FRUSTRATION AND DELAYS

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Delays and Frustrations

Writing of the law's delays some 2,000 years ago, Juvenal complains:-

"Term after Term I wait, till months be past,
And scarce obtain a hearing at the last.
Even when the hour is fixed, a thousand stays
Retard my suit, a thousand vague delays:
... wealth and patience worn away,
By the slow drag-chain of the law's delay."

In more recent times Hamlet puts the law's delays as fifth on the list of his seven burdens of men. Dickens memorialised the law's delays in "Bleak House" and Gilbert and Sullivan have satirized them in verse and song.

Since speed and cheapness are two claimed advantages of arbitral proceedings, it is important to ensure that delays are minimal and that proceedings should not be frustrated in such a fashion that unnecessary costs are incurred.

Causes of delays and frustrations in arbitral proceedings are:-

- Selection of an unsuitable type of procedure;
- Failure to define the area of the dispute;
- Lack of necessary qualifications in the arbitrator to determine the dispute;
- Failure to determine details of the procedure to be adopted;
- The stated case;
- Delaying tactics;
- Joint arbitrators failing to agree;
- Special orders as to costs.

The gravamen of this paper is that most delays and most frustrations can be avoided by the nominated arbitrator who knows his job who has given careful thought before accepting appointment to the problems that may arise in the arbitration, who appreciates the fact, that in the preliminary proceedings, many of these problems can be nipped in the bud and ironed out and who refrains from accepting appointment until after the preliminary conference.

Selection of an unsuitable type of procedure

Is a hearing, as lawyers understand it, really necessary?

> "The feeling exists amongst informed non-lawyers in the commercial arbitration world that some members of the Inns of Court would rather die on the rack before the Grand Inquisitor than denounce or sully the purity of their beloved accusatorial system. Much as we in this Institute admire, in the abstract, devotion to the professional faith on which one has been weaned ... our concern is solely with providing and operating the most efficacious traffic route to direct those who seek the help of the private sector arbitration service towards the settlement of their commercial differences with the utmost of expedition and economy."

In reading this "cri de coeur", expressed as it was in a leader in *Arbitration* in February of this year, one recalls the words of Scrutton, L.J., expressed over fifty years ago:

> "It is possible to be too accurate in investigating disputes ... It is better, on the whole, for business to have a rough and ready way of getting at the truth rather than the more accurate, expensive and dilatory method of the courts."[1]

But we tend to cling to our court "adversary" or "gladiatorial" system, as it has been called, in which lawyers fight with their objective not to see that justice is done but to win for their clients. The Continental "inquisitorial" system conjures up, in the minds of some, the excesses of the Spanish Inquisition but it is nothing of the sort. Under it, the arbitrator's duty is to arrive at the truth; to this end the collection of evidence is under his control and not that of the parties and he carries the main burden of interrogating witnesses.

The type of arbitration can vary from the "look and sniff" type employed, particularly in many of the commodity markets in England, to a full scale adversary type arbitration with legal representation, hordes of witnesses, expert and otherwise, a strict adherence to the rules of evidence, lots of lawyers, shorthand writers and all the other trimmings that one sees in court, apart from wigs and gowns.

If the dispute is basically one in which the issues can best be resolved by the expert, the inquisitorial system may be well preferred to the adversary system, provided the arbitrator posseses the necessary expertise.

If the dispute basically involves disputed questions of fact, it may well be that the adversary system should be adopted but if it involves basically a question of expert evidence, it may be either that a set of stated facts can be agreed upon or affidavit rather than oral evidence.

If the dispute is all about documents, the arbitration should be conducted as a documentary arbitration without any oral evidence being called.

In many arbitrations the adversary system is best suited to the

resolution of certain issues, e.g., disputed questions of fact, whereas the inquisitorial system is to be preferred in determining issues in respect of which the arbitrator has expert knowledge.

The parties, by agreement, may control every aspect of the arbitration procedure. So it is, that prior to the hearing, the nominated arbitrator should strive for a clear agreement for a suitable type of procedure or procedures, bearing in mind that even if the type of procedures has been agreed upon prior to the hearing, the parties may agree to vary it thereafter, should the necessity arise.

But, in the absence of agreement, an arbitrator need not follow the procedures laid down for proceedings in a court of law; he may adopt an infinitely more simple procedure so long as it does not lead to any unfairness between the parties in any particular dispute. The mere absence of a hearing before an arbitral tribunal does not constitute any such unfairness.[2]

In general, the pre-dispute submission will not deal with the type of procedure to resolve any dispute but, aliter, with the post-dispute submission which may well include agreement as to procedures and sometimes a series of questions to be answered by the arbitrator to form the basis of his decision. It may be, in a particular case, advisable to consider at the preliminary conference whether specific questions can be agreed upon to be answered by the arbitrator prior to making his award.

Failure to define the area of the dispute

Prior to the preliminary conference, the nominated arbitrator should carefully consider both the submission and the notice of dispute. Is the submission, in effect, an agreement to refer *all* matters in dispute? In this event, does the notice of dispute clearly set forth all questions which the parties wish to arbitrate? This should be closely investigated at the preliminary conference.

If, on the other hand, the agreement is limited, is the dispute notified with the submission? In the case of a limited submission, the arbitrator cannot, without agreement, proceed to determine any other submission.

But to paraphrase the views of Jordan, C.J. in delivering the judgment of the court in Henry v. *Uralla Municipal Council*,[3] if appointed to determine some particular question only, an arbitrator cannot, without consent, proceed to determine any other question. If, however, the reference is to determine all disputes arising within the terms of the submission, he may determine any such dispute at the instance of either party. Under such a general reference either party may raise new disputed questions and submit new claims and defences subject to the arbitrator's discretion to refuse to hear if proceedings have reached such a stage that to hear them would constitute a substantial injustice.

Lack of necessary qualifications in the arbitrator to determine the dispute

"Every cobbler to his last". The lawyer without other qualification will, generally, take infinitely more time to unravel the average dispute arising in construction and building contracts and the like, or as to the quality of equipment or commodity goods, than an expert in the field. He should, accordingly, hesitate to accept sole appointment in such disputes unless there are problems

such as hotly disputed questions of fact or difficult and fundamental questions of law. The layman arbitrator on the other hand, would generally be unwise to agree to arbitrate whereas questions of law loom large and he should shy away from issues involving the rescission or rectification of a contract or where the main issue is one of fraud which, even though not embraced in the original submission can, nevertheless, be arbitrated by express agreement.

But both the lawyer, on the one hand, and the expert arbitrator, on the other, may well fulfil a function as a joint arbitrator.

Failure to determine details of the procedures to be adopted

The preliminary conference should be the occasion on which close attention is given by the arbitrator and the parties as to details of the procedure to be adopted. But if the parties are legally represented, a problem often encountered, is that, at this early stage, one or more of the legal representatives has little or no idea what the dispute is all about and so is of little assistance. This problem is not confined to commercial arbitrations; it arises frequently in commercial disputes before the courts. It can only be overcome, in arbitral proceedings, by the firm arbitrator who insists that, well before the hearing, questions such as the area of the dispute and the procedure to be adopted are truly considered. It may well be necessary for him to insist on a number of pre-hearing conferences until there has been a proper consideration of all preliminary matters. If the issues to be determined are complex, a number of pre-hearing conferences may well be necessary in any event.

In types of disputes requiring expert resolution, consideration should be given to the question of limiting the number of expert or other witnesses.

If the dispute involves a consideration of substantial documentary evidence, eons of time can be saved by the parties agreeing jointly to file a composite indexed set of documents which it is agreed need not be proved formally.

I have appended the draft agenda prepared by the Institute for the preliminary conference.

Each and every question relevant to the particular arbitration proposed in that agenda should be carefully considered. Agreement as to the form of pleadings and particulars, whether there should or not be exchange or mutual inspection of documents and whether, in complicated cases, interrogatories should not be administered all require consideration. In regard to the advisability of shorthand writers and transcripts of evidence, it may become necessary to consider whether a transcript should be prepared of all or only part of the evidence and whether addresses should also be transcribed.

If all parties, prior to the hearing, agree that no substantial questions of law are involved, such agreement may be of assistance to the arbitrator if, during the hearing, he is requested to state a case.

If there is more than one disputed question, the question of whether a Scott Schedule should be prepared and, if so, whether by the plaintiff or by the parties jointly, should be considered. The Scott Schedule is basically a brief summary of both sides of the dispute, arranged in a columnar form.

If the arbitration is complicated and going to take some time, even though there has been a satisfactory

preliminary conference, it may be advisable to give either party liberty to apply at some suitable date to iron out, finally, any ambiguities or problems that may have arisen following the preliminary conference.

I hold the firm view that, in general, the nominated arbitrator should not agree to accept appointment until he is satisfied that the area of the dispute and the type and details of the procedure have been properly debated. If he so withholds his acceptance, the parties (and they will generally have agreed to his nomination) will appreciate that unless the arbitration is to proceed as he thinks it should, he may well refuse to act.

The stated case

As Messrs. Dorter and Widmer have said in their book:-

> "In all Australian States and in New Zealand, there is power in the arbitrator to state a case for the opinion of the relevant court and he has a duty to do so if directed by the relevant court. There is also a power in the arbitrator to state an award in the form of a case stated for the court's opinion."[4]

"Misconduct", appeals to the courts and stated cases are the principal nightmares of the uninformed lay arbitrator. In the United States, as I understand it, the stated case procedure does not apply and it has been substantially modified in England by the 1979 Arbitration Act under which, also, the parties may agree to preclude appeals in certain types of arbitration.

But the stated case procedure should hold no terrors. An arbitrator should agree to state a case whenever the facts as *proved* or *admitted* before him give rise to a point of law which fulfils the following requisites:-

- The point of law is real, relevant, substantial and such as to be open to serious argument and appropriate for decision by a court of law;
- The point of law should be of such importance that its resolution is necessary for the proper determination of the case as distinct from a side issue of little importance;
- The point of law should be clear-cut and capable of being accurately stated as a point of law as distinct from the dressing up of a matter of fact as a matter of law.[5]

A stated case should not be refused on the sole ground that only a small sum is involved.

Particular care should be taken, however, to refuse to state a case prematurely. So often a point of law assuming significance at an early stage of the proceedings fades away as the arbitration proceeds and the same observation applies as to facts which may vary in certainty of their proof and in their importance as the hearing proceeds.

If the arbitrator refuses to state a case during the hearing, he will be guilty of misconduct if he does not give the party requesting the case to be stated reasonable time to apply to the court.

The power in the arbitrator to state an award in the form of a case stated for the court's opinion is unqualified. He has an absolute discretion but, in making a decision, he should generally be guided by the same principles applicable to stating a case during the hearing.

Delaying Tactics

These are usually more prevalent in times of inflationary trends, unstable costs of commodities or rates of exchange or when cash-flow assumes importance.

One method is the special case procedure; one's own experience would suggest that many premature applications are made for the sole purpose of postponing the final result.

But what if during the hearing a party, with the object of delaying the proceedings, refuses to obey an arbitrator's direction such as in relation to time for filing particulars or attending on the date fixed for the hearing, etc.?

In all States there is implied in the submission, unless a contrary intention is expressed therein, certain provisions set forth in the various State Arbitration Acts. One of these is as follows:-

> "The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require."[6]

But, with the exception of Queensland,[7] the various State Acts make no provision for proceeding ex parte for any cause.

Dismissing a claim for want of prosecution would be beyond power but "an arbitrator" is authorised by the nature of his office, to proceed ex parte for good cause.[8]

If a party refuses to attend at the hearing or the claimant refuses to take any action to apply to fix a date for the hearing, an arbitrator would be entitled, on giving the defaulting party due notice and making it clear that the notice is peremptory, to proceed ex parte.

If attempts are made to delay by filing particulars of claims or defences out of time, the arbitrator, acting reasonably, may refuse to hear them and, similarly, if a party refused to acknowledge the arbitrator's power and authority, by refusing to obey his lawful direction, he can proceed ex parte if acting reasonable and after due notice of his intention so to do.

In the unusual case of the advocate filibustering and and indulging, for example, in endless valueless examination or cross-examination, or in a tedious and unnecessary address, it must be borne in mind that an arbitrator generally has power to control the proceedings before him. He could, I believe, in the exceptional case, restrain such conduct but this can usually be done by gentle persuasion and, in one's experience in the courts, I have no recollection of any instance of the exercise of this power.

There is also the application for an adjournment. Is it bona fide? Is it reasonable? And, in this connection, what is the prejudice, if any, to the other party?

If these questions are properly considered by the arbitrator, no injustice will be caused.

If the arbitrator is of the opinion that an advocate's delaying tactics would not be approved by the client, an order that the client should attend on some particular occasion may well have a salutary effect.

Joint arbitrators failing to agree

One's own view is that whether or not joint arbitrators must be unanimous can be resolved from a consideration of the relevant words in the submission but, in the light of the fact that there is some conflicting authority[9] as to whether joint

arbitrators must be unanimous, this question, which will not often arise, should preferably be resolved by agreement prior to the hearing.

Special orders as to costs

If the arbitrator is considering not making the usual order, viz. that costs should follow the event, but rather, some unusual order, he should give the parties an opportunity to make submissions on the question of the costs. If, thereafter, he decides to make a somewhat unusual order, he may save an appeal on the question if he gives his reasons therefore in the award.

Conclusion

In most arbitration proceedings, the preliminary conference and such futher pre-hearing conferences as may be necessary are important days.

Delays and frustrations will be avoided if the firm arbitrator, the parties and their legal advisers, give close and careful consideration at such conferences as to how the arbitration should proceed.

And finally, when in the years ahead you have the task of resolving difficult questions of fact, may I remind you of the following passage in the Gentoo Code cited in Wrottersley, *The Examination of Witnessess in Court*[10]:-

> "When two persons upon a quarrel refer to arbitrators, those arbitrators, at the time of examination, shall observe both the plaintiff and the defendant narrowly, and take notice of either, and each of them, when he is speaking hath his voice fallen in his throat . . . or the hair of his body stand erect."

If Customs officials have the right to strip travellers naked for the purpose of ascertaining whether they are concealing dutiable goods, why should not those arbitrators, who are followers of the Code, have the same right in regard to the exceptionally hirsute witness?

Footnotes

1 *Naumann* v. *Nathan* (1930) 37 Lloyds Rep. 249, 250.
2 *Russell on Arbitration*, 20th ed., pp. 221-222.
3 35 S.R. 15.
4 *Arbitration (Commercial) Law and Practice*, p.151.
5 *Russell on Arbitration*, 19th ed., pp. 293 et seq.
6 E.g., sub-clause (f) of the Second Schedule to the N.S.W. Arbitration Act 1902.
7 Queensland Arbitration Act, 1973, s.19.
8 *Russell on Arbitration*, 20th ed., pp. 262-263.
9 Cf., *United Kingdom Mutual Steamship Assurance Association* v. *Houston* (1896) 1 Q.B. 567; *MEPC Australia Ltd.* v. *The Commonwealth* (1973) 2 N.S.W.L.R. 848.
10 3rd ed., p. 72.

Appendix

DRAFT AGENDA

PRELIMINARY CONFERENCE: Time am/pm Date: / /19
HELD AT: MBA/RAIA
CLAIMANT:
RESPONDENT:
ARBITRATORS: SELF and
PRESENT FOR CLAIMANT:
PRESENT FOR RESPONDENT:
1. AGREEMENT TO REFER
   a) Is Agreement in writing: Yes/No

b) Is Agreement in fact agreed between the parties? Yes/No
c) Type of Contract/Sub-contract.
d) Arbitration clause No. ? Law applying?
e) Single arbitrator/Co-arbitrators/Umpire.
f) Do Agreement to Refer and nominations appear in order: Yes/No
g) Amount of deposit paid: $ to by
h) Does Agreement give power to order increases in security YesNo
i) Any objection to nominees YesNo
j) Do Arbitrators appear to have jurisdiction YesNo

2. NATURE OF PROCEEDINGS
   a) Conciliation/Simplified arbitration/Normal arbitration.
   b) Any separate submission existing/required? Yes/No
3. COSTS
   a) Approx. amount of Claim? Counterclaim? $
   b) Do parties agree to usual fees and room hire charged by nomination bodies Yes/No
   c) Do parties agree to Arbitrators fees of $ per hour for Self and $ per hour for Co-arbitrator Yes/No
   d) Do parties agree that such fees will be charged for all time spent in regard to the matter? Yes/No
   e) Do parties agree that a minimum charge of hours will apply for every day of hearing and/or inspection? Yes/No
   f) Do parties agree that a cancellation fee of $ per Arbitrator will apply should any hearing andor inspection day be cancelled less than days before such day? Yes/No
   g) Do parties agree that Arbitrators' out of pocket expenses are to be reimbursed? Yes/No
   h) Do parties agree that the Arbitrators are entitled to progress payments for fees and expenses? Yes/No
   i) Do parties agree that the Arbitrators shall be at liberty to obtain technical andor legal advice from such persons as they may see fit to consult should they deem it to be in the best interests of the conduct of the Arbitration and the costs thereof shall be included in the arbitrators' fees as out of pocket expenses to be reimbursed at cost YesNo
   j) Do parties agree that the Arbitrators shall have power to make from time to time any order in regard to futher security for costs and that such security shall be applied in accordance with the direction from time to time of the arbitrators? Yes/No
   k) Is the Claimant to arrange for shorthand writers? Yes/No
   l) Do parties agree that the costs of the transcript be shared equally between them/be part of costs of the reference? Yes/No
   m) Will a copy of the transcript be given to each Arbitrator? Yes/No
   n) Any agreement between parties re costs? Yes/No
4. REPRESENTATION OF PARTIES AT HEARING
   a) Solicitor for both/one/neither:
   b) Counsel for both/one/neither:
5. MATTERS TO EXPEDITE OR FACILITATE HEARING
   a) Do parties agree that the Arbitrators will delay the appointment of an Umpire until such time as they consider such appointment necessary: Yes/No
   b) Will parties agree figures as figures only: Yes/No

c) Will parties admit matters not in dispute? Yes/No
d) Will parties agree to eliminate pleadings/particulars? Yes/No
e) Do parties agree that the rules of evidence will not apply: Yes/No
f) Do parties agree that the arbitrators may if they think fit make an interim decision? Yes/No
g) Is any issue of law likely to arise? Yes/No
h) Do parties intend to make written submissions in regard thereto? Yes/No
i) Does each party agree that it will forward a copy to the other party of any document sent to the Arbitrators? Yes/No

In view of these agreements and arrangements between the parties, the nominees accept their respective nominations and now formally enter on the reference.

6. TIMETABLE
   a) Parties' estimate of time for the hearing? days
   b) Points of Claim to be delivered by: / /19.
   c) Request for Particulars re 6b) (if required) to be delivered within weeks of receipt of 6b).
   d) Reply to 6c) to be delivered within weeks of receipt of 6c).
   e) Points of Defence and Counterclaim (if any) to be delivered within weeks of receipt of 6d)/6b).
   f) Request for Particulars re 6e) (if required) to be delivered within weeks of receipt of 6e).
   g) Reply to 6f) to be delivered within weeks of receipt of 6f).
   h) Reply to Defence and Defence to Counterclaim (if any) to be delivered within weeks of receipt of 6g)6e).
   i) Rejoinder and Reply on Counterclaim (if required) to be delivered within weeks of receipt of 6h).
   j) Is discovery and inspection required? Yes/No
      by / /19 .
   k) Is list/affidavit of documents required? Yes/No
      by / /19 .
   l) Parties will deliver a copy of relevant documents to each Arbitrator at least days before the commencement of the hearing.
   m) Place of hearing:
   n) Hours of hearing:
   o) Dates of hearing:
   p) Is an inspection of property required? Yes/No
   q) Any arrangements re same?
   r) Any arrangements re written submission to Arbitrators:
   s) Do parties agree that the Award be made in a reasonable time in lieu of the time limited by the Act? Yes/No
7. GENERAL
   a) Do parties agree that the Arbitrators will confirm the matters determined at the Conference Yes/No
      By? Self/Co-Arbitrator.
   b) Is there any matter of a formal nature that either party wishes to raise? Yes/No

CONFERENCE CLOSED AT am/pm.

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