

Guest Editorialist

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Has the Rot Set In?

Should the Arbitrator disclose his thinking within the opening paragraph of an Award, or remain mysteriously secretive until the epilogue, much as in the best assassination plots of Miss Marples?

The question is rhetorical. You, the reader have guessed the writer's aims in this manifesto. Is faith to be shattered and the iconoclasts raised shoulder-high for suggesting that the newcomers should become revisionists?

The passage of time hardly changes anything. Mechanisation and radicalism may affect one's thinking, but only because of the methods of presentation. Ideas remain immutable. Philosophy has hardly more than burgeoned since the Age of Pericles. Even the morbidity of Schopenhauer and Kant has succumbed ultimately to the determinism of Bergson. Satanic or bucolic, the choice is still open but one does admire the judgements of our former Master of the Rolls, in which the story unfolds in the opening sentences, with a foretaste of the denouement in the next two lines.

Why are the younger Arbitrators ostracised to-day by their elders for exuberance in Awards? Pages of script, countless drafts, endless corrections demonstrate the inadequacy of their powers of expression.

But many recitals and most arguments inevitably disclose plagiarism. Good synthesis is evidence of a former editor's work. Logorrhea and convolution are now standards of composition. Originality or erudition are frowned upon.

During the hearings, Arbitrators are subject to the artillery of meaningless words and expressions, interspersed with the customary "You know—or don't you know?" which my Oxford Dictionary describes as synonymous

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with "I know I am expressing myself badly but I am sure that you are intelligent enough to grasp my meaning".

Which is a reminder that the dictionary drifts on to explain that the expression "actually" should be added only to vouch for words or statements which seem surprising, incredible or exaggerated.

Paradoxically it is not my duty here to lampoon my younger brethren; my successors tomorrow, "*Ehem Fugaces . . . fabuntur anni*". I will languish in caducity, while the New Order gears to downgrading clarity. Are your thirty pages of reasons really necessary, or should we expect the judge to fall victim to sophistry? By definition, an Arbitrator is eclectic.

An Award of eighty pages is verbiage. The parties involved know the nature of their differences in the most intimate detail. Is it indispensable to recite the contract? It could be more conveniently stapled to the back page. Must the evidence be repeated *ad nauseam* and *verbatim*, to serve at a retrial? Is it because Arbitrators live in the shadow of the courts and keep glancing over their shoulder in fear of an appeal or of an adverse court decision?

If the Award is final why should the courts interfere with the substance? They should only exercise vigilance in relation to *vice de forme*. The courts need only seek conformity with procedural rules and not heterodoxy within *ordre publique*. Arbitrators too, must have greater confidence in themselves.

At present, one could surmise that in the larger disputes before the venerable and much-revered ICC, the Arbitrators feel they must justify their gargantuan fees by tendering many thousands of words in return. Is conscience satisfied by such volumetric outpourings?

The best judgements are short and precise. Counsel's torrential salivation is not indicative of talent. There is no need for the Arbitrator to satisfy the disputants' curiosity. They know the targeting, the weaponry and the amplitude of straddling their objectives. Usually near misses.

American AAA Awards are very good on this score. They are simple. They are direct. English Awards used to be so before the 1979 Act. Now they have fallen victim to the enthusiasm of newcomers who believe that verbosity is synonymous with quality.

The less said of some Continental Awards the better. Sometimes it is only the penultimate paragraph that merits reading. Perhaps the expositions follow the traditionalistic teachings of the universities, which have encouraged learned dissertations within postgraduate theses and a measure of spiritual onanism.

An ounce of practice is worth tons of theory. Pathologists make poor surgeons. Ornithologists cannot wring the neck of a chicken. It is doubtful if former Astronomers Royal could steer the royal steam launch through shoals,

rocks or the Grand Union Canal. Why pay exorbitant fees to the economist to reward him for the few days he is away from his pulpit or lectern? The scales are weighted unfairly. Many of the worthies who sit for days by an attractive lakeside resort or half way up an alp, cannot remotely justify their princely remuneration.

Delays of two to three years to convene first meetings are agonising and sadistic. Often the initial encounter is adjourned so that a member of the tribunal may rush back to teaching or to resume his role as luminary of some distant corporation. Why not pick those Arbitrators who are available at short notice? It still remains true to-day that time is money.

Arbitration is now one of the better-paid professions. Maliciously, if perhaps metaphorically, there are no slim Arbitrators. The geese that lay the golden eggs should not be sacrificed. Arbitration is rapidly being priced beyond the reach of the medium-sized undertakings. Only the rich or the insured can afford to litigate. It is cheaper to resort to the courts, and in many countries it is swifter. The danger is real, let us not bury our heads in the sands like the proverbial ostrich.

Commercial arbitration should be left to those engaged in trade and industry. Banish the interminable speeches and admonitions of proctors and their serfs, preserve pragmatism in dealing with disputes.

An Award is little more than a Pindaric Ode. The Claimant starts with the strophe. The anti-strophe follows by the Respondent, before the apotheosis sung or proffered as the epode by the umpire or the tribunal.

It is you, the reader, who must halt the fungus. Let us home back to the innocence and simplicity of long ago.