

The future of arbitration

by Derek Roebuck

History can tell us nothing about what is going to happen in the future, but if we change the question to “what should happen?”, a historian may have something to say about what might be possible because it has been done before.

This short piece is based on a contribution to the debate at the London School of Economics on 13 February 2014 at the launch of Jan Paulsson’s *The Idea of Arbitration* (Oxford University Press, 2013). It starts from two assumptions. The first is “the fact that most human beings do not have the remotest chance of obtaining decent justice from state courts” (p 184) and that the proper purpose of any imaginable private alternative scheme of mediation and arbitration is to satisfy the needs of the parties. After all, if they did not want to, they would not have to use it.

The second assumption is also declared in Paulsson’s book (pp 193, 194):

Looking backwards and sideways at other human civilizations, it seems more useful to ask how communities have sought to achieve social order, and to test models by reference to reality, rather than reject reality because it does not correspond to our idées fixes.

In the search for the machinery of the future, we cannot let the concepts limit the technology. So if, Paulsson (p 21), “the imaginative use by parties of procedures which borrow variously from arbitration, mediation and indeed courts... leads to *conceptual confusion*”, *tant pis!* we say to the *philosophes*.

So what do we want a private scheme of alternative dispute resolution to do? On what principles should it be based? The first is that whatever we invent should not harm the common good; the second that the outcome should be accepted by both sides; then efficiency and honesty; reasonable speed; and, if it is to have any ethical credibility at all, affordability, even to the poor.

Is it hopelessly Utopian to try to assemble a machine which can provide such outcomes? Can we really hope that the state might offer such a boon? Should we plan for someone else to do it?

We need to consider every kind of process. We know about mediation. The experts say that it should be facilitative, the mediators refraining from suggesting solutions. We shall not take that for granted. If mediation fails and arbitration becomes necessary, we must have different arbitrators. We

need to look at the validity of that assumption, too. Moreover, the arbitrators should not be nominated by the parties, for then they would take sides. Is that a problem?

What if there were a model from our own past, which lasted with general approval for over 50 years?

LESSONS FROM THE REIGN OF ELIZABETH I

I am working on mediation and arbitration in the reign of Elizabeth I (1558-1603) for a book, *Mediation and Arbitration under Elizabeth I*, scheduled for publication in 2015. From the start she put the responsibilities of government into the hands of her Privy Council, which often sat within walking distance from here. They were members of the nobility (the ones you see prancing about in doublet and hose on television) with others she hoped she could trust, including the judges.

Let’s see how that Privy Council’s performance measures up to the demands we would make of our preferred system. Then we can ask: if they could do it, why can’t we?

Accessibility? The Council sat most days, including Sundays, Good Friday (with the Archbishop of Canterbury in attendance) and sometimes Christmas Day, even once when it fell on a Sunday. It kept an office open even on those days when it did not sit. It dealt with every kind of business, from disputes over title to land to issuing individual passports, while coping with foreign wars, invasion, plague and piracy, not to say Ireland.

Hundreds of petitions were presented every year. More than 20,000 are reported in the *The Acts of the Privy Council* (JR Dasent (ed), London, HMSO, 32 vols, 1890-1907). The Council did a lot of mediating and arbitrating itself, but had to commission others to cope with its workload. It had total authority, overriding all other courts, regularly staying proceedings there. The Council did not follow any bureaucratic forms. Each response was tailor-made.

Anyone could present a petition, foreigners and English alike, from the highest, including members of the Council themselves, to the lowest. Women were often petitioners and respondents in their own right. The Council expressly showed greater concern for them, with particular care for the poor and widows. Often it was responding to specific instructions from the Queen herself to give special assistance to women in need.

The genuineness of its concern for those who needed special treatment is shown by an entry for 5 April 1579. It arranged an arbitration in a land dispute between Richard Justice and William White:

White seems to be a very simple person, and so deserves to be pitied; in case it shall be adjudged that the right in the land in controversy appertains to him, then... their Lordships... would advise among themselves of some means how the same may be assured to him and his right heirs, without leaving him any power to convey away to any person other than by lease for 21 years, as tenant in tail, but to remain to himself and his heirs.

In another matter, the Dean of St Paul's was asked to help Richard Brotherton, who seemed to be "distempered in his wits":

Their Lordships think meet to refer him to the Dean to consider if either by counsel or physic he may be reduced to order, or otherwise bestowed with some of his friends who may take such care of him as is convenient for a man in his case; in which their Lordships offer assistance as cause shall require.

In other words, "Please let us know if we can be of any further assistance, if the counselling and drugs don't work."

No claim was too small. A bricklayer and a plumber had done some work for the Earl of Lincoln and complained when he did not pay them. The Council asked him nicely but:

if there shall be any difference between them in their account, their Lordships think meet that two be appointed to judge the same, whereof the one to be appointed by his Lordship and the other for the poor men by the Council.

The Council was not imposing its choice of arbitrator; just making sure the tradesmen had a proper counterweight to the Earl's. I cannot stress too firmly that these records are evidence of government action. They were spoken and recorded for those they instructed to act, not for public propaganda.

For more than a century government policy had encouraged trade and accommodated the expectations of merchants, English and foreign, who usually preferred the law merchant to the common law. They also preferred mediation and arbitration by their own kind, which the Council was happy to arrange. It would deal with a dispute between foreign merchants about a matter with no connection with England at all, if that would dispose of the matter fairly and promptly; but it would refer it to a foreign power if that were more appropriate. On 21 August 1571 it wrote to the Lord Mayor of London, saying that on second thoughts a dispute between members of the Fortuni family of Florence, previously committed to "certain persons, as well English as strangers... did belong rather to the Duke of Florence, unto whom they are subjects."

On a cold Sunday morning at the end of November 1586, 11 members sat in Richmond, with William Cecil, Lord Burghley, in the chair. They commissioned the Admiralty judge and four Doctors of Civil Law to hear the petition of Peter Fryer, "a merchant of Portugal." His ship had been taken "under colour of letters of reprisal." When he started an action in King's Bench, he was told that the proper forum was the Admiralty Court; but the Council had a better idea: it appointed arbitrators "to avoid expense of charges and loss of time by following the... ordinary course of the law."

Such a state-provided arbitration scheme could not have worked in isolation. It flourished in an environment where mediation-arbitration was the preferred machinery. There are hundreds of private arbitration documents recording the routine practices and preferences of the time.

What were all these arbitrators doing?

Typically, each party nominated one or two arbitrators, as they always called them, who would meet to resolve the dispute. They had no easy means of communication other than face-to-face. They were expected to do the best they could for their party. But that required them to confront the reality that they had better settle for what they could get. All being well they could agree on the size of the pot to be divided. Then nothing more subtle than half each would be better than tossing up. If they realised that something more refined was needed, they should at least be able to agree on the arbitrators (equal numbers from each side). They often included themselves, recognising that their acquired knowledge of the facts and the stances of the parties, and the trust created by their familiarity with one another, outweighed the fear that their knowledge of the other side's case would mean that – Heaven forbid! – the merits would come out.

And that is exactly what Elizabeth I's Government insisted on. They could not have made it plainer. They did not want a "legal" resolution, which depended on lawyers' niceties. The Council did not yet have available to it our phrase "on the merits." That expression does not appear in English writings until 1621. But these are some of the terms they used, following no standard formula, when instructing arbitrators to decide: most commonly according to "justice and equity" or "justice and conscience" or "good conscience" or "according to equity and (good) conscience"; or "equity and justice according to right"; or "equity and reason"; or "equity and your consciences"; or just "according to equity"; or simply "as right requireth"; or "according to right"; or even to "make such order as they think reasonable"; or "with reason and indifferency" where it was just a question of dividing up an estate; or "to the reasonable satisfaction of the suppliant" in a mercantile dispute; or, in a dispute between a parson and his patron, "to make some conscionable end."

Perhaps the least restrictive words were its request to Sir Rowland Heyward, MP and twice Lord Mayor, and the Recorder of London, to respond to a complaint from one of the Pages of Her Majesty's Chamber of injuries committed by a Proctor, by taking such order "as they shall think meet for the policy of the city."

Let us compare what was offered then to what we can manage today. What chance has the poor widow? What chance has anybody of a resolution on the merits? What does the rule of law ensure? We need the rule of law. It was hard won and we can see what happens in countries where it cannot be relied on – more than half the world not at all, and for the rest not always if it does not suit the government.

But it works in practice for most of us here, most of the time. Even when it doesn't, we need it as a communal aspiration, a basic foundation for our cooperation as a community, and

sometimes as a stick with which to beat the government. But it is a means to an end.

What end? Surely, one which complies with our moral imperative. And what is that? Order? Yes, without a dependable structure society will fall apart. But for what purpose?

The ethical demand is fairness – fairness for all. If Elizabeth I could insist on disputes being resolved on the merits, providing a universal scheme to do it, apparently without too much fuss or cost, why can't we?

Derek Roebuck

Senior Associate Research Fellow, Institute of Advanced Legal Studies