Saving Time and Cost in Major Arbitration

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Introduction

Arbitrators should work assiduously to save both time and cost in all forms of arbitration. Obviously major arbitrations are likely to offer more scope for creative management, and the New Commercial Arbitration Act[2] places the need to resolve commercial disputes "without unnecessary delay or expense" front and centre.

It has been said of the courts that "at least the Judges are free". With daily hearing fees in most jurisdictions that is less true than it used to be. However, it is undoubtedly the case that in arbitration the "Judge" and the venue are paid for by the parties.

It is possible to consider many aspects of the Court process, which if followed slavishly by an arbitrator, will simply add to the costs of the parties, without any commensurate benefit.

This paper explores successive steps of the dispute process, looking at ways in which time and cost can be saved, without sacrificing fair and final resolution.

Eliminating or Reducing Pleadings Disputes

It is commonplace for pleadings in complicated matters to undergo multiple revisions.[3] One is tempted to ask what good is really achieved by so many iterations of the document.

It is also commonplace for an arbitrator at the provisional preliminary conference, and often before entering onto the reference, to say to the parties, words to the effect of, "In a couple of minutes tell me what your claim is about". Then, upon hearing what the claim is about, the arbitrator is likely to say to the respondent, words to the effect of, "In a couple of minutes tell me what your defence and/or counterclaim are".

Recently, in *Barclay Mowlem Construction Ltd v Dampier Port Authority* [2006] WASC 281; (2006) 33 WAR 82 Martin CJ said:

> *"It is, I think, important when approaching an issue of that kind to bring to mind the contemporary purposes of pleadings. The purposes of pleadings are, I think, well known*

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2 In section 1C. In this paper, "New Act" means the *Commercial Arbitration Act 2010 (NSW)* and its counterparts in other States, and "Old Act" means the uniform Acts introduced throughout Australia from the mid 1980's to 1990.

3 In *Murchison Zinc Company Pty Ltd v Thiess Construct Contractors Pty Ltd* (WA Full Court) dated 20 June 2010, the version of the Statement of Claim under attack was the ninth version of that document. In the Myer Centre litigation in South Australia in the early 1990's requests for particulars granted by the Court turned a 17 page Statement of Claim into a document well over 1000 pages long with many pleadings applications still outstanding. This led to a Court review of the rules relating to pleadings and particulars.

and include the definition of the issues to be determined in the case and enabling assessment of whether they give rise to an arguable cause of action or defence as the case may be, and apprising the other parties to the proceedings of the case that they have to meet.

In my view, the contemporary role of pleadings has to be viewed in the context of contemporary case management techniques and pre-trial directions. In this Court, those pre-trial directions will almost invariably include; firstly, a direction for the preparation of a trial bundle identifying the documents that are to be adduced in evidence in the course of the trial; secondly, the exchange well prior to trial of non-expert witness statements so that non-expert witnesses will customarily give their evidence-in-chief only by the adoption of that written statement; thirdly, the exchange of expert reports well in advance of trial and a direction that those experts confer prior to trial; fourthly, the exchange of chronologies; and fifthly the exchange of written submissions.

Those processes leave very little opportunity for surprise or ambush at trial and, it is my view, that pleadings today can be approached in that context and therefore in a rather more robust manner, than was historically the case; confident in the knowledge that other systems of pre-trial case management will exist and be implemented to aid in defining the issues and apprising the parties to the proceedings of the case that has to be met.

In my view, it follows that provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and apprising the parties of the case that has to be met, the Court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the Court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment."

The five steps suggested by Chief Justice Martin are almost invariably directions given by an experienced arbitrator.

For the reasons articulated by Chief Justice Martin, what then is the merit of a pleadings battle? Surely the key issue is the recognition that, at some stage of the dispute, there must be a sufficiently particularised pleading and response, so that the parties clearly inform the other of the cases to be met and pursued, and ultimately determined by the arbitrator. That presumably ought to be at about, but not necessarily prior to, the start of the hearing, provided the parties have in the course of preparing the matter at all times had a proper understanding of the dispute.

To that end, it is presumably sufficient for relatively simple points of claim to commence the process, and be met with an outline of the respondent's key points of defence, and relatively little more until after the preparation of the trial book and exchange of witness statements and expert reports.

Certainly there is no reason why that relatively simple exchange should not occur early, and it should not hold up the further steps to prepare the matter for hearing.

Simplifying Discovery and Production of the Trial Book

Frequently, the next area of major debate, and waste of both time and cost, is the process of discovery.

In litigation, parties exchange "lists of documents". Debates occur about whether there has been full discovery, discovery by category or bundle, sometimes about thoughtless discovery, perhaps even the possibility of burying your opponent in paper.

To what good end? There is no magic in the list of documents itself, and mostly the parties have an excellent idea of what documents are relevant, and both omissions and excesses can be dealt with at, or after, the hearing in a variety of ways.

The only relevance of discovery is to identify and group documents, which will form part of the trial book and permit parties to lead evidence by reference to or through those documents. There are some simple rules which should be observed, in preparing the index and the trial book: -

1. The claimant prepares the first draft, and the respondent adds to it;
2. If either party wants a document in the trial book it goes in;
3. Summaries or extracts may not be used instead of the complete document;
4. If a party has failed to provide a document which turns up at the hearing, and is important, the opposing party is likely to be entitled to an adjournment and costs;
5. The numbering process should permit numeric searching by computer;
6. The process of assembly of the trial book should identify who introduced the document. This can be done by number of simple strategies;
7. In the event that there is a debate about the utility or otherwise of a particular document or group of documents being included in the trial book, if it transpires that they are not used, the party introducing them should bear the cost involved in any event, and subject to persuading the arbitrator otherwise, irrespective of the outcome of the arbitration.

It may well be that various sections of what comes to be the trial book are relevant for use in expert conclaves, and the preparation, and preparing and indexing the trial book should proceed with both aims in mind.

When preparing the trial book, some attention to its manageability should be given. Trite as it is to say, there is no point in attempting to put 600 pages in a lever-arch file designed to hold 450. The files need to be manageable in the hearing room. The parties should make sure that the numbering is clear so if, for example, further photocopying is needed, the numbers are not lost when the document is recopied.

There are a number of modern technologies such as Drop Box, which can be used to save documents to the parties' computers, and if necessary, to synchronise them with an iPad, or a mobile phone, as well as record changes made by way of adding or removing documents. Proper use of modern technology can help the parties work efficiently to manage documents both of an electronic or hard copy kind in an effective and economic way.

Experts

Parties are probably not yet ready for the appointment of a single expert whose role is to advise the tribunal. Courts and others have sometimes advocated such an approach, but while that may be appropriate in specific kinds of case, mostly that position will not be adopted for the time being.

The chances are that as the work, the subject of the dispute, proceeds, the parties will have used experts to advise them in many areas, perhaps particularly where there are variations or programming issues, or other considerations on site which require a rethinking of that which was planned, undertaken or attempted. For that reason there are likely already to be experts on each side in major matters.

However, honest experts are usually able to agree on matters fairly readily. There is no place for dishonest experts, and the experts who are engaged need to sign expert witness protocols, which proliferate in the courts these days, and can readily be adapted to arbitration, so that it is clear that their obligation is to the arbitration ahead of party interests.

Usually the differences between experts relate to the assumptions that they are asked to make, and these may derive from factual differences between the parties, introduced by lay witnesses. Even so, and recognising that such differences may not always be able to be overcome, the sooner the experts meet, the better.

A powerful reason for ensuring that this occurs is that, in many cases, the divergences between the parties can escalate. If the differences are understood early on, either commercial resolution, or recognition of the risks involved may lead to resolution of the claim, or perhaps compromise on specific issues which may take the heat out of the dispute, or at least discrete parts of it.

What is an Expert Conclave and How Does it Work?

Not everybody understands the expert conclave process. It is usually treated as a without prejudice discussion between two, perhaps more, experts and it remains without prejudice until a joint report is produced, usually signed by both experts. The parties' lawyers will not be present at an expert conclave if it is to be effective. Furthermore, given that it is without prejudice as between the parties, the arbitrator's involvement in the discussions is necessarily limited, and requires discretion.

Most competent experts have no wish to be seen as a barracker, because the word gets around fairly quickly in what is still a relatively small industry.

Conclaves work, because the parties identify the material on which the experts are working. The experts identify where they are in agreement, and where they are in disagreement, and it is common place that even in complex matters the experts will be able to reduce the areas of disagreement to a few A3 sized sheets, which then tell the arbitrator what it is that they have to look for, listen to and make findings about in the evidence given at the hearing.

Time and money spent on expert conclaves is likely to be reflected by savings in time at the hearing, as well as by achieving a significant number of agreements, which themselves will save both time and costs. If the outcome is a series of relatively short A3 page documents setting out the claim number, the

claimant's claim, the respondent's response, the reason for their differences, the nature of the issue to be determined, and what the arbitrator has to do to come to a conclusion, this will invariably result in the dispute being brought into a clear focus at the hearing.

Before attending an expert conclave, the arbitrator needs to have an understanding of what papers the experts have been provided with, and indeed to be armed with a copy of those papers, so that while the experts are conferring, the arbitrator can consider what it is that the experts are discussing, either from an agenda of topics, or an analysis of the claims and responses. Routinely, the arbitrator will meet with the experts and explain to them that which the lawyers already know, namely that if the experts are honest and competent, the differences between them will almost certainly boil down to either differences in the facts on which they are asked to work, or perhaps some other technical differences. The arbitrator will not participate in the substantive discussions of the experts.

Most expert witnesses are actually quite eager to explain to the arbitrator the justification for their conclusions, and for that reason, they are willing to identify succinctly what it is that the arbitrator must do to make findings which come to the conclusion reached by the expert. This clearly focuses on the debate in advance of the trial in precisely the way contemplated by Chief Justice Martin, and encouraged by experienced arbitrators.

Pre-Trial Procedures – Preliminary Conference Management

The major advantage of arbitration is the ability of the arbitrator to move, and help the parties also move, very quickly. Arbitrators can simply move much more rapidly than the Court, even though the Federal Court docket system permits very effective court management of its cases.

An arbitrator should generally encourage the parties to cooperate and deal intelligently with each other in respect of preparation of the matter for hearing. Complicated matters are usually difficult enough, without attempts at petty point scoring. However, there is absolutely no reason why the arbitrator cannot always be available on short, but reasonable, notice for a phone hook-up if some particular sticking point emerges in relation to interlocutory issues.

An arbitrator may use institutional rules, and a variety of standard form orders to administer an arbitration procedurally, but it is invariably better to attempt to tailor a process which is specific to the particular dispute at hand.

The matter should always be regularly managed by preliminary conferences held, if necessary, by a phone hook-up.

There is however no reason why an arbitrator cannot prepare and distribute minutes on the day of a preliminary conference. A few simple rules will help. List the hearing for late morning. Have a template agenda/ minutes prepared in advance. Work through the items in sequence. Without fail, get the minutes out before close of business on the day of the preliminary conference. Do not attempt to record every word spoken, but invite the parties to acknowledge that you have dealt with major matters discussed, and invariably the minutes will become virtually set in stone. Keep a folder of the minutes. Number the preliminary conferences. Refer back to earlier minutes, to ensure that nothing has slipped between the cracks.

Insist on an Early Face-to-Face Meeting of the Client Principals with the Legal Representatives Present

Arbitrators sometimes overlook the importance of holding a face to face meeting of the parties early. Generally, the earlier the better, though there is one rule about attempts at settlement, namely that it is sometimes too early, but never too late. It may be that a particular individual on one side or the other has climbed to a position from which it is difficult to descend, but an early meeting with appropriate senior representatives will usually flush that out. Such a meeting provides an ideal setting in which to analyse the commercial reality, or otherwise, of the proceedings, and arbitrators should take the trouble to do this, and not assume that the lawyers have done it.

It may be achieved by obtaining rough agreement from the parties as to the cost on a per day basis for rooms, counsel, witnesses, the parties (including opportunity costs), office support, transcript, the arbitrator and where appropriate, an associate. In the course of costing the hearing times, it is necessary for the arbitrator to distinguish between lay witness days and expert witness days, because the latter are generally considerably more expensive.

The arbitrator should ask the parties estimate to the likely length of the hearing by reference to the number of witnesses, the number of experts and the nature and amount in dispute. If there is a serious discrepancy between the parties in their estimates, this may well give some clue as to the difference in the parties' approaches to the matter.

If arbitrators apply a healthy scepticism to estimates provided, and have regard to their own experience, this will usually assist them to conduct an effective conference of this kind.

Provided they are aware of the costs involved early enough, the parties are usually well able and willing to make sensible commercial decisions which may resolve the matter. On the other hand, if this step has not been taken until the parties are committed, it may well be that whatever the common sense of resolving the matter, well-resourced parties will conclude that they have spent enough to chance their arm in a hearing, usually to the detriment of both.

Planning the Hearing

The parties should be directed to provide a schedule of witnesses, with a time allowed for cross-examination by agreement of the parties. The schedule initially should be for lay witnesses only, and unless there is some good reason why not, all the lay witnesses should give evidence prior to the expert witnesses. The expert witnesses should be scheduled to be heard in a hot-tub setting on a topic by topic basis, after the lay evidence.

The witness schedule should be published and provided to the arbitrator, and should allow both a reasonable time for cross-examination, and should permit the parties to plan an orderly approach to management of the hearing. If there is a need for revision of the schedule, which should occur by agreement, but if there is disagreement that can be readily dealt with by a further directions hearing.

It may be appropriate to allow a few gaps at strategic points of the hearing to accommodate slippage, or other unforeseen contingencies.

Cost Protection Offers

There are a variety of forms of cost protection offers, which may involve ingenuity on the part of the parties, and there is no reason why the arbitrator should not remind the parties that there a variety of ways in which both sides can protect themselves to some extent in relation to costs, because the making of such offers may well encourage the parties to resolve the matter overall, or take steps to narrow the ambit of the matters being contested in the hearing.

Naturally, any cost protection offers should be sealed, so that the arbitrator is not affected thereby, and can deal with them when the question of costs arises.

The Modern Management of Arbitration

The discussion of natural justice in Geoffrey Gibson: The Arbitrator's Companion makes it clear that one of the main concepts of procedural fairness is to ensure that a party is able to properly present its case. Section 18 of the New Act enshrines that principle.

In *Johnson v Johnson* (2000) 174 ALR 655 at paragraph 13 a majority of the High Court said:-

> *"Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In Vakauta v Kelly Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of "the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case." Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them."*

It is common place for counsel to complain about some Judges who do sit mute while evidence is advanced and arguments are presented. If anything is a potential time-waster on the part of the arbitrator, it is that approach, and good arbitrators should be willing to have a dialogue with counsel, aimed at getting to the heart of the matters in issue.

Conduct of the Hearing

It goes almost without saying that the arbitrator should be firm and fair. Whether the proceedings are conducted under the Old Act (section 14), or the New Act (section 19(3)), the arbitrator's approach should be the same and reflect the need to resolve the dispute without unnecessary delay or expense.

It is plain that in a major or long-running matter, things may go wrong in ways which do not reflect badly on the parties. A little latitude by the arbitrator will not hurt because disputes of all sizes, which go to a contested hearing, involve enough tension, without additional unnecessary pressure being applied.

Experienced arbitrators should probably consider and accommodate the reporters and witnesses well ahead of the parties and lawyers, but there is no reason, for example, why a particular witness should not be allowed to be run over a little to accommodate flight times and personal convenience. However, for the purpose of publishing a schedule of anticipated witnesses, and allowing reasonable time for cross-examination, the arbitrator should guard against such techniques as running interstate witnesses or counsel against flight times or other petty conduct.

It is a good idea to establish a proper, cooperative tone early.

Regime for Objections to Evidence

The parties to a well-run arbitration before a legal arbitrator should at least consider an agreement pursuant to section 19(3) of the Old Act to dispense with the rules of evidence. The New Act, again in section 19(3), contemplates that the arbitral tribunal will have the power to determine the admissibility, relevance, materiality and weight of any evidence.

The provisions do not either make it "open slather" or negate a need for a regime for objections to evidence. An agreement as to a protocol for the nature of objections which might be taken, could be as follows:-

1. **(HS)**: Hearsay evidence, both oral and written, will be admitted subject to relevance as proof of the communication of the matters asserted but not as proof of the truth of those matters.
2. **Documents (D)**: Where documents are in evidence or available to be tendered in evidence, evidence of the contents or effect of those documents will be admitted subject to relevance as evidence of proof of the state of mind or understanding of the witness but not as proof of the contents or effect of the documents; it is and remains the task of the Court to determine those matters.
3. **Relevance (R)**: Oral or documentary evidence to which objection is taken on the ground of relevance will be admitted subject to relevance unless the Court is persuaded in a particular case that to take this approach will unduly prolong the hearing.
4. **No probative value (NPV)**: Evidence which has no probative value in respect of an issue of fact or law in the arbitration shall be excluded.
5. **Limitations (L)**: no objection if admitted only as evidence of [for example, limited to evidence of a factual assumption made by the witness only].

6. **Conclusions**: Evidence of conclusions **(C)**, other than opinion based on specialised knowledge **(O)**, will be admitted subject to relevance only as evidence of the state of mind or understanding (SM) where a basis for the conclusion is shown; but if no basis is shown then the evidence will be excluded.

   6.1 **As to conclusions:**

   (1) **C-A**: argumentative or submission and not evidence of fact or a conclusion,

   (2) **C-B**: no basis for the conclusion of fact in the evidence,

   (3) **C-K**: the evidence is not a fact within the witness' knowledge,

   (4) **C-L**: conclusion of law, not evidence, shall be disregarded subject to relevance being established.

   6.2 **As to an opinion based on specialised knowledge:**

   Opinion evidence shall be disregarded where

   (1) **O-E**: the witness lacks the expertise to express the opinion, or expertise has not been established,

   (2) **O-FA**: the expert has not identified the relevant factual assumptions on which his opinion is based,

   (3) **O-M**: the basis of the opinion has not been established on facts in evidence or identified assumed facts and/or there is no explicit reasoning from the fact (or assumed fact) to the conclusion/opinion Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705.

   6.3 **As to evidence of state of mind**:

   (1) Evidence of the state of mind **(SM)** of a witness or another including evidence of intention **(SI)** or speculation **(SS)** shall be disregarded subject to relevance being established.

Everything in Writing

In an effort to save time and cost, the parties should be required to present everything in writing which can be reduced to writing. This includes pleadings, openings, evidence in chief and submissions. Generally, there should be no oral evidence in chief from witnesses, beyond swearing them to their witness statement. There should also be a regime in place for the provision of a colourised version of the statement of the next witness to be called. This needs to be ideally a few days ahead, so that objections, if there are any, can be dealt with in an orderly fashion. It is desirable that that regime should be administered reasonably firmly.

In the case of the evidence regime referred to above, the colourised version of the witness statement of the witness to be called will be coloured blue, where it is suggested that the statement to which objection is taken should be struck out, and yellow, where it is contended that there is a weakness in the evidence, and the weakness is identified by an objection in accordance with the protocol, but it did not need to be struck out.

Often the outcome of a particular objection may be so obvious that it will be conceded by the other side. The process which follows may well be a response in tabular form to both the opposition and the arbitrator, and then a further reply either conceding the objection or arguing the position, so that at the commencement of the witness' oral evidence, rulings may be given, often without further argument.

As a matter of probability, a large number of objections will be treated as "yellow", with the consequence that the evidence is not struck out but the basis of the objection is sufficiently noted, so that if that part of the witness testimony becomes critical, the arbitrator can make an appropriate allowance for the alleged weakness of the testimony.

When considered with the benefit of hindsight that process will work well, and save arid debates about admissibility, relevance and the like.

Hot-Tub Expert Evidence

There have been a number of papers on the presentation of expert evidence in a hot-tub setting.[4]

Generally, the witnesses will sit together at the witness' table, being sworn in at the same time. If there is a challenge to some aspect of one witness' evidence, that challenge may be dealt with, initially, usually by the opponent's counsel cross-examining the witness after brief evidence in chief, in the usual way. When the hot-tub evidence commences, counsel calling the witness will be at liberty to ask questions, and opposing counsel also. The witnesses are able to ask questions of each other, and comment upon whether or not they agree with the opinions expressed by the other witness.

In most circumstances the previous participation in the expert conclaves well prepares the witnesses for the hot-tub process. Their differences will be relatively well understood, and, handled sensibly, such a process is likely to save many days hearing time without disadvantaging either party.

Indeed such a process may, with the assistance of counsel, lead to further agreements which, in a sense, become an extension of the agreements reached in the expert conclave process.

Agreement on a Chronology

In most substantial disputes an analysis of the events chronologically permits a clearer understanding of cause and effect, and also permits the testing of oral evidence about a course of conduct, or series of events, that can be measured against what was written, said or done at the time. Once more cooperation between the parties is of the essence. Frequently opposing parties will put a different spin on a particular event or incident, but it is usually a straight-forward process to analyse the preferable view, when that event is placed in its chronological consequence. The parties should identify whose entry it was in the chronology, if there is any contention about a particular item, so that the arbitrator is helped to distinguish between chronology and submission.

4 See for example, McClellan CJ, "Concurrent Expert Evidence" 29 November 2007

The Form and Contents of the Award

Both the Old and New Acts provide for the form and contents of the award, in sections 29 and 31 respectively.

Both Acts contemplate that the award will be in writing and signed, and require a "statement of the reasons for making the award" in the Old Act, and "the reasons on which it is based" in the New Act.

Section 31(3) of the New Act permits the parties to agree that no reasons are to be given. It is rare for such an agreement to be made.

What was meant by "a statement of the reasons for making the award" was hoped to be dealt with by the High Court in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37. The much awaited decision really did nothing more than repeat the standards stated by Donaldson LJ when giving judgement in *Bremer* [1981] 2 Lloyd's Rep 130 at 132-133 namely:-

> *"All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a reasoned award."*

In reality, the High Court's majority decision amounts to saying "how long is a piece of string?", because under both Acts what is required to satisfy the statutory provision will "depend upon the nature of the dispute and the particular circumstances of the case."[5]

In light of the High Court's approach it is probably important that the parties should consider whether or not, under the New Act, they ought to agree that no reasons are to be given.

If such an agreement is made, the parties will be likely to have taken steps which will preclude the Court's intervention under Part 7 of the New Act.

Recourse against the Award

Sadly, in some jurisdictions the Arbitrator's Award is seen by well-resourced parties as simply a step in the process. If enough is in dispute, the arbitrator's award will routinely be followed by an application for judicial review of the award. In different States the Courts have grappled inconsistently with the principles for the grant of right of appeal. Unfortunately, an arbitration routinely followed by a round of litigation merits the melancholy remarks of Heydon J in *Gordian Runoff*.[6]

In what might be described as the interventionist States, the Courts have been quick to find "error of fact or law on the face of the award", whereas in other States a much more robust approach has been taken.

5 *Gordian Runoff Ltd* at [53]
6 *Gordian Runoff Ltd* at [111]

There were options available under the old Act to avoid judicial review if that was the parties' wish and the New Act has attempted to reinforce that position, and has probably substantially succeeded in most circumstances.

Exclusion Agreements under the Old Act

Under the Old Act it was necessary for the parties to sign an exclusion agreement if there was to be an attempt to affect the parties' rights to seek judicial review of an award under section 38 of the Act or determination of a preliminary point of law.

An exclusion agreement in relation to arbitration appeals under the Old Act might be as follows:-

> *The award of the arbitrator [name] in this matter will be considered to be final and binding by the parties and no party will institute or maintain proceedings in any court by way of appeal and all parties expressly agree that this agreement is intended to and does operate as an exclusion agreement affecting rights under sections 38 and 39 of the Commercial Arbitration and Industrial Referral Agreements Act 1986, and the parties agree that:*
>
> *(a) the Supreme Court shall not, under section 38(4)(b), give permission to appeal with respect to a question of law arising out of an award; and*
>
> *(b) no application may be made under section 39(1)(a) with respect to a question of law.*

Part 7 of the New Act

Under the New Act, Part 7 seeks to limit recourse to the Court, requiring an application for setting aside in accordance with section 34(2) and (3), or an appeal under section 34A.

Section 34(2) and (3) contemplate that an arbitral award may be set aside by the Court in very limited circumstances:-

(i) party incapacity or arbitration agreement invalidity;

(ii) party not given proper notice or otherwise unable to present the party's case;

(iii) limited rights with respect to decisions beyond the scope of the submission to arbitration;

(iv) composition of tribunal or procedure not in accordance with the parties' agreement or the Act;

b) disputes not capable of settlement by arbitration or the award is in conflict with the public policy of the State.

Applications for setting aside may not be made after 3 months have elapsed from receipt of the award.

Section 34(2) requires the party making the application to furnish proof of the items complained of. While the grounds would appear to be extremely limited, the fact that a review by the Court is retained, and includes amorphous concepts such as "conflict with…public policy", may leave the door slightly ajar in an interventionist jurisdiction. In reality the grounds for setting aside an award under section 34 are so limited, that they should not be relevant to a regularly constituted, and properly run arbitration.

Experienced arbitrators would be well advised to have regard to section 34(2) of the Act during the course of the arbitration to ensure that there is no technical irregularity, which permits an opportunistic application by a disappointed party.

Under section 34A of the New Act, an appeal lies on a question of law if the parties agree before the end of the appeal period (3 months after the award) and the Court grants leave.

The Court must not grant leave unless it is satisfied:-

(a) the determination of the question will substantially affect the rights of one or more of the parties; and

(b) the question is one which the tribunal was asked to determine; and

(c) on the findings of fact in the award –

  (i) the decision is obviously wrong; or,

  (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

(d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

The appeal under section 34A is only on a question of law, and requires the parties to agree and the Court to grant leave. The limitations on the Court's ability to grant leave are significant, and in section 34A(3) the provisions are cumulative so that provided the Courts adhere to the obvious legislative intent, this must very substantially restrict the number of appeals. The parties may further reduce the options for appeal by making an agreement under section 31(3) that there will be no reasons given.

The consequence of these provisions must be to limit judicial review and therefore substantially enhance the position of arbitration in our dispute resolution regime.

Application to Smaller Arbitrations

This paper attempts to address which can be applied to major arbitration in an effort to save time and cost. In major arbitrations there is usually more scope for cost and time saving, but there is no reason why similar principles should not apply to smaller arbitrations. Experienced arbitrators will probably adapt the proposals outlined in this paper with a close eye on the question of cost/benefit. Many of the proposals appropriate to major arbitration need to be modified to suit the circumstances of a smaller arbitration, but must always be aimed at reducing delay and expense.