TOWARDS MORE EFFICIENT ARBITRATION

PART I—PRE HEARING PROCEDURES

This is the first of a series of three articles by A.A. de Fina, President of the Australian Centre for International Commercial Arbitration and Senior Vice President of the Institute of Arbitrators Australia and a Grade I Arbitrator of the Institute.

The articles propose means of increasing the efficiency of the arbitral process by taking advantage of the powers conferred on arbitrators under the "uniform" Arbitration Acts. The continuing emphasis by the Institute on higher levels of expertise and knowledge in arbitrators and the confidence of both the arbitrator and disputing parties arising from this emphasis has created an environment where significant changes can be introduced to the betterment of the arbitral process.

As arbitrations increase in number, size and complexity so the need for efficient case management to reduce or contain costs consistent with the proper administration of justice also increases.

Whilst the extent of judicial case management in Australia varies significantly both between differing jurisdictions and as between judges and is, to some extent, a controversial issue, there is no doubt that the facilities available to arbitrator under the "uniform" Arbitration Acts[1] to seek and apply pragmatic alternatives to traditional procedures in an attempt to limit both time and cost can and should be applied.

For a number of reasons the arbitration of large and complex disputes in Australia has, in a procedural sense, traditionally followed very closely, almost to the extent of mirroring the litigation process.

Lawyers acting for the parties, be they solicitors or counsel, naturally prefer to work within philosophical and practical structures and procedures consistent with their training, experience and concepts of the law. Arbitrations are under the supervision of the courts where judges also apply the same traditional principles.

Conscious of this and perhaps given the history of the development of arbitration in Australia where the involvement of lawyers as arbitrators was almost non-existent, arbitrators essentially untrained and unqualified in the law were and are still reticent to interfere with or direct what many perceive as immutable practices.

As arbitation is a consensual process and there is significant capacity for the parties themselves to direct and control the proceedings lack of interference by arbitrators is understandable.

Many arbitrators and lawyers believe that the arbitrator should sit passively, allowing himself to be entertained by counsel and rapidly and unerringly to publish a fair and comprehensible award.

Among other lawyers, and a significant proportion of the commercial community, arbitration is seen, rightly or wrongly, as being a process where, if there is not some active involvement by the arbitrator, time and costs incurred deleteriously outweigh any other benefit.

An arbitration, as far as the arbitrator is concerned, has three separate periods.

(1) Pre-hearing
(2) Hearing
(3) Publishing of the Award

Currently the practice of arbitrators in the pre-hearing period is, save as to principally setting a timetable and establishing the commercial relationship between the arbitrator and the parties, to allow the parties to conduct the interlocutory proceedings as they see fit. If there are either initially or subsequently unsatisfactory arrangements made by the parties, or failure of one or both of the parties to follow an agreed timetable or to meet agreed obligations, arbitrators appear to adopt the view that there are no sanctions they can or should impose.

This position fails to recognise that the pre-hearing processes do not merely set the scene for the hearing but establish precisely the form, character and time of the hearing, and facilitate the rapid publication of the award at the completion of the hearing.

The authority for an arbitrator adopting a more interventionist or directive role is given variously at differing sections of the "uniform" Acts. For the purposes of this article the references given shall be to the Victorian Act[2].

Subject always to the overall caveat of conducting proceedings in accordance with the rules of natural justice[3] an arbitrator can order such steps or procedures as may be deemed necessary to achieve efficiency or expedition. It should also be noted that the relevant sections are subject to opting out provisions or any restraints imposed by the arbitration agreement, matters ordinarily under the sole control of the parties. There is, in addition, a requirement, also subject to an opting out provision, that the arbitrator must determine any question that arises in the course of the proceedings in accordance with the law[4].

Subject to those qualifications an arbitrator may conduct the proceedings as he sees fit[5] and is not bound by the rules of evidence[6].

An example of some procedures and practices that might be adopted by an arbitrator to both expedite pre-hearing programmes and potentially to encourage settlement follow.

The arbitrator's primary concern is to build a record. This record consists of the pleadings supported by evidence. Where there is a large volume of documentary evidence the seriatim introduction of exhibits related to their presentation by witnesses and not necessarily in their appropriate real time frames poses significant organisational problems for an arbitrator.

The use of "common bundling" or agreed documents with a single identification system and with an annotated and detailed listing, whilst imposing an additional workload on solicitors in preparation of the case, can achieve far more cost effective pre-hearing and contributes greatly to efficiency and reducing confusion during hearings.

Where, in the course of preparing a common bundle, there are identified documents upon which there is no agreement, a preliminary hearing can deal with many disputed documents alleviating the disruptive effect of continual challenges to admissibility during the running of the hearing. This does not necessarily preclude either some or all of the disrupted documents being subsequently admitted during the hearing when relevance, validity and probativeness may become clearer established. Whilst documentary or other evidence which is needlessly cumulative or confusing should, in most circumstances, be excluded, there is less reason to protect an arbitrator from receiving inadmissible evidence than, for example, a jury in a trial.

The arbitrator can determine the weight to be given to evidence when drafting the award, and consequently a leniency to allow in evidence rather than excluding it on balance, usually in the overall context reduces time of hearing. Large arbitrators almost invariably involve the use of expert witnesses. This is particularly so in the building and construction industry, one of the largest users of arbitation to resolve disputes.

Significant elimination of refining of issues in dispute can be achieved by adopting positive measures in respect to expert witnesses and their evidence.

The issue of qualification as an expert should be dealt with as soon as possible after the parties are in a position to properly identify in detail all of the issues in dispute. Ordinarily this occurs after exchange of pleadings and inspection of discoverable documents. The parties, having selected their proposed expert witnesses, must exchange full background information and have the opportunity to examine the qualifications, standing and relevance of their opponent's proposed experts. If objection is taken this issue is dealt with as a preliminary matter at a pre-hearing conference by the arbitrator. Once having established appropriate qualification an exchange of experts' reports is carried out by order pre hearing.

Final reports by the experts with a common numbering system and detailed annotation and referencing are prepared and exchanged preferably pre-hearing but at least some time before the first expert evidence is given. These final reports are to include the experts' opinions, facts, data, models, summaries and all other material relied upon by the expert. Unless expert evidence is developed in this manner it will ordinarily not be admitted.

A final pre-hearing conference some days before the commencement of the hearing is valuable to review preparedness and to set down any specific hearing procedures which appear desirable from either the parties'

or arbitrator's viewpoint and arising from the matters that have developed or been evidenced in the pre-hearing procedures. Such matters as the appropriateness and timing of a view can be dealt with at this time.

Despite the best intentions and endeavours of the parties in respect to the timetables set at the preliminary conference, changing circumstances or new or different issues sometimes become apparent and are of such a nature or consequence that changes to original timetables by intercession by the arbitrator becomes necessary.

The arbitrator must balance strict enforcement of compliance with orders gainst reasonable allowances for legitimate inabilities to comply with the schedule or to seek additional information which is properly required.

The facility of leave to apply to the arbitrator at any time during the pre-hearing period must be extended. Timetables set should, as far as reasonably possible, contemplate and be capable of accommodating, without severe disruption, pre-hearing conferences to deal with such issues.

It should be remembered by both practising and aspiring arbitrators that the processes proposed in this article have no place in simple or small arbitrations, and even in the large and complex disputes to which they are particularly directed are not exact formulae which must be slavishly followed.

Each dispute is unique, the competent arbitrator should be able to recognise the particular requirements and aspects which can reasonably be applied to each particular dispute to achieve, as far as possible, cost efficiency without in any way prejudicing the rights and expectations of the parties or the performance of the arbitrator.

An example of a time table or schedule incorporating some of these principles follows.

SCHEDULE

Date	*Step No*	*Matter*	*Intervening time Period*
XXX	1	Points of Claim	Minimum 4 weeks
XXX	2	Points of Defence and Counterclaim	Minimum 4 weeks
XXX	3	Reply and Defence to Counterclaim Exchange Lists of Discoverable Documents	Minimum 1 week
XXX	4	Inspection of Documents commence	Minimum 3 weeks
XXX	5(a) (b)	Agreed common bundle of documents plus parties' separate list of disputed documents—identified, described and listed	2 weeks

	(c)	Names, details, (qualifications) of Experts exchanged	
XXX	6	Lodgement of objection to experts	1 week
XXX	7	1st PRELIMINARY HEARING to deal with disputed documents (preliminary only) and experts, other matters	1 week
XXX	8(a)	Written reports of experts to be exchanged	Minimum 3 weeks
	(b)	Updated common bundle of documents to review matters to date and decide procedures and format of hearing	
XXX	9	2nd PRELIMINARY HEARING	
XXX	10(a)	Final reports of experts limited only to issues in dispute using common numbering system and referring to annotated documents exchanged preferably before commencement of hearing.	

Notes:

A. Any proper request for particulars of any pleadings be delivered within 7 days of relevant pleading and further and better particulars within 14 days (i.e. 7 days after request).
B. Parties at liberty to apply at any time.
C. Must be a good and proper reason for change to timetable.

1. Commercial Arbitration Act 1984 (Victoria)
   Commercial Arbitration Act 1985 (New South Wales)
   Commercial Arbitration Act 1986 (South Australia
   Commercial Arbitration Act 1985 (Northern Territory)
   Commercial Arbitration Act 1985 (Western Australia)
   Commercial Arbitration Act 1986 (Tasmania)
   Commercial Arbitration Act 1986 (A.C.T.) and N.T. ordinance
2. Commercial Arbitration Act 1984 Victoria
3. s; s.42(1); s.44(a)
4. s.22(1)
5. s.14
6. s.19(3)