

**ASPECTS OF ARBITRATION:
REGULATION OF PROCEDURE AND
ENFORCEMENT OF PRE-HEARING ORDERS**

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*... but man, proud man,
Drest in a little brief authority,
Most ignorant of what he's most assur'd,
His glassy essence, like an angry ape,
Plays such fantastic tricks before high heaven,
As make the angels weep.*

W.Shakespeare, Measure for Measure 1.ii.114

or

How to avoid making an ass of yourself!

A Introduction

- 1 An arbitrator has authority and should not be afraid to use it. The parties have appointed him to adjudicate between them and he has a duty to do so which is discharged only by consensual or curial termination of his authority or by the publication of his award.
- 2 An arbitrator's authority may be unfettered except as to the obligation to publish a binding award or it may be fettered by detailed agreement between the parties as to timetable, procedure and evidence.
- 3 This paper is concerned with :
 - (a) the position regarding regulation of procedure where the arbitrator's authority is not fettered or to the extent that it is not fettered ;
 - (b) the position regarding the enforcement of pre-hearing orders.

B Preliminary Matters

- (i) Inception of arbitrator's authority

- 4 The first point to be noted is that an arbitrator has no power until the dispute has been referred to him.
- 5 A dispute may be referred to an arbitrator in any one of three situations :
- under an arbitration clause in an agreement in which he or she is named as arbitrator by name or office
 - under an arbitration clause in an agreement in which the arbitrator is not named
 - under an ad hoc submission to him or her as a named arbitrator
- 6 In the first and second situations the arbitrator has no authority until the dispute in question has been referred to him in writing in an additional document known as a reference. In the third situation, the submission also operates as a reference.
- 7 In the first situation (that of an arbitration clause naming an arbitrator) a dispute may be referred to the arbitrator unilaterally. In the other two situations the reference must be bilateral.
- 8 The lack of co-operation where a bilateral reference is required does not leave the party wishing to proceed remediless. That party has available the powers of acting unilaterally or applying to the Court contained in sections 7 and 6 respectively of the Arbitration Act 1908 ("the 1908 Act").¹ The latter power but not the former is preserved by Article 11 of the Model Law.²
- (ii) Fundamental principles underlying exercise of arbitrator's authority
- 9 Identification of the fundamental principles on which an arbitrator should act is essential in order to define the limits of his powers in relation to the regulation of procedure and the enforcement of his pre-hearing orders.
- 10 The 1908 Act does not define the fundamental limits of an arbitrator's powers in relation to procedure. The Model Law does do so.

- 11 The 1908 Act contains two relevant provisions :
section 4, which provides that a submission should be deemed to include the provisions specified in the Second Schedule to the Act, so far as they are applicable to the reference under the submission, unless a contrary intention is expressed in the submission. The relevant provisions of the Second Schedule in the present context are paragraphs 6 and 7.³ section 8, which empowers the arbitrators or umpire acting under a submission to administer oaths to the parties and witnesses appearing, unless the submission expresses a contrary intention.
- 12 The Model Law contains the following relevant provisions :
- Article 18. Equal treatment of parties⁴
- Article 19. Determination of rules of procedure⁵
The other Articles in the Model Law dealing with procedure (Articles 20 and 22-26)⁶ are similar to the provisions of the 1908 Act in that they are specific provisions rather than statements of principle.
- 13 The question arises of how the principles enunciated in Articles 18 & 19 of the Model Law compare with the common law rules which apply to arbitrations under the 1908 Act.
- 14 Under the Model Law the parties or, in the absence of agreement between the parties, the arbitrator are empowered to fix their own procedure subject to two requirements ...
- (a) "the parties shall be treated with equality" ;
and
(b) "each party shall be given a full opportunity of presenting his case".
- 15 The same is true under the common law. See, for example, the following passages in Walton and Vitoria : *Russell on Arbitration* (20th ed, 1982) :

... an arbitral tribunal (like any other tribunal performing judicial functions) has the duty of

acting in accordance with the essential rules of "natural justice" 7

and :

Not only will express and clear agreement between the parties justify any departure from ordinary rules of procedure and the like, but an express agreement between the parties will in general bind the arbitrator to act as the parties have agreed.

The principles just stated are subject to this exception, that it is possible for an agreement between the parties as to the conduct of an arbitration to be "so contrary to fundamental principles that it is treated as contrary to public policy" and so is unenforceable. 8

and :

The first principle is that the arbitrator must act fairly to both parties, and in the proceedings throughout the reference he must not favour one party more than the other, or do anything for one party which he does not do or offer to do for the other. He must observe in this the ordinary well-understood rules for the administration of justice. 9

and :

An arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents. 10

C Regulation of Procedure

(i) General Approach

16 It is my view that an arbitrator, while being sensible and not seeking to impose on the parties to the arbitration a regime neither of them wants, should take hold of the matter and, for example, on the receipt of the reference should :

- (a) diarise the agreed timetable (if any) and draw to the attention of the parties any omissions in the agreed timetable, for example a failure to

provide for the filing of a reply where there is provision for points of claim and points of defence to be filed ;

- (b) in the absence of an agreed timetable, call a preliminary conference to fix a timetable for interlocutory matters and for the hearing ;
- (c) on completion of the interlocutories call a preliminary conference to fix a date for a hearing if that has not already been fixed ; and should subsequently draw to the parties' attention any failure to comply with the timetable on the part of either party.

17 I am of this view for the following reasons :

- (a) the parties have agreed to submit disputes between them to arbitration and have done so ;
- (b) on the authority of the *Bremer Vulkan* case¹¹ the parties to an arbitration have a mutual obligation to progress the arbitration ;
- (c) the arbitrator (where there is a single arbitrator) can be said to be the agent of the parties for this purpose ;
- (d) the same can be said of an umpire (or a third arbitrator under the Model Law¹²) ;
- (e) although the position is not as simple in respect of arbitrators appointed by the individual parties to an arbitration rather than jointly, they can be seen as acting as the individual party's agent in the discharge of the mutual obligation imposed on those parties ;
- (f) such an active role for an arbitrator is consistent with the move towards an active role for the Courts in litigation ;
- (g) unless, therefore, neither side, having referred the matter to arbitration, wishes to proceed with the arbitration, the arbitrator has, and

should exercise, the power to move the matter along.

(ii) Type of Procedure

- 18 The full potential of arbitration as a dispute resolution procedure has not been achieved in New Zealand because the lawyers involved in arbitration have tended to conduct arbitrations like litigation. Arbitration is a flexible process and should be kept so. The litigation mode is appropriate in some cases but by no means in all.
- 19 What is appropriate in any case should be determined by reference to :
- (a) the fundamental principles already discussed ;
 - (b) the requirements of the particular case.
- 20 From the point of view of procedure, there are, broadly speaking, three types of arbitration :
- (a) those in which the arbitrator receives neither evidence nor submissions from either party but decides the matter purely on the basis of inspection and the exercise of his own professional or otherwise qualified opinion (eg quality disputes) ;
 - (b) those in which the arbitrator decides the matter on the basis of documents supplied by the parties with or without written submissions ;
 - (c) those in which the arbitrator decides the matter on evidence and/or oral submissions.
- 21 Even in the last type of arbitration, which is that which most nearly approximates to litigation, it is not necessary that the full panoply of Court procedure be adopted.

(iii) Matters for Regulation

- 22 The following matters may require regulation in the course of an arbitration :

- (a) initial statements of case ;
- (b) interlocutories such as discovery and inspection of documents, interrogatories and particulars ;
- (c) the attendance of witnesses and the obtaining of evidence *aliunde* ;
- (d) the form of presentation of evidence for hearing and the procedure at hearing.

The above list comprises matters which are within the competence of an arbitrator under the 1908 Act and/or will be so under the Model Law if adopted in New Zealand. Matters such as security for costs, securing of the amount in dispute, interim injunctions and the appointment of receivers which are peculiarly within the competence of the High Court are not dealt with in this paper¹³ ; but it should be noted that Article 9 of the Model Law, which provides :

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

may not be wide enough to cover all the present powers of the Court. If it does not, then, as a result of Article 5 of the Model Law, which provides :

In matters governed by this Law, no court shall intervene except where so provided in this Law

some of the Court's present powers (which duplicate as well as supplement those of the arbitrator) may no longer be exercisable.

23 Initial statements of case.

In the third type of arbitration referred to in paragraph 20, the practice is generally to adopt forms of pleading similar to those used in Court. Even when drawn properly (which is very often not the case), pleadings of this kind do not amount to a full statement of a party's case but only to a statement of the facts necessary to be proved in order to establish the party's case or defence as the case may be.

It is not clear from the wording of Article 23 (1) of the Model Law¹⁴ :

... the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars ...

whether the initial statements of case required under the Model Law (in the absence of agreement to the contrary - Article 23(1)) are any fuller than the customary pleadings under the 1908 Act. However, Article 23(1) of the Model Law provides the flexibility required in this and other types of arbitration by allowing the parties to agree otherwise "as to the required elements of such statements". It will therefore remain competent for the parties to submit full statements of their respective cases rather than pleadings in, for example, the second type of arbitration referred to in paragraph 20.

24 Interlocutories.

Interlocutories fall into two categories :

- (a) those directed to the discovery of evidence ;
- (b) those directed to the particularisation of the parties' cases.

Discovery of evidence takes two forms :

- (a) discovery of documents (discovery usually so called) ;
- (b) discovery of oral evidence (obtained by means of interrogatories or questions required to be answered on oath).

An arbitrator may make orders for both kinds of discovery. The jurisdictional basis for this power under the 1908 Act is paragraph 6 of the Second Schedule to the Act which, in terms of section 4 of the Act, is deemed to be included in a submission unless a contrary intention is expressed therein.¹⁵ The paragraph reads, so far as relevant :

The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, do all such other things as during the proceedings on the reference the arbitrators or umpire may require

The related power to order inspection of documents discovered derives from the same source.¹⁶

The position under the Model Law is uncertain. Whereas the 1908 Act provides ¹⁷ that the procedural provisions contained in the Second Schedule to the Act shall apply unless excluded, Article 19(2) of the Model Law¹⁸ (which might be seen as giving the arbitrator the same wide power) operates only to the extent that the parties have failed to "agree on the procedure to be followed... in conducting the proceedings." If, therefore, the parties agree on a procedure which does not provide for discovery, it may be that there is no room for an argument that the arbitrator has the power to order discovery of either kind.

The purpose of particulars being to state the matters to be proved in order to establish the claim or defence, as the case may be, and to define the issues between the parties, there is obviously scope on occasion for further and better particulars of a pleading. An arbitrator has the power to order such particulars in arbitrations under the 1908 Act not because of any provision of the Act itself but because of an implied power to do whatever is necessary to enable him to adjudicate on the issues between the parties.¹⁹

It is suggested that the position will be the same under the Model Law if adopted. This suggestion is made in reliance on the definition of "arbitration agreement" in Article 7(1) :

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise

between them in respect of a defined legal relationship, whether contractual or not. ...

(underlining added). The arbitrator must clearly have the power to ensure that the disputes submitted to him are clearly defined.

These powers may, of course, be expressly conferred by agreement of the parties.

25 Attendance of witnesses and obtaining of evidence

An arbitrator has no power over third parties. If, therefore, a party wishes to call a witness who declines to attend, the assistance of the Court must be invoked. There is provision for this under the 1908 Act²⁰ There are also occasions on which it is necessary to obtain the examination on oath of a witness before an officer of the Court or any other person or the issue of a commission or request for the examination of a witness out of the jurisdiction. Provision is made for this in the Arbitration Amendment Act 1938 ("the 1938 Act")²¹

Article 27 of the Model Law is apt to cover the second of these requirements but may not be apt to cover the first. It provides :

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

The present power of the Court to assist by procuring the attendance or production of a witness is derived from the provisions of the 1908 Act. If provision is not made in the Act adopting the Model Law for the preservation of this power, there will be a serious gap in the new law.

26 Form of presentation of evidence and procedure at hearing

The 1908 Act does not explicitly require oral presentation of evidence. The provisions of the Second Schedule to the Act, which are the only provisions apart from section 8 of the Act which

refer to the manner in which evidence shall be given, are :

- (a) subject, in terms of section 4 of the Act, to a contrary intention in the submission ; and
- (b) expressed, at least so far as paragraph 7 of the Second Schedule is concerned, in permissive terms.

The 1908 Act is silent as to the manner of presentation of oral evidence where that method of presentation is adopted. It has been common for many years in the construction field, at least, for the evidence in chief of witnesses to be prepared in writing, read on oath and subjected to cross examination in the normal manner rather than being presented entirely by *viva voce* examination.

The position is likely to be the same under the Model Law if adopted. Article 24(1) provides :

Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

D Enforcement of Pre-hearing Orders

- 27 At common law an arbitrator has power to enforce his pre-hearing orders.
- 28 This power may be summarised as follows :

(a) Procedural Orders

- (i) to dismiss a claim where there has been default in filing a statement of case ;

- (ii) to debar a defendant from defending a claim where there has been default in filing a statement of defence ;
 - (iii) to debar a party from relying at the hearing on any part of his case in respect of which he has committed a procedural default, for example failing to give particulars or discovery ;
 - (iv) to dispense with all or the remaining pre-hearing stages and fix a prompt date for the hearing ;
- (b) Orders relating to the hearing :
- (i) to dismiss the claim of a claimant who fails to appear at the hearing ;
 - (ii) to proceed in the absence of a defendant who fails to appear at the hearing.²²

It is necessary, in each case, that the order be made after notice to the defaulting party.

29 The powers of an arbitrator under the Model Law are more limited. Article 25 provides :

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) *the claimant fails to communicate his statement of claim in accordance with Article 23(1), the arbitral tribunal shall terminate the proceedings ;*
- (b) *the respondent fails to communicate his statement of defence in accordance with Article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimants allegations ;*
- (c) *any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.*

The power under (a) corresponds to the present power to dismiss the claim where there is default in filing a statement of claim (see para 28(a)(i) above) but does not go as far. Termination of the proceedings could occur without the making of an award.

The power under (b) above has no equivalent in the existing law but is unexceptional.

The power under (c) above corresponds broadly to the power to proceed ex parte in default of compliance with an order regarding a hearing (see para 28(b)(i) & (ii) above) but does differ in requiring the tribunal to "make the award on the evidence before it " both where the claimant is in default and where the defendant is in default.

- 30 The conclusion must be that the Model Law represents a serious weakening of the present powers of an arbitrator.

References

- ¹Law Commission Preliminary Paper No 7 : Arbitration A discussion paper, (NZLC PP7) pp 80 and 79 respectively
- ²NZLC PP7 p155
- ³NZLC PP7 p82
- ⁴ NZLC PP7 p157
- ⁵Ibid.
- ⁶NZLC PP7 pp157-158
- ⁷ Walton & Vitoria : *Russell on Arbitration* (20th ed, 1982), p 208.
- ⁸Walton & Vitoria : op cit, p 209
- ⁹Walton & Vitoria : op cit, pp 213-214
- ¹⁰Walton & Vitoria : op cit, p 217
- ¹¹[1981] 2 All ER 289
- ¹²Article 11(3) - see NZLC PP7, p155
- ¹³For a treatment of these matters see the author's paper "Attachments and other Interim Court Remedies in support of Arbitration - The New Zealand Position" published in the IBA volume "Interim Court Remedies in Support of Arbitration A Country by Country Analysis" (1987).
- ¹⁴NZLC PP7 p157
- ¹⁵Mustill & Boyd : *Commercial Arbitration* (2nd ed, 1989) pp293, 319 & 661 ; Walton & Vitoria, op cit, p224
- ¹⁶Walton & Vitoria, op cit, p225
- ¹⁷s4
- ¹⁸NZLC PP7 p157
- ¹⁹Mustill & Boyd, op cit, p319 ; Walton & Vitoria, op cit, p255
- ²⁰Sections 9, 16 & 19 - see NZLC PP7 pp80 & 81
- ²¹Section 10 & First Schedule para (4) - see NZLC PP7 pp89 & 91
- ²²See Mustill & Boyd, op cit, pp 535-543 ; Walton & Vitoria, op cit, pp224 and 262-264. See also *Crawford & Anor v A.E.A.Prowing Ltd* [1973] Q.B. 1, [1972] 1 All ER 1199 .

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