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ARBITRATION**

PRELIMINARY AND INTERLOCUTORY MATTERS IN ARBITRATION

by

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Introduction

Once a decision to refer a dispute to arbitration is made, the parties have to choose and appoint the arbitrator. This selection of arbitrator represents the single most important decision that the parties make in the arbitral process. The quality of the arbitrator represents the key to an efficient arbitration. During the process of choosing a suitable arbitrator, the parties or their representatives would be in touch with each other.

As far as possible, parties should try to reach agreement on the arbitrator rather than to leave it to an appointing body. Failing which, parties should also consider carefully their choice of the appointing body. They should avoid those that have developed a reputation for appointing incompetent or inappropriate arbitrators. It is too late to reconsider the appointment of the arbitrator once it is made and accepted.

It is general practice for the arbitrator, once appointed, to notify the parties of his appointment and call for a preliminary meeting to initiate a preliminary dialogue with the parties. 1 It may be helpful to establish a framework for the arbitration proceedings and what the parties have agreed by way of procedure for the arbitration. It may also enable the arbitrator to ascertain from the terms of appointment as to whether the dispute is to be determined by documents only. It is usual for the representatives of the parties to discuss beforehand and present an agreed position to the arbitrator on the question of his fees and expenses to avoid any possible embarrassment. 2 The preliminary meeting

||Page xcvi>> should not take place until the arbitrator has accepted the nomination as arbitrator. Otherwise, his appointment is not complete and he would have no jurisdiction to convene the preliminary meeting.

Nature of the preliminary meeting

Although there is no legal requirement for a preliminary meeting, its effectiveness when held arises from the fact that the arbitrator, parties and their lawyers get together at one place and have face to face discussions. 3 It is the first meeting the arbitrator will hold with the parties or their representatives. The preliminary meeting is part of the reference and its main purpose is to discuss the format of the arbitration and also, set the parameters of the arbitration. It is not far fetched to say that this meeting forms the basis of most successful arbitrations. 4 On occasions, arbitrators may be attracted to the idea

of proceeding directly to the hearing proper. It is advisable that such an approach is considered only for smaller disputes in an attempt to reduce costs.

A preliminary meeting is also to satisfy the arbitrator that he is properly appointed and consider submissions from the parties as to the procedures required to be completed before he can make his award and the timetable for those procedures. The arbitrator has also to follow a variety of procedures in conducting the arbitration and the principle of party autonomy governs the procedures to be followed. The parties are given the widest discretion to agree on any procedure that they prefer as long it is consistent with public policy. They may expressly or impliedly opt for a procedure to be adopted at the reference or delegate it to the arbitrator.

In consideration of what procedure to be adopted for the preliminary meeting, A W Shilston, explains,

‘Whether based on an exchange of informal ad hoc statements, or pursuant solely to oral discussion at the meeting, through tactful questioning, the arbitrator should endeavour to estimate the nature of the business problem to be solved, and the order of the money claim in dispute. It is usually far better if lawyers have not set the scene for the arbitration through formal documentary exchanges before the arbitrator appears on the scene. Maximum opportunity should be given for a procedure to be devised by the arbitrator, after full discussion, which is likely to be timely and economical in the engagement of human resources.

Sometimes it may be possible in smaller claims for the arbitrator to obtain, through discussion and skilful questioning, sufficient agreement on the facts to

enable him to prepare an award after the first meeting. The arbitrator, in this situation, should obtain the agreement of both parties, before closing the meeting, that they have nothing to add to the discussion on the problem in view. He should record this in his award which should describe, briefly, the procedure adopted. In the more complex arbitrations, through a succession of preliminary meetings if need be, it should be possible to identify the true underlying issues. During the process of sifting, some original heads of claim may dissolve. It is good practice, following each meeting, for the arbitrator to prepare notes, setting down the understandings reached and giving the parties the opportunity to comment thereon in writing. Arbitration is all about communication to generate confidence and enable the heart of the problem to be exposed as quickly and economically as possible, leaving each party, whatever the outcome, with the feeling that procedurally it obtained a square deal, without successful gamesmanship on the part of the opponents.

After the real issues are identified, the written preparation of claims and defences can then begin, to programme in appropriate style and monitor with further interlocutory meetings, as necessary, prior to the actual hearing. By maximising the advantages of interlocutory activity, overall economy in the conduct of the arbitration will be achieved by minimising the length of the oral hearing, and maximising reduction to writing of the expression of the substance of the case. In summary, the principle purpose of preliminary

meetings is to give the arbitrator an opportunity to evaluate the arbitral problem and, as adviser on procedure, ensure that the problem-solving function is carried out in an economical and timely fashion with the use of appropriate resources'. 5

The intention is for the arbitrator to issue an order for directions immediately following the preliminary meeting that will assist in the efficient and timely completion of the various tasks that need to be undertaken before the award can be made. However, in some cases, the arbitrator may wish to proceed directly to ordering parties to outline their cases in written submissions. In other cases, the arbitrator may request for a brief summary of each party's case before the commencement of this preliminary meeting.

Where the parties or their representatives have a reasonable understanding of arbitration procedures, they should be invited to contribute to the manner the arbitration should be conducted. After all, at this stage of the proceedings they should know more about the dispute and differences than the arbitrator. A preliminary meeting may nevertheless be useful in eliminating possible future misunderstanding as to the scope of the reference and the manner in which the arbitration is to be conducted. An experienced arbitrator can often complete a preliminary meeting in less than an hour.

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Notice of preliminary meeting

The arbitrator will therefore write to the parties calling for a meeting. The notice convening the preliminary meeting requires careful drafting and would normally enclose an agenda. The notice would require the parties to attend the preliminary meeting either in person or by representative to address the arbitrator on relevant issues such as any objection to the composition of the arbitral tribunal, setting of time limits for pleadings, discovery and inspection, fixing of a time and place for the hearing, filing and exchange of expert reports, preparation of an agreed bundle of documents, ways and means of curtailing the proceedings by, inter alia, admitting issues, whether or not there will be a transcript of the record and, if so, the arrangement of payments for it, desirability of exchanging witness statements in advance and opening and closing submissions.

The agenda for the preliminary meeting

The agenda tailored to contain the above items is used to progress the preliminary meeting in a business-like and expeditious manner. There is no standard preliminary meeting agenda. An excellent attempt at producing such a standard agenda has been made by the United Nations in its UNCITRAL Notes on Organizing Arbitral Proceedings, Vienna, 1996. It lists and briefly describes useful questions on organizing arbitral proceedings for which it may be appropriate to have timed decisions. Although it does not purport to be exhaustive or definitive, Redfern, Hunter, Blackaby and Partasides have compiled the Notes into a checklist of matters that the arbitral tribunal may wish to consider: 6

(1) Procedural rules – The adoption of a set of procedural rules, in the event that the parties have not already done so. 7

(2) Language – The language of the proceedings, the language that is to be used in the hearings and the need (if any) for translation of oral presentations and documents, and the costs involved. 8

(3) Place of arbitration – the seat of arbitration and all its implications, if a seat has not already been decided upon by the parties. The arbitral tribunal may also wish to consider whether it will hold hearings outside the seat of arbitration. 9

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(4) Administrative services – If the arbitration is not being administered by an institution, the arbitral tribunal may determine who will be responsible for the organisation and administration of the arbitration. The arbitral tribunal may also wish to consider the appointment of a secretary and his functions. 10

(5) Deposits – Unless an institution is charged with organizing the financial aspects of the arbitral procedure, the arbitral tribunal may determine the costs that are to be paid and provide for their management. 11

(6) Confidentiality – The arbitral tribunal may need arrangements to ensure confidentiality. 12

(7) Routing of information – The arbitral tribunal may make arrangements for lines of communication between the participants. It must also make arrangements for the exchange of written submissions. It may decide on the means of communication and should establish the event to which facsimile and other means of communication should be used. 13

(8) Exchange of written submissions – The arbitral tribunal should establish the conditions for the submission of further written submissions. It may decide on the number, method and time-limits of any such submission. 14

(9) Defining the issues – The arbitral tribunal may prepare a list of issues and the order in which they should be decided and determine precisely the relief that is sought. 15

(10) Settlement negotiations – The arbitral tribunal should consider the extent (if at all) to which it should offer to facilitate settlement negotiations. 16

(11) Documentary evidence – The arbitral tribunal may set time-limits for the submission of documents and determine the consequence of late submission. It should also determine whether the parties are going to be compelled to produce the documents. 17

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(12) Physical evidence – The arbitral tribunal may make arrangements for any physical evidence to be presented as well as any site inspections it may wish to undertake. 18

(13) Witnesses – The arbitral tribunal may wish to determine:

(a) the advance notice required concerning witnesses and the content of such notice and the nature of the statement of the witness; 19

(b) the possibility of pre-hearing witness depositions; 20

(c) the manner in which the hearing of witnesses will take place, and the degree of control the arbitral tribunal wishes to exercise. 21

(14) Experts and expert witnesses – The arbitral tribunal may wish to consider appointing an expert to report to it and determine how such a person is to be chosen. It may also determine the terms of reference for the expert and decide how the parties are to comment on such terms of reference. 22

(15) Hearings – The arbitral tribunal may wish to decide on some or all of the following matters as concerning hearings:

(a) should hearings be held at all? And if they are to be held, how are they to be structured; 23

(b) should there be a limit on the time that each of the parties has? And in what order will the parties present their arguments; 24

(c) the length of hearings and whether a record should be kept of the proceedings and how they are to be kept; 25

(d) whether the parties should be allowed to submit a summary of their oral arguments? 26

It is for the parties by agreement to determine the language or languages of the arbitral proceedings. 27 Art 17 of Arbitration Rules of Regional Centre for Arbitration Kuala Lumpur provides that 'subject to an agreement by the parties,

||Page ciii>> the arbitral tribunal shall, promptly after, its appointment, determine the language or languages to be used in the proceedings.' An issue of language can be important in some international commercial arbitration especially if they involve parties speaking different languages.

It is usual that English is used in arbitration proceedings for the delivery of pleadings of the parties, the hearings and any award decision or communication by the arbitrator. Sometimes, testimony is given in the vernacular and foreign languages. In the case of the later, translations are arranged as part of the proceedings. The arbitrator is empowered to demand proof of authenticity of translation if the matter is in doubt. 28

In summary, a typical agenda for a preliminary meeting will include such matters as identification of the parties and their representatives, confirmation of the arbitration agreement and applicable arbitration rules (if any), determination of the interlocutory and procedural powers available, delivery of pleadings, agreement on documents, witnesses and expert witnesses, hearing dates for the reception of evidence, determination whether a reasoned award is required, general issues relating to the arbitration, venue and arbitrator's fees. Some of the matters require decisions which can be the subject of agreement between the parties or, in the absence of agreement, determined by the arbitrator.

The preliminary meeting

The preliminary meeting itself will be attended by the lawyer or representative with perhaps, one or two from the party who instructs him. The meeting itself is not the occasion for airing the disagreements between the parties other than to explain the subject matter of the dispute. It may also be the first occasion on which the parties have met for some time. As it becomes apparent during the course of the meeting the seriousness of the position they have reached and the length and expense of the arbitration stretching before them, they may wish to consider settling their differences shortly after the meeting. The meeting is certainly not an opportunity for the parties to present evidence or to make speeches. While the parties should not bring large numbers of persons to attend the preliminary meeting, the arbitration may not be able to prevent their attendance provided they are engaged or employed by one of the parties. Third parties or their representatives should not attend the preliminary meeting. The exception is when with the permission of the parties, a pupil arbitrator may attend as an observer for educational purposes.

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Earlier, the arbitrator would have forwarded the agenda to the two parties or their representatives. Preliminary meeting can be held anywhere where it is convenient. Normally, it is held at the premises of the various arbitral appointing bodies. It can even be held at the arbitrator's office. The venue should be located where there will be no

interruption and where there is sufficient space for all who may attend. Privacy is important.

The arbitrator chairs the meeting. He would start by introducing himself. He would then ask the claimant's representative to introduce himself and anyone else he has brought along. Likewise, the respondent will be asked to do the same. Alternatively, the arbitrator may circulate an attendance sheet and request those present to list their names and status on it. If there are persons like a third party, the arbitrator should ask the person to leave the meeting.

The arbitrator will then work through the agenda item by item. Each party is invited and given the opportunity to address him on those items. Wherever possible, an agreement be obtained. It is common for parties to have a large measure of agreement on most of the items. Sometimes the parties' representatives are in contact with each other upon receipt of the agenda and had agreed on the timetable for the arbitration proceedings. The parties are free to agree on what they can and the arbitrator is bound by such agreements.

The arbitrator must decide if the parties disagree on any matter under consideration at the preliminary meeting including the setting of timelines. However, he must only do so after hearing both parties and should allow sufficient time for the parties to comply with his decision. It is normal for the arbitrator to give the decision then and there although he would record all decision with or without agreement in the arbitrator's order for directions following the preliminary meeting.

The entire process of the preliminary meeting enables the arbitrator to issue directions relating to the conduct of the proceedings. The arbitrator gets a early grasp of the nature of the dispute by asking for an indication of the likely issues at the preliminary meeting. It may even serve to narrow to what is truly in dispute between the parties and cut out the irrelevancies. Together, the parties and arbitrator are then able to consider and agree on efficacious measures to elicit the appropriate facts, evidence and law to expedite the proceedings and saving of costs.

In complex disputes, it is common to convene more than one preliminary meeting. There will be times when one party has not kept to the programme and there will be submissions from that party for additional time. This submission may be heard at a further meeting when the other party is given the opportunity to oppose or agree with the particular submission. Other problems may also arise during the preparation for the hearing and it will be

||Page cv>>>necessary for a further meeting so submissions can be received from the parties. After hearing submissions the arbitrator will make a determination and give directions to the parties.

Interlocutories

The period between the preliminary meeting and the hearing is often referred to as the interlocutory stage of the arbitration. It is often the most difficult part of the arbitration for the arbitrator who has to balance a series of competing interests:

- (a) the wish of the parties to take as much time as they need to prepare their case including making such revisions to their case as they consider necessary;
- (b) the objections of the other party who thinks that its opponent is only interested in wasting time and delaying the day of reckoning when the award is published;

(c) the overriding duty of the tribunal to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of this opponent;

(d) the additional overriding duty of the tribunal to adopt suitable procedures and to avoid unnecessary delay or expense, so as to provide a fair means of resolving the dispute.

Interlocutories are applications or issues which arise between parties between the preliminary meeting and the hearing. Typical interlocutory issues include request for extension of time for pleadings, request for further and better particulars, leave to amend pleadings, leave to adduce expert or additional expert evidence, disputes over discovery, request to adjourn hearing sessions, application for security for costs, request for additional time to comply with previous orders for directions, request for consolidation or concurrent hearings, challenging the existence or validity of the arbitration agreement, challenging the arbitrator's jurisdiction

The modern approach is wherever possible the arbitrator should avoid interlocutory hearings to keep the costs and orality to the minimum. Written submissions may be ordered by the arbitrator without a hearing to enable a ruling or decision is made. Most interlocutory matters like amendment to pleadings or further and better particulars can be decided by documents only without a need for an oral hearing. By way of submissions and replies, both parties are heard and the requirement of natural justice is fulfilled. An interlocutory hearing is only held to strike a balance between speed and fairness when these issues cannot be resolved through correspondence.

Following the preliminary meeting, the arbitrator will normally issue procedural directions for the general conduct of the arbitration, including

an initial timetable, the form which the arbitration is to assume, rules of evidence and whether the proceedings are to be oral, documents only or in the form of an inspection. Most experienced arbitrators have standard draft directions for convenience and speed.

The decision or ruling of an arbitrator made on an interlocutory application, takes the form of a 'Directions' or 'Order for Directions' as issued in the course of the arbitration. The purpose of communicating such decisions by the arbitrator is to maintain certainty, clarity, efficiency and control of the proceedings.

Some salient elements of an "Order for Directions" would include (1) directions Number; (2) nature of application; (3) state if direction is by consent or not; (4) time frame for compliance; (4) state clearly what the parties to do; (5) costs (6) sign and date it.

There is no appeal procedure for a party against the order for directions; the arbitrator's decision on these matters is final. 29 The arbitrator is not obliged to give reasons for interlocutory decisions and should not do so. The court in *K/S A/S Bill Biakh v Hyundai Corporation* 30 held that it had not inherent jurisdiction to correct procedural errors. There is only power for an award to be remitted and not a pre-award ruling.

Waller J in *Fletamentos Maritimos SA v Effjohn International BV (No 3)* 31 stated, '... the judge seem to take the view that he has the power to review, and, if necessary, remit the interlocutory ruling to the arbitrators if there had be some form of procedural mishap. He thought that he had that power under s 22(1) of the 1950 Act... I am bound to say that I do not believe that the judge's view was right. I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically the position is, as I

understand the authorities, that the court has never had some general power to supervise arbitration and review interlocutory decisions. The power it does have comes from the Arbitration Act. It follows that there can be an examination as to whether there has been misconduct at any stage which may lead to the arbitrator being removed. But the power to review and remit under section 22 applies to awards 32 . Insofar as the judge relied on s 22(1) (which speaks of matters rather than awards), as providing the power to ||Page cvii>>review and remit a decision not in the form of an award, it seems to me with respect his view is inconsistent with well established authorities’.

Pleadings in arbitration proceedings

Formal pleadings are a term used for the documents such as the Points of Claim, Points of Defence and Counterclaim (if any), and Points of Reply, in which the parties set out their claims and the facts which they intend to prove and on which they will rely upon. They are the type of written statements required in court proceedings which set out all the matters claimed. Pleadings must state all of the facts relied on in support of the party’s case and the remedies sought with as much particularity as will alert the other party to the case they have to meet. 33 Pleadings do not state or summarize the evidence that will be called in support of the allegations, nor do they state points of law which will be relied on or argued. They identify issues of fact.

Sir Jack Jacob and Ian S Goldrein state the principal objects of pleadings as follows: ‘(a) First. To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court... (b) Secondly. To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial... (c) Thirdly. To inform the court what are the precise matters in issue between the parties which alone the court may determine, since they set the limits of the action which may not be extended without due amendment properly made... (d) Fourthly. To provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided therein so as to prevent future litigation upon the matters already adjudicated upon the litigants or those privy to them.’

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In the absence of an agreement to the contrary, pleadings is usually required in arbitration. 35 Evans J in *Indian Oil Corp Ltd v Coastal (Bermuda) Ltd* 36 observed that pleadings in arbitration will have the same status as in commercial litigation in the following words, ‘though with the reservation

||Page cviii>>that in my view arbitrators should be more ready to emphasize the practical advantages of pleadings, in terms of notifying the opposite party (and the tribunal) of the factual matters which will be relied upon, rather than what may be called the negative function of preventing a party from raising issues which he has not pleaded’. Mustill and Boyd list a range of possible uses for pleadings in arbitration. 37 In summary, pleadings should state facts and not plead law; avoid a recitation of evidence; contain material facts and material facts only; and be concise a form as possible.

Formal requirements of pleadings

Pleadings are normally exchanged sequentially. The claimant states his claim as ‘Points of Claim’ and the respondent answers the claim in the ‘Points of Defence’. If there is in addition a counterclaim, the document will be referred to the ‘Points of Defence and

Counterclaim'. The Claimant may respond with a 'Reply to the Defence, which are further allegations in response to the defence and, where there is a counterclaim, a 'Defence to Counterclaim'. Finally, the respondent may submit a 'Reply to the Defence to the Counterclaim'. Occasionally, further pleadings may be delivered.

A counterclaim differs from a defence in that it will raise a new issue. For example, if an employer claims for defective work the respondent may, in the reply, claim that the work is not defective. This would be a defence. The respondent may further claim direct loss and/or expense due to delays caused by the employer. This would be a counterclaim.

Arts 18 and 19 of Arbitration Rules of Regional Centre for Arbitration Kuala Lumpur clearly envisage that the initial written pleadings submitted by the parties are not to be considered as final and definitive statements of the parties' respective positions because the parties may submit a statement of 'all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.' 38

The rules do not impose any strict time-limits, although it does give guidelines. Art 23 provides that, 'The periods of time fixed by the arbitral tribunal for the communication of the written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time limit if it concludes that an extension is justified.'

The arbitrator will usually read through the pleading when they are delivered to him. He may draw the parties' attention to any errors or

||Page cix>>discrepancies that he may find. When pleadings are complex and confused, the arbitrator may ask for a list of issues to be agreed by the parties, setting out clearly the points which the arbitrator is to decide. If necessary, a further preliminary meeting may be necessary to settle the matter between the parties.

Amendment to pleadings

Amendment to the pleadings may arise during the course of the arbitration proceedings as parties may have not briefed their representation adequately or due to the change of representation in the midst of the arbitration process. It may also arise when parties realise that the submission at the interlocutory stage or evidence at the hearing itself will not support the case as pleaded without modification or the evidence supports another cause of action which has not been pleaded.

The parties are free to allow the arbitrator to amend or supplement the pleadings. Subject to this constraint, the arbitrator has default power to allow the parties to amend or supplement their pleadings, unless he considers it inappropriate. New claims cannot be raised later by one party without the other party's or the arbitrator's agreement. A party may realize that the evidence adduced at either the interlocutory stage or even at the hearing itself will not support part of his case as pleaded without modification or the evidence supports another cause of action which has not been pleaded at all.

In such a situation, the party concerned would apply to the arbitrator for leave to amend its case with a copy to the other party. The application will be accompanied by a draft of the proposed amendment with the redundant text struck out and the new text underlined for identification. The proposed amendment should be fully particularized so as not to attract an additional application for further and better particulars.

The arbitrator will consider representations from both sides to see the prejudice caused to the other party if the proposed amendments are allowed. Generally, amendments are allowed if it is possible for the arbitrator to adequately compensate the other party for the

prejudice he will suffer by a costs order against the party wishing to amend. 39 If the arbitrator gives the appropriate directions, the pleadings may be amended to include new claims and defences. The arbitrator may grant a party leave to amend pleadings at any stage, and normally will allow all amendments which are necessary to ascertain the real questions between the parties.

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However, the arbitrator has no discretion if the amendment or supplement exceeds the scope of arbitration agreement. 40 The arbitrator's jurisdiction is defined by the issues that have been referred to arbitration, and the jurisdiction cannot be enlarged by subsequent amendment of the pleadings by the parties without agreement of both the parties and the arbitrator. The proposed amendment, cannot, without agreement from both parties and arbitrator, extend the issues beyond the scope of what has been submitted to arbitration. 41

The exceptions may be for example, where the proposed amendment is not particularized; or if allowed, the hearing will have to be vacated, the proposed amendment being a new cause of action which can be commenced under a new arbitration notice and be heard at a later date; or the proposed amendment is a new cause of action which is time barred. The arbitrator feels the party has acted in bad faith, or that by an earlier error the party had done some injury to the other party which cannot be compensated by costs. If the proposed amendment means that the other party had wasted time and money dealing with the original pleading, the arbitrator may allow the amendment, but with the costs to be borne by that party in any event.

If a party cannot deliver a pleading on time, he should seek the other party's agreement to an extension, and inform the arbitrator of the outcome. If this is not forthcoming, the party will have to apply to the arbitrator. As a rule, the arbitrator should not make up his mind when dealing with matters which require a decision until he has considered submissions from both parties. Such submissions are usually in writing unless they have been made in an interlocutory meeting to the arbitrator. It is usual upon application to give one short extension unless there are compelling reasons not to do so. In mind the issues of fairness, delay and expense, the arbitrator will scrutinize closely further requests for extension.

Further and better particulars

The purpose of a pleading is to fully alert the other party as to the case which he has to meet. He then has the full opportunity to bring evidence so as to rebut all of the allegations which he denies. Each party must have a full understanding of the other's case. Each party is also entitled to know all of the facts and matters relied upon. If a pleading is vague or does not give sufficient detail or is not precise of the case it requires to be met, the party in receipt of it may not be able to confirm with his own witnesses as to whether the allegation is true or not.

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This might occur, for example, if a pleading referred to a letter without giving its date or a meeting without saying who was present or to defects without specifying exactly what the defects were. The said party may ask for clarification, sometimes referred to as 'further and better particulars'. Gibbs J in *Baily v Federal Commissioner of Taxation* 42 explained, 'Particulars fulfil an important function in the conduct of litigation. They define the issues to be tried and enable the parties to know what evidence it will be

necessary to have available and to avoid taking up time with questions that are not in dispute. On the one hand they prevent the injustice that may occur when a party is taken by surprise; on the other hand, they save expense by keeping the conduct of the case within due bounds’.

Occasionally, the requests for further and better particulars are merely time wasting exercises. It may run up expense and cause delay. It may also serve to complicate the pleadings and increase the number of documents to be referred to in order to appreciate each party’s case. A difficult party may even use it as a delaying tactic.

In such a circumstance, the arbitrator has a duty and role in preventing this. Sharkey, J and Dorter, J caution, ‘Tactically requests for particulars are unfortunately often abused. For example, where a respondent has the funds claimed and can abuse the power of the purse strings to strangle the claimant’s liquidity, costs and even interest will not always be sufficient compensation. Apart from anything else, they may be too late. Accordingly, provided the principles above are satisfied, the arbitrator may have to draw the line before allowing an opponent pedantically to procrastinate instead of proceeding expeditiously with the arbitration. If the parties are not themselves able to resolve a trial of strength between them about whether particulars are sufficient, the arbitrator will need to be a bold spirit rather than a timorous soul. The parties have an obligation and the arbitrator has the power...’ 43

The other party is not obliged to reply, unless the arbitrator makes an order to that effect. Either party may seek further and better particulars from the other, by way of request to the arbitrator for directions to that effect. Further particulars may sometimes be asked for in the form of interrogatories. These are a series of questions, for which there is perhaps little documentary evidence available, to be put to the other party and answered on oath. Interrogatories are rarely required in arbitration. Once the arbitrator orders the further and better particulars, the other party must supply the answers in writing within the time frame set by the arbitrator.

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Statements of case

Instead of pleading, parties can opt for statements of case. The claimant will serve the statements of case which sets out the dispute in a full narrative form. Witness statements, principal relevant documents and a list of all documents relied upon is annexed. The relevant law is set out and argued with a summary of evidence to be adduced in support of each allegation. The statements must be sufficiently full to enable the other party to fully understand the case it has to meet. The respondent will then serve a statement of defence together with a statement of counterclaim, if there is a counterclaim. This will be followed by the claimant’s statement of defence to the counterclaim. Each party may then serve a reply to the respective statements of defence.

Discovery

The purpose of the hearing is to ascertain the true facts in the case. The concealment of evidence is not acceptable. Discovery is the process whereby one party requires the disclosure of relevant documents or information to the matters in dispute which the other party has in its possession, custody or power. The process of discovery is distinct from the pleadings and involves two elements, namely, discovery and inspection. The parties may have no difficulty in producing the documents underlying the contract such as correspondences leading up the dispute together with other documents exchanged

between the parties and their lawyers. The real difficulty arises from production of contemporary documents which is in the possession of one party but not communicated to the other. Such documents maybe letters exchanged between the other party and a third party, internal documents passing between the various departments within the party's own organization, etc.

Mustill and Boyd explain, 'Any document is disclosable, which is reasonable to suppose, contains information which may enable a party either to advance his own case or to damage that of his adversary, or if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.' 44

The arbitrator can decide as to what are the documents or classes of documents that should be disclosed by the parties and the stage in the arbitral proceedings when this should be done. However, he has no power to order a party to disclose any documents. Either party will have to apply to the court for assistance to enforce his order to have the documents disclosed. The arbitrator has no power to order third parties to produce documents in their possession

||Page cxiii>>even though it may be relevant to the matter in issue. Redfern Hunter, Blackaby and Partasides allude to a situation where a third party may be giving evidence upon request of one of the parties but may refuse to produce relevant documents upon being questioned by the other party. 45 While the arbitrator does not have power to compel the witness to produce the document, he may draw an adverse inference in respect of such witness' evidence.

Discovery is a procedure to allow each party to be fully aware of all documents in the other party's possession, custody or power on the matter which is actually in issue in the case. Bernstein, Tackaberry and Marriott state that its purpose is to allow the parties to look for admission in their adversary's documents which may be helpful to establish their version of the case. 46 Any document which may reasonably be supposed to contain information which either enable a party to advance his own case or to damage that of his opponent including any document which may fairly lead him to a train of enquiry with either of these consequences, must be disclosed.

Discovery is given by listing every disclosable document, including those already possessed by the other side and those which the disclosing party once had but no longer possesses. The list is in three parts: the first part is those documents which the parties have in their possession, custody, or power and in respect of which they do not claim privilege; the second part is those document which the parties once had but no longer have it in their custody, power or possession and in respect of which they do not claim privilege; and the third part is those documents which the parties claim privilege.

Specific discovery is available where a party has reason to believe that the other party has not fully complied with his obligation as regards to discovery. Mustill and Boyd states that the complaining party identifies the documents or classes of documents which he alleges is missing and his reasons for believing that they are relevant and that they must be, or have been, in the possession, custody or power of the other party. 47

Restrictions on discovery

The extent of the discovery process in arbitration will largely depend on its nature and the wishes of the parties. 48 Discovery is restricted where

||Page cxiv>>the private right to privacy and interest of the State as contained in privileged materials outride the general interest in disclosure. Privileged materials fall

into three categories – privilege in respect to Affairs of State; legal professional privilege; and communications for the compromise of a dispute. In this regard, the rules in litigation are also applicable to arbitration. 49

For example, section 123 of the Malaysian Evidence Act 1950 provides, ‘No one shall be permitted to produce any unpublished official records relating to affairs of the State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Government of Malaysia, and of the Chief Minister in the case of a department of a State Government.’ The documents covered by s 123 of the Evidence Act 1950 are unpublished official records related to affairs of the state. 50

Section 126 of the Malaysian Evidence Act 1950 prohibits a lawyer, without express consent of his clients, from disclosing at any time, any communication made to him in the course of and for the purpose of his professional engagement. This privilege applies to any legal advice and communication passing between a party and his lawyers at the time when the arbitration or litigation was contemplated or pending. Privilege also extends to documents obtained by the lawyers for the purpose of the arbitration or litigation. 51 For example, this could be documents of experts or consultants if those documents came into existence for the sole or primary purpose of the arbitration when such proceedings were being contemplated or after the commencement of the arbitration. 52

Unlike the courts, parties in arbitration may be represented by any persons of their choice and they are not required to be represented by lawyers. 53 The designation of a particular representative may affect the type of privilege, if any, which may attach to communication between the party and his designated representative. While the law allows parties to arbitration to be represented by non-lawyers, it does not state explicitly that privilege extended to non-lawyer representatives.

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Privilege may extend to documents which came into existence in a genuine attempt to compromise or settle the issue. Such documents, produced in the course of settlement negotiations are usually marked ‘without prejudice’. These words do not in themselves clothe a document with privilege, unless the document is the first or subsequent attempt to settle. The fact that a document is not marked ‘without prejudice’ does not prevent it being privileged. No privilege attaches to confidential documents. However, such documents remain confidential within the arbitration and cannot be disclosed or copied outside the reference to arbitration.

The court in *Webster v James Chapman & Co* 54 held in the interest of justice that a party is permitted to use a privileged document which had come into his possession without any fraud or other improper conduct. Therefore, privilege may be lost if there is inadvertent disclosure of a privileged document. Tackaberry and Marriott state that if the document was obtained by fraud or by a trick, its use will be restrained. 55

Inspection

An order for discovery is usually accompanied by an order for inspection as part of the discovery process. 56 Inspection is the exercise of looking at the documents which are not privileged that the opposing party has disclosed unless privileged has been waived.

Each party is entitled to look at the original documents in the other party's list of every disclosable document and to take copies of them.

The court in *Urban Small Space Ltd v Burford Investment Co Ltd* 57 held that the purpose of inspection is not limited to documents which would be admissible in evidence. Following this, a bundle of agreed documents is prepared, i.e. those documents whose validity is accepted by both parties. The parties will also prepare their own bundles which will be used to present their case in the arbitration. If a party is suspected of concealing a document, the arbitrator may ask him to prepare a fresh list in the form of a statutory declaration.

Application for adjournments

One of the duties of the arbitrator is to do nothing to prevent a party from calling his evidence. Where one or the other party is not able to adhere

to the time schedule and seeks adjournment and it appears that the application for adjournment is not intended to cause delay and seems genuinely needed, the arbitrator should allow it.

The court in *Larchin v Ellis* 58 stated, 'It was by no means obligatory upon the arbitrators to allow of any delay that was asked for within the time during which they were bound to make their award. It was for them to judge, in the first place, whether the application for further time was bona fide, or only for delay. And even supposing it to be bona fide, still they were to judge whether it was reasonable.'

One or both parties may not be too enthusiastic about the arbitration proceedings which may give rise to default by the parties. In such a situation, an arbitrator may refuse to adjourn the case at the instance of a party absenting deliberately and without sufficient cause. The arbitrator retains the discretion whether or not he will or will give one of the parties to call a witness from abroad. 59 An umpire's refusal to grant an adjournment to enable the applicant to rebut the evidence of a witness who had been called by the umpire himself was held to be misconduct.

Conclusion

Arbitration is now one of the most popular options gaining recognition as more and more parties look to it for an expeditious and cost-efficient resolution. While parties are given a reasonable opportunity of putting their case and dealing with that of his opponent, it is at the preliminary and interlocutory stage that the arbitrator and the parties will put framework in place for the successful resolution of the dispute and difference between the parties.

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1 Tackaberry and Marriott, *Bernstein's Handbook of Arbitration*, 4th Edn, 2003, paragraph 2.655, pp 241.

2 Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th Edn, 2004, Sweet & Maxwell at pp 330-332.

3 Sutton, J Kendall, J Gill, *Russell on Arbitration*, 21st Ed, 1997, paragraph 5.131, p 216.

4 D A Davis, 'A view of the London Maritime Arbitration', (1986) 52 *Arbitration* 150; Howard Holtzman, 'What an Arbitrator can do to overcome delays in international arbitration', (1986) 52 *Arbitration* 169.

5 A W Shilston, 'The evolution of modern commercial arbitration', (1987) 4 *Journal of International Arbitration* 45 at pp 65-66.

- 6 Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th Edn, 2004, Sweet & Maxwell at pp 333-335.
- 7 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 14–16.
- 8 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 17–20.
- 9 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 21–23.
- 10 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 24–27.
- 11 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 28–30.
- 12 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 31–32.
- 13 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 33–37.
- 14 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 38–42.
- 15 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 43–46.
- 16 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 47.
- 17 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 48–49.
- 18 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 55–58.
- 19 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 60.
- 20 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 61.
- 21 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 62–68.
- 22 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 69–72.
- 23 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 74–77.
- 24 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 78–80.
- 25 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 81–83.
- 26 UNCITRAL Notes on Organising Arbitral Proceedings, paragraphs 84–85.
- 27 See for example, the Arbitration Rules of the Regional Centre for Arbitration Kuala Lumpur, art 17.
- 28 *E Rotheray & Sons Ltd v Carlo Bedarida & Co* [1961] 1 Lloyd's Rep 220.
- 29 *Ocean Laser Shipping Ltd v Charles M Willie & Co (Shipping) Ltd, The Smaro* [1999] 1 Lloyd's Rep 225 per Rix J.
- 30 [1988] 1 Lloyd's Rep 187.
- 31 [1997] 2 Lloyd's Rep 302.
- 32 See Donaldson J (as he was then) in *Exormis Shipping v Oonsoo* [1975] 1 Lloyd's Rep 432; *Three Valleys Water v Binnie* [1990] 52 BLR 47, a decision of Steyn J (as he was then); and Donaldson MR in *King v McKenna* [1991] 2 QB 480 at 490B-C.
- 33 Sutton, J Kendall, J Gill, *Russell on Arbitration*, 21st Edn, 1997, paragraph 5.144, p 220.
- 34 Sir Jack Jacob and Ian S. Goldrein, *Pleadings: Principles and Practice* (1990, Sweet & Maxwell) at pp 2–3.
- 35 See *Re Commercial Arbitration Act 1986; South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1990) 55 SASR 327; I N. Duncan Wallace, *Hudson's Building and Engineering Contracts*, 10th Edn, 1970, Sweet & Maxwell at pp 858, 860–861.
- 36 [1990] 2 Lloyd's Rep 407 at p 411.
- 37 Mustill and Boyd, *Commercial Arbitration*, 2nd Edn, 1989, at p 319.
- 38 Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th Edn, 2004, Sweet & Maxwell at pp 348-349.

- 39 Congimex SARL (Lisbon) v Continental Grain Export Corpn (New York) [1979] 2 Lloyd's Rep 346; Edward Lloyd Ltd v Sturgeon Falls Pump Co Ltd (1901) 85 LT 162; Re Crighton and Law Car and General Insurance Corpn Ltd [1910] 2 KB 738.
- 40 See Leif Hoegh & Co A/S v Petrolsea Inc, The World Era [1992] 1 Lloyd's Rep 45; Interbulk Ltd v Aiden Shipping Co Ltd, The Vimeira (No. 1) [1985] 2 Lloyd's Rep 410.
- 41 Sutton, J Kendall, J Gill, Russell on Arbitration, 21st Edn, 1997, paragraph 5.148, at pp 221–222.
- 42 Baily v Federal Commissioner of Taxation (1977) 136 CLR 214 at p 219.
- 43 Sharkey, J and Dorter, J, Commercial Arbitration, 1986, The Law Book Company of Australia, Sydney.
- 44 Mustill and Boyd, Commercial Arbitration, 2nd Edn, 1989, at pp 323–324. See also Compagnie Financiere et Commerciale Du Pacifique v Peruvian Guano Co [1882] 11 QBD 55 at p 62, per Esher MR.
- 45 Redfern, Hunter, Blackaby and Partasides, Law and Practice of International Commercial Arbitration, 4th Edn, 2004, Sweet & Maxwell at pp 360.
- 46 Bernstein, Tackaberry and Marriott, Handbook of Arbitration, 3rd Edn, 1998, paragraph 2.458, pp 138.
- 47 Mustill and Boyd, Commercial Arbitration, 2nd Edn, 1989, at pp 323–324.
- 48 See Edwards (Inspector of Taxes) v Bairstow [1956] AC 14 at p 36, per Lord Radcliffe; Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema [1981] 2 Lloyd's Rep 239; [1982] AC 724, per Lord Roskill.
- 49 Tackaberry and Marriott, Bernstein's Handbook of Arbitration, 4th Edn, 2003, paragraph 2.697, pp 258.
- 50 See BA Rao v Sapuran Kaur [1978] 2 MLJ 146; Wix Corp SEA Sdn Bhd v Minister of Labour & Manpower [1980] 1 MLJ 224.
- 51 Chua Su Yin v Ng Sung Yee [1991] 2 MLJ 348; Yeo Ah Tee v Lee Chuan Meow [1962] MLJ 413; Dato' Au Ba Chi v Koh Kheng Kheng [1989] 3 MLJ 445.
- 52 Tackaberry and Marriott, Bernstein's Handbook of Arbitration, 4th Edn, 2003, paragraph 2.701, pp 259.
- 53 See Zublin Muhibbah Joint Venture Sdn Bhd v Government of Malaysia [1990] 3 MLJ 125.
- 54 [1989] All ER 939.
- 55 Tackaberry and Marriott, Bernstein's Handbook of Arbitration, 4th Edn, 2003, paragraph 2.703, pp 259.
- 56 James Laing, Son & Co (MC) Ltd v Eastcheap Dried Fruit Co [1962] 1 Lloyd's Rep 285 at p 290.
- 57 [1990] 28 EG LR 120.
- 58 (1862) 11 WR 281. See also Dalmia Dairy Industries Ltd v National Bank of Pakistan Ltd [1978] 2 Lloyd's Rep 223.
- 59 Ginder v Curtis (1863) 14 CBNS 723; Doddington v Hudson (1823) 1 Bing 384; Glazebrook v Davis (1826) 5 B & C 534.