considers that the Arbitrator appointed to determine the related dispute is not appropriately qualified to determine the dispute under this Deed; and

17.2.2 The Arbitrator shall have power to make such directions and all necessary Awards in the same way as if the procedure of the High Court as to joining 1 or more Defendants or co-joining Defendants or 3rd parties was available to the parties and to him.”

The court held at [47]:

“I now come to the more difficult question: what proportion of the issues in the two arbitrations must converge in order to trigger clause 17.2? The language of the clause leaves this matter unclear. In these circumstances, it seems to me proper to have regard to the commercial purpose of the provision. That commercial purpose is plain and obvious. It is to avoid multiplicity of proceedings, which (as is well known) generate excessive costs and carry the risk of inconsistent findings. Bearing in mind the commercial objective, I do not think that the threshold of clause 17.2 should be set too high. It is not necessary that the majority of issues in dispute B should be the same as or connected with issues in dispute A. In my judgment, it is sufficient if a material portion of the issues in dispute B have that characteristic. Once a material portion of the issues in dispute B are the same as, or are connected with, issues in dispute A, then it makes obvious commercial sense for both disputes to be dealt with by the same tribunal.”

4. PROCEDURAL REFORM

- 4.1 Arbitration is head and shoulders above litigation. Every dispute resolution system needs to adapt to the changing needs of society and the rapid advances of technology. That means an almost constant process of procedural reform. In the world of litigation, procedural reform is a political process. That character of the process sometimes prevents necessary reforms from ever happening. I have seen many instances of that in my work of civil justice reform. Even when political intervention does not block civil justice reforms, it often causes substantial delays. There was a delay of some three-and-a-half years between the publication of my January 2010 report and the implementation of its recommendations. By contrast, arbitral institutions can and do respond swiftly to the changing needs of their users.

¹² See, e.g., article 8 of the LCIA rules. For a general review of the multi-party provisions in the various institutional rules, see Kondev, *Multi-party and multi-contract arbitrations in the construction industry* (Wiley Blackwell 2017); reviewed at Const LJ 34 (2018) pages 223-227.

- 4.2 Examples. By the end of the twentieth century, it was becoming clear that parties needed some effective control over the length and cost of arbitration. Starting with the Geneva Chamber of Commerce in 1992, the institutions introduced such measures for lower value claims. Views differed as to what was the upper threshold for lower value claims. The SIAC took US \$4.5 million. The ICC took \$2 million. Most other institutions took a lower figure. In 2017 the ICC was given power to reduce arbitrators' fees by up to 20% for unjustified delays in submitting their draft awards for scrutiny. This was a reaction to market pressure.
- 4.3 The ICC expedited procedure. In 2017 the ICC introduced a new expedited procedure which applies automatically to all claims up to £2 million and to cases involving a higher amount on an opt-in basis. The Court may appoint a sole arbitrator, even though the arbitration agreement provides for three arbitrators. There are strict time limits for the conduct of the proceedings: case management conference within 15 days, final award six months after that. This procedure undoubtedly reduces the delays and costs of the process. It is welcomed on that account.¹³ But there are also concerns that the procedure limits party autonomy and that the value of a claim should not determine its suitability for the expedited procedure.¹⁴
- 4.4 Summary disposal. Summary disposal in international arbitration is increasingly seen as a means of reducing time and cost.¹⁵ Courts have long had the power to dispose summarily of claims or defences which have no real prospect of success. Arbitral institutions have recently started introducing provisions to similar effect. Concerns about enforceability have been alleviated by a number of judicial decisions. In *Global International Reinsurance v TIG Insurance* 08 Civ 7338 (JSR) (SDNY 2009) the US District Court held that the latitude available to arbitrators to determine appropriate procedures is well established. There are Australian and English decisions to the same effect.
- 4.5 Hot tub. Hearing expert evidence concurrently has long been an option in arbitration. It saves substantial time and costs. It enables the tribunal to get to the heart of the issues swiftly. Courts have now begun to adopt this procedure. The Australian courts did so first. In January 2010 I published a report recommending (amongst much else) that we should adopt hot tubbing as an optional procedure. I organised a pilot of the procedure in Manchester from 2010 to 2013. In April 2013 the procedure was incorporated into our rule book. Many judges were sceptical at first, but the procedure is now catching on. Last October the Judicial College and the Chancery Bar Association organised a demonstration of hot tubbing for the benefit of judges. This was well received. The significant point is that this is an innovative and beneficial procedure where arbitration led the way and the courts followed slowly, but much later.
- 4.6 A homogenous body of users. The users of arbitration are, by and large, a homogenous body. Arbitration is a commercial enterprise, driven by financial considerations. The decision-makers are accountable to their managers and/or their shareholders. The community of arbitration users are, broadly speaking, all looking for the same kind of regime. In litigation, by contrast, the users are far from homogenous. Different user-groups have very different priorities. Personal injury practitioners, for example, may successfully lobby for reforms which suit their own interests, but are damaging to other sectors. The Access to Justice Act 1999 affords a graphic example of that phenomenon.

¹³ Buhler & Heitzmann, 'The 2017 ICC expedited rules: from softball to hardball?', *Journal of International Arbitration* 34 (2017) pp. 121-148

¹⁴ Steensma & Bell, 'Expedited arbitration and the future of international construction disputes', [2018] *ICLR* pp. 251-260

¹⁵ Ryan & Dharmanga, 'Summary disposal in arbitration: still fair or agreed to be fair?', *Journal of International Arbitration* 35 (2018) pp. 31-57.

4.7 Competition. Competition between dispute resolution systems or institutions is a driver of improvement. One reason for the creativity and procedural innovations of the Australian courts is competition. The Federal Court sitting in Sydney, the Federal Court sitting in Melbourne, the Supreme Court of New South Wales and the Supreme Court of Victoria are all competing to attract in the top commercial work. In the arbitration world, we have almost perfect competition. The major institutions are all competing to attract in work and to be the body named in contractual arbitration clauses. This is a driver for constant improvement of their rules and procedures.

5. TRANSPARENCY

5.1 Litigation is more transparent than arbitration. Open justice is a cardinal principle of litigation. Applications for a hearing in private are seldom granted. Even then, as much as possible of the proceedings are conducted in open court, with private sessions kept to a minimum. Documents referred to in a court hearing are generally made available to the media. In *R (Guardian News and Media Ltd) v Westminster Magistrates* [2012] EWCA Civ 420; [2013] QB 618 Toulson LJ said:

“Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 407, 477:

‘Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.’”

5.2 Arbitration. In arbitration, the opposite is the case. The parties generally want their dispute and its outcome to be kept well away from the public gaze. Arbitrators respect that wish. Privacy is one of the bonuses of arbitration. It is what the parties are paying for.

5.3 The current controversy. The high degree of secrecy which surrounds arbitrations has generated controversy in recent years.¹⁶ In his 2016 Bailii Lecture Lord Thomas CJ argued that the rules limiting appeals from arbitrators to the courts were too restrictive. The result was that arbitrators were developing the law without judicial oversight and in decisions which very few outsiders saw. Lord Saville and Sir Bernard Eder delivered forceful responses. They maintained that parties to arbitrations needed finality, not lengthy court proceedings dissecting arbitral awards. Lord Thomas returned to this issue in a later speech. Whilst accepting the importance of arbitration, he said that it was “very, very undesirable that we are entering into a stage where great legal minds who have retired from the bench are giving awards and setting out principles which are known only to the cognoscenti”.

5.4 Comment. It is fair to say that there is a problem here. In some areas of business activity, disputes are almost always arbitrated. Examples are big IT disputes, satellite agreements and large joint venture agreements. In these areas there is not any publicly available body of judicial decisions, which parties can study before they embark upon arbitration. Other relevant arbitral decisions are not generally available and they do not have the status of precedent.

¹⁶ See <https://globalarbitrationnews.com/a-zero-sum-analysis-of-arbitration-and-litigation-is-to-the-detriment-of-both-an-assessment-of-lord-thomass-bailii-lecture-and-sir-bernards-ciarb-speech>

- 5.5 Remedial steps. The arbitral institutions are aware of the problem and have taken steps to address it. The ICC publishes extracts of arbitral awards and procedural orders in the court bulletin, without identifying the parties and usually three years after the proceedings have closed. Furthermore, if there is a challenge to an arbitral award, the court's judgment may well go into the public domain: see *Obrascom v Veon* [2018] EWHC 985 (Comm) at [45]-[48].
- 5.6 Proposal by Constantine Partasides QC and Simon Maynard. In their article, 'Raising the Curtain on International Arbitration',¹⁷ Constantine Partasides QC and Simon Maynard propose a modest reform, which would bring England into line with Australia and the USA. Arbitrations should not be automatically subject to confidentiality. Instead, the parties should be left to agree whether or not their arbitral proceedings are confidential. There is much merit in this proposal. It would not infringe the vital principle of party autonomy in arbitration, but it would on at least some occasions increase the transparency of the process.
- 5.7 Applications for discovery by third parties. There is a separate question as to whether the court should require the production of otherwise confidential arbitration documents in proceedings brought by someone who was not a party to the arbitration. The court must have power to do so. In exercising that power, the court must weigh up the parties' entitlement to confidentiality against the legitimate interests of the non-party in the related litigation. In *Esso Australia Resources Ltd v The Honourable Sidney James Plowman & Co* [1995] HCA 19, the Minister for Energy and Minerals (who was not a party to the arbitration) was allowed discovery of arbitration documents and material from the arbitral record.

6. TRIBUNAL EXPERTISE AND FACILITIES

- 6.1 Arbitration wins. One of the great advantages of arbitration is that the parties choose their own tribunal. The current system whereby each party nominates one arbitrator and the two nominees select the third member/chairman is now well tried and tested.
- 6.2 Contrast with litigation. Some jurisdictions have specialist judges to handle construction cases and commercial cases. England has the Commercial Court and the TCC. The judges in those courts are well familiar with the technical issues which regularly arise in those areas of litigation. But many jurisdictions do not have specialist judges in those fields. In some jurisdictions, if a highly technical construction case comes before a generalist judge, he may refer the matter to an outside expert for an opinion. One of the complaints which I heard during my first civil justice review was that in certain jurisdictions a court appointed expert may effectively decide the case. The parties may have little or no say in the selection of that expert.
- 6.3 Use of IT. It is fair to say that the use of IT has caught on more slowly in the courts than in other sectors, such as banking. When new technologies become available, they have to be investigated and then considered by rule committees and other bodies. After that, budgets must be prepared, equipment purchased and judges trained. The rules governing e-disclosure in England came a long time after that process was technically possible. In arbitration, by contrast, the parties can harness new technologies available with much less difficulty.¹⁸ ODR has reached the world of arbitration far more swiftly than on-line ADR has reached the courts.

¹⁷ *Arbitration International* 33 (2017), pp 197-202

¹⁸ See Vannieuwenhuysse, 'Arbitration and new technologies: mutual benefits', *Journal of International Arbitration* 35 (2018) pp. 119-129

7. PARTY CONTROL

7.1 Arbitration wins. Parties to arbitration have far more control over the process than litigants enjoy. They can choose arbitrators who (a) have appropriate expertise and (b) are available during the time periods when the parties wish to hold their hearings. Litigants in court have none of these luxuries. They cannot choose their judge and they must take their place in the court lists.

7.2 Control of hearing length. The parties can by agreement fix the length of any hearing and agree how the time will be shared between them. The arbitrators will then be bound by that agreement. My experience at the Bar was that this arrangement worked very well. For example, I recall a one-week hearing in an arbitration in London and a four-week hearing in an international arbitration in Hong Kong, where the time limits provided an excellent discipline. They forced both parties to concentrate on the important points. I won one of those cases and lost the other. Absent any time limits, both of those hearings would have dragged on for much longer, but I have no doubt that the outcomes would have been exactly the same.

7.3 Does that mean arbitration is always perfect? No. The parties may agree a time limit for the hearing, which is unrealistic. The hearing may be so short that important evidence cannot be effectively tested and central issues cannot be properly debated. I am aware of cases where this has happened. If you are going to have a common law style arbitration (as opposed to trial on the documents with written submissions) then there will be an irreducible minimum hearing length, which is necessary to achieve justice. None of this is a criticism of arbitration as a means of dispute resolution. It merely means that the parties must use it properly.

8. THE QUEEN MARY UNIVERSITY 2018 REVIEW

8.1 Earlier reviews. In 2006 QM began conducting empirical studies of international arbitration. These have now become biennial reviews. A strong message from these reviews was that parties were concerned about the delays and the cost of arbitration. This led to a number of the initiatives discussed above. Also, as commentators pointed out, it highlighted the need for parties to consider that aspect when drawing up their arbitration agreements. They could, for example, consider including measures to restrict costs and delay in their arbitration clause.¹⁹

8.2 The 2018 review. On 9th May 2018 QM published the results of its 2018 International Arbitration Survey, entitled “The Evolution of International Arbitration”. This report was based upon questionnaires completed by 922 respondents and interviews by phone or face-to-face with 142 of those respondents. The findings repay reading in full. I summarise some of the key results below.

8.3 Preferred institutions. The preferred institutions were, in order of preference:

ICC	77%
LCIA	51%
SIAC	36%
SCC	27%
ICSID and ICDR/AAA	(both 13%)

8.4 Preferred seats. The preferred seats were, in order of preference:

London	64%
Paris	53%
Singapore	39%

¹⁹ Weiss, Klich & Profaizer, ‘Techniques and trade-offs for incorporating cost- and time- saving measures into international arbitration agreements’, *Journal of International Arbitration* 34 (2017) pp. 257-277 at 260

Hong Kong	28%
Geneva	26%
New York	22%
Stockholm	12%

- 8.5 Arbitration favoured for cross-border disputes. 97% of respondents favoured arbitration, rather than litigation, for resolving cross-border disputes. The principal reasons for this preference were (i) enforceability of awards and (ii) avoiding specific legal systems/national courts. In the light of this response and the further points set out above, the answer to the question posed in the title of this lecture must be an emphatic yes.
- 8.6 One possible further improvement. Despite that optimistic assessment, there is still work to be done in controlling the costs of international arbitrations. 67% of respondents said that the high level of costs was the worst feature of international arbitration. I understand that the lion's share of those costs are the legal fees of the parties, rather than the fees paid to arbitrators. I therefore invite people to consider the benefits of introducing costs budgeting/costs management into arbitrations, at least for lower value claims. This regime, although controversial at first, now works well in the English courts.²⁰ A mild version of costs budgeting already exists in maritime arbitrations under the LMAA Terms. Para 11 of schedule 2 requires the parties, after the close of pleadings, to complete a questionnaire. Question 15 asks for an estimate of costs through to the end of the reference. At the end of the case arbitrators can take this into account when assessing recoverable costs.

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²⁰ See Clark & Jackson, *The Reform of Civil Justice* (Sweet & Maxwell, second edition, 2018), chapter 16.