SAVING TIME AND MONEY IN ARBITRATION

Paper for AMINZ Arbitration Day 16 November 2009

by Hon Robert Fisher QC

Introduction

1. Choosing arbitration as the means of resolving a dispute does not of itself mean that it will be resolved quickly or cheaply.

2. In the hands of dedicated procrastinators, arbitrations can still be festooned with defended interlocutory battles over pleadings, further particulars, discovery, and the admissibility of proposed exhibits and briefs. This can be eked out with a protracted hearing and delayed award followed by a lengthy series of court reviews and appeals. By taking every possible point, and marching through every procedure known to the law, it is possible to rival court proceedings in their time and expense.

3. Fortunately it does not have to be that way. This paper suggests seven ways in which time and money can be saved in arbitrations:

A. Fit the procedure to the particular dispute

B. Use proactive case management

C. Downsize the arbitral tribunal

D. Expedite the pretrial procedures

E. Expedite the hearing

F. Expedite the award

G. Reduce the opportunity for review

A. Fit the procedure to the particular dispute

4. Arbitration should not be thought of as a uniform procedure. Every dispute is different. Each calls for its own procedure. The lack of formal rules makes it easy to be flexible.

5. In deciding what procedure a particular dispute calls for, two questions must be asked: (i) how much can sensibly be spent in resolving this dispute (the Rolls Royce continuum) and (ii) what techniques best suit a case of this kind (let the punishment fit the crime). I deal with these in turn.

(i) The Rolls Royce continuum.

6. At virtually every point in an arbitration a procedural choice lies between the elaborate and the rudimentary.

7. At the elaborate end of the scale, there may be a panel of three arbitrators, formal pleadings, full Peruvian Guano discovery, personal attendance at conferences and defended interlocutory hearings, service of full briefs of evidence and a formal oral hearing at which a full daily transcript is distributed. That can be followed by rights of review and appeal to the High Court, the Court of Appeal and the Supreme Court.

8. At the other end of the scale there may be a sole decision-maker sitting as expert, an exchange of letters to identify the issues, no discovery, and a decision made on the papers without any hearing or right of appeal or review.

9. Most arbitrations fall somewhere along that continuum. Where a case is placed on the continuum should be a conscious decision. The approach needed for an argument over the collapse of the Auckland Harbour Bridge is unlikely to suit an argument over a breakdown in Mums washing machine.

(ii) Let the punishment fit the crime[1]

10. The second question is what techniques will best resolve a dispute of the kind in question.

11. Not all disputes call for the same techniques. A dispute over a broken bungy cord may be resolved by having the arbitrator leap off the Sky Tower. A construction dispute may require a Scott schedule from the claimant and a hearing conducted on site. For a valuation dispute valuation reports will usually be an adequate substitute for pleadings. A commercial dispute may require a sophisticated formula for giving effective discovery of a companys electronic database. Procedural flexibility is the key.

Lawyer preferences

12. Due to their training and background, lawyers instinctively lean towards procedures that mimic the approach that would be taken in court.

13. That may not be a bad starting point so long as there is a readiness to depart from it. After all, court procedures have been worked out over many years with a view to ensuring that each side gets a proper hearing. The more one departs from that model, the greater the risk that there will be a breach of natural justice. Court-like procedures also have the security of the familiar. Lawyers are less likely to feel at home in a shearing shed with everyone talking at once and the arbitrator trying out the shears himself.

14. So I do not advocate wholesale rejection of traditional procedures. The trick is to be constantly on the alert for shortcuts which save time and money without prejudicing the outcome.

When should procedural decisions be made?

15. Many major procedural decisions must be made at the outset. They may be modified as the case progresses but the critical time is the preliminary conference. In addition to procedure in the more narrow sense, consideration should be given to the nature and scope of the dispute, what tribunal is best suited to decide it, and the nature of the review and appeal rights exercisable by the losing party. It will usually be too late to revisit such fundamental issues later.

16. It is important to note that so long as they can agree, the parties are not bound by anything in their arbitration clause. At the time that an arbitration clause is drafted it is impossible to predict what disputes may arise between the parties, and therefore what procedures will best resolve those disputes.[2]

17. Sometimes the parties include a procedural timetable in a submission agreement before the arbitral panel is appointed. This is generally undesirable. It reduces flexibility to cope with fresh developments as the arbitration progresses. If the die is cast in the agreement new procedures can be adopted only if both parties agree to vary the original timetable. By agreeing on procedure in advance the parties also lose the input of the arbitrator. Most arbitrators will have something useful to contribute based on their experience and the particular methods that suit their own way of deciding cases.

18. The first way of saving time and money is therefore to cut the coat to fit the cloth. The cost must remain proportionate to the amount at stake. The techniques must suit disputes of the kind in question.

B. Use proactive case management

19. The second way of saving time and money is to use the arbitrator to proactively manage the arbitration.[3] The potential benefits include:

> *Taking advantage of arbitrator continuity.* Because they know that they are the ones who will ultimately have to decide the case, arbitrators usually familiarise themselves with the file, run interlocutory matters in that knowledge, and structure the hearing in a way that they know will suit their particular methods. It is no criticism of judges that rostering requirements usually make that level of personal involvement impracticable.
>
> *Taking advantage of arbitrator accessibility.* Arbitrators are usually accessible at short notice through direct emails (so long as they are copied to the other side) and telephone conferences. Most interlocutory matters can be disposed of with a minimum of time and formality.
>
> *Narrowing the issues*. By closely involving the arbitrator from the beginning, it is usually possible to minimize defended interlocutory hearings, refine the ultimate issues, reduce the number of witnesses and experts, reduce the number of exhibits and shorten the hearing.

Reducing bilateral escalation. Both parties may make interlocutory applications, instruct multiple experts, call multiple witnesses, or prepare lengthy submissions, in order to meet the perceived threat of corresponding action from the other side. Neutral suggestions from an arbitrator can often short-circuit this. Each party might be secretly happy to drop a perceived factual issue, limit the time or pages spent on evidence or submissions, or join in instructing an arbitrator-appointed expert.

20. Whether proactive case management is possible and wanted usually comes back to the legal practitioners involved. If counsel agree upon a particular procedure, timetable or adjournment, it is not for arbitrators to override them. The process is ultimately consensual. However in most cases time and money can be saved by involving the arbitrator from the outset.

C. Downsize the arbitral tribunal

21. Many arbitration clauses provide for three-member arbitral tribunals. One suspects that this is more a matter of tradition among transactional lawyers than conscious choice. Even where the contract is a high value one it is impossible to tell in advance whether the particular dispute that emerges will turn out to involve a substantial proportion of that value or a minor matter on the periphery. I have never seen an arbitration clause that attempts to allocate in advance different dispute mechanisms for different values, or types, of dispute.

22. It will only be after a dispute has arisen that the parties will really be in a position to decide on the numbers and membership of the tribunal that ought to decide it. Only then will they know the sum at stake, the kind of dispute, the nature and level of expertise required, and therefore the form of tribunal that will best suit their needs.[4]

23. Of course the parties are not bound by anything in their arbitration clause so long as they can agree on the approach to be substituted. Good arbitrators will assist them in that choice, even if it means that two members of a three-member panel must fall upon their sword. If the parties have not interfered in the process by which the first-tier arbitrators had appointed an umpire, the neutrality of the process will usually encourage the parties to agree on the umpire as the sole arbitrator.

24. In a few domestic disputes the magnitude and complexity of the issues will justify a three-member panel. The vast majority will not. Arbitrations run by sole arbitrators are simpler, quicker and cheaper. Scheduling is easier and time does not need to be set aside for collaboration. If the responsibility is thought to be too great for one decision-maker, appointment of a sole arbitrator in combination with a right of appeal to the AMINZ Appeal Tribunal should achieve the necessary oversight without undue time and cost.

D. Expedite the pre-trial procedures

25. Reference has earlier been made to the varying levels of procedural sophistication at which the proceedings can be pitched. During the pretrial period this has particular application to pleadings, discovery and form of evidence. The choices within each can be summarised as follows.

(i) The pleadings continuum

26. The main choices are:

Letters. Sequential filing and service of letters outlining claim and response.

Valuation reports or equivalent. Sequential filing and service of reports (suitable for rent reviews etc).

Pleadings. Sequential filing and service of conventional pleadings, possibly combined with Scott schedule listing particulars of alleged defects.

Pleadings and documents. Sequential filing and service of conventional pleadings and those key documents on which the parties propose to rely.

(ii) The discovery continuum

27. The main choices are:

No discovery;

Informal arrangements between counsel, but if not completed by specified date targeted discovery to follow.

Targeted discovery per sample directions attached.

Full discovery i.e. Peruvian Guano discovery per High Court Rules, sworn lists to be served on specified date and inspection to be completed by specified date.

(iii) The evidence continuum

28. The main choices are:

Agreed facts plus documents. No witness evidence.

Oral without prior exchange. Evidence is confined to oral evidence, and production of exhibits, at the hearing.

Will say statements. Timetable for sequential filing and service, with or without draft exhibit lists.

Affidavits. Timetable for sequential filing and service. Saves attendance at hearing where not required for XXM. Affidavits may refer to documents in discovery lists without production as exhibits until preparation of common bundle later.

Full briefs and draft exhibit lists. Timetable for filing and service per High Court Rules for witness briefs and documentary exhibits but filed as well as served.

(iv) Issues conference

29. It will normally be useful to have an issues conference attended in person by the arbitrator, counsel, clients and experts. Usually the best time for this is after initial pleadings, discovery and inspection. In some cases (for example where there is likely to be significant argument over discovery, or where legal costs could be high in proportion to the amount at stake) it can be useful to have the conference earlier. In either case the main purposes of the conference are to:

Identify the real issues in detail
Agree on matters that are common ground
Resolve potential interlocutory matters by agreement where possible
Identify and timetable opposed interlocutory matters
Identify for the experts the alternative factual scenarios upon which they will need to comment
Arrange for the experts to meet and report on matters of common ground and matters in dispute
As far as possible timetable the future of the arbitration proceedings.

E. Expedite the hearing

30. Formal hearings are time-consuming and costly. Assuming that there is to be a hearing, its duration should be kept to a minimum. Three steps will assist in that regard.

31. One is to ensure that during the interlocutory stage the issues are progressively refined. This is where an issues conference should help. Matters that are common ground, or that are inconsequential, can be weeded out. The focus can be clearly placed upon the real issues.

32. Secondly, the arbitrator should come to the hearing with a high level of understanding of the case. Where the amount at stake warrants the preparation of briefs, exhibits, chronology and openings the arbitrator should have read these before the hearing starts. This will relieve counsel and witnesses from the need to read openings and briefs verbatim. The oral exchanges can be confined to the key issues.

33. Thirdly, a reasonable balance can be maintained between adversarial combat and truth-seeking. Ambush and surprise are to be discouraged. Both counsel should present their openings orally before any evidence is called. Hot-tubbing of expert witnesses will assist in some cases.

34. With or without those aids, a decision will always be needed as to the level at which the hearing is to be pitched. The hearing continuum is broadly as follows:

Decide on the papers without a hearing

Meeting with lawyers or representatives and decide on papers

Hearing with openings, witnesses with un-typed digital recording, and closings

Hearing with openings, witnesses with full transcript, and closings.

F. Expedite the award

35. There is little point in organising an expeditious journey through interlocutory procedures and hearing if the arbitrator spends the next year on a reserved decision. Judges have little control over their workloads. Arbitrators do not have that excuse.

36. In my view it is incumbent upon arbitrators to schedule not only the time required for a substantive hearing but also the time for at least the initial draft of an award immediately after the hearing. The obvious benefit is a prompt award. But in addition the evidence and argument will still be fresh in the mind of the arbitrator when the award is written.

37. To that end it may be useful to include in the arbitration agreement a time limit for the award. Most of us tend to work better if working towards a deadline. On the other hand any such limit should include a provision allowing the arbitrator to extend the deadline for reasons which must be explained to the parties in writing. Without an escape route of that kind there is a danger that, for circumstances beyond the arbitrators control, the award is not issued within the time available. The party whose case did not appear to go well at the hearing may be unwilling to voluntarily extend the time.

G. Reduce the opportunity for review

38. Parties to an arbitration expect that the award will be the end of the process. Unfortunately in some cases it can be merely the first round. Unless precautions are taken at the outset, the award can wend its way through a series of hearings for review, leave applications and appeals. The journey can take the parties through the High Court, the Court of Appeal and the Supreme Court before the result is finally known.[5]

39. Once an award is given it will be too late to secure cooperation over the scope of the jurisdiction to review or appeal. The winning party will regard any opportunity for challenge to the award as an outrage. The losing party will go through the processes and award with a fine toothcomb intent on exploiting every conceivable procedural and substantive error. This will often include the tactic of filing a meritless review application or appeal for negotiating purposes or, particularly where one side is better funded than the other, dragging out a war of attrition. Such tactics are possible only where there is the jurisdiction to appeal or review for legal, procedural or natural justice error.

40. To discourage the tactic of filing meritless review applications or appeals it may be useful to include in the arbitration agreement a provision that if a party appeals or applies for review and fails, that party will pay the reasonable solicitor-client costs of the opposing party. But this is unlikely to deter losing parties from challenging awards for tactical reasons if there is the jurisdiction to do so.

41. Fortunately at the outset of the arbitration no-one knows who the losing party will be. At that stage the parties can choose where they wish to position their case along a continuum of potential reviews and appeals with a reasonable level of objectivity. In ascending order the choices are:

> *Expert determination*: By appointing the decision-maker as an expert rather than an arbitrator the parties immunize the decision from any review for breach of natural justice or other procedural invalidity under Article 34 of Schedule 1 to the Arbitration Act and any appeal on a question of law under cl 5 of the Second Schedule to that Act. The downside is loss of the procedural and natural justice protections of the Arbitration Act 1996 and the potential for ensuring the legality of the decision.
>
> *No appeals*: It is competent for the parties to agree that their arbitration award will not be subject to any appeal on a question of law even though remaining open to review under Article 34. Section 6(2)(b) of the Act makes it clear that the parties may contract out of the right of appeal which would otherwise apply to a domestic arbitration under cl 5 of the Second Schedule.
>
> *Appeals only to AMINZ Appeal Tribunal*: By adopting this formula the parties achieve a level of oversight of the legal integrity and fairness of the initial arbitration process while at the same time remaining within strict time limits, one level of appeal only and retention of confidentiality.
>
> *Appeals to the courts but only by leave*: This is the default position under cl 5 of the Second Schedule to the Act.
>
> *Appeals to the courts as of right*: Under cl 5(1)(a) of the Second Schedule to the Act it is competent for the parties to provide a right of appeal on a question of law as of right, i.e. without first requiring the leave of the court. As in the last case, appeals

then lie to the Court of Appeal, and to the Supreme Court subject to the grant of leave by those courts.

42. Where the parties wish to place themselves upon that continuum will turn largely upon speed, economy and finality weighed against the desire for refined levels of legality and justice. Also relevant is the faith the parties have in the arbitral tribunal and the perceived need for its work to be subject to independent oversight.

43. It seems unlikely that at the outset either party would welcome the prospect of successive court appeals after the award is given. Speed, economy and finality were probably the strongest drivers in the decision to choose arbitration in the first place. Commercial parties, in particular, are likely to place a high value upon those considerations.

44. A decision which is prompt and certain allows the parties to channel their time and resources into core commercial activity going forward rather than further litigation looking back. At least one pair of commentators has concluded that (at least where the appeal is to the courts) a right of appeal increases the cost of commerce by requiring the parties to review awards with a view to considering an appeal and, where so advised, to pursue the appeal, without generating any corresponding benefit.[6]

45. Overall, the question whether to retain rights of review and/or appeal comes down to a cost-benefit analysis. Principal benefits of retention are likely to be vindication of expectations as to legality and the discipline imposed upon decision-makers when they know that their work may be marked by others. The price is likely to be delay, legal cost, uncertainty, loss of confidentiality, loss of control over the process, and loss of choice in the identity of the decision-makers.

46. For many parties an appropriate compromise between those competing considerations will be to provide for an appeal to the AMINZ Appeal Tribunal. By adopting this formula the parties achieve a level of oversight of the legal integrity and fairness of the initial arbitration process while retaining strict time limits, limitation to a single level of appeal, and confidentiality of the process.

Conclusions

47. Arbitrations are essentially an opportunity to save time and cost, not a guarantee that that will happen. To exploit the opportunities, the parties should be flexible in tailoring the procedure to the needs of the particular dispute and use the personal continuity, ready accessibility, and proactive case management, that arbitrators can offer. The potential for reviews and appeals should be limited or abrogated altogether. At every step in the proceedings a conscious choice should be made between the rudimentary and the elaborate to ensure that the time and cost of the exercise is proportionate to the amount at stake and the nature of the dispute.

48. Whether advantage is taken of these opportunities turns on the imagination and flexibility of the lawyers and arbitrator involved.

STANDARD RF DIRECTIONS FOR TARGETED DISCOVERY[7]

1. *Own Documents.* Each party is to provide to the other party by [specified date] a list of all documents on which it proposes to rely together with copies of the actual documents unless clearly also held by the other party.

2. *Request to Produce.* Within [10 working days] of receiving the other partys Own Documents as above, a party may file and serve a list of those documents, or narrow and specific categories of document, requested of the other party provided that in relation to each document or category requested there is a statement as to how it is relevant and essential for disposal of the proceedings and why it is believed to be in the possession or control of the other party.

3. *Production or objection.* Within [10 working days] of receiving a Request to Produce, or such further period as may be agreed or permitted at the time, the recipient will in relation to each requested document or category either provide the requesting party with a copy or file with the Tribunal an Objection To Produce stating the grounds for the objection.

4. *Ruling.* As soon as practicable after receiving an objection to produce the Tribunal will give directions as to the manner of its disposal

---

[1] Gilbert and Sullivan: *The Mikado*

[2] It is difficult at the time of drafting the clause to predict with a reasonable degree of certainty the nature of the disputes and the procedures that will be suitable for those disputes. ICC Publication 843 Techniques for Controlling Time and Costs in Arbitration para 6

[3] The arbitral tribunal should work proactively with the parties to manage the procedure from the outset of the case ICC supra at p 7.

[4] High-value and complex contracts can give rise to small disputes for which a three-member tribunal may be too expensive ICC supra at para 3.

[5] An extreme example is *Casata Ltd v General Distributors Ltd* [2004] 2 NZLR 824 (HC); [2005] 3 NZLR 156 (CA); [2006] 2 NZLR 721 (SC) with its multiple hearings before the arbitrator, High Court, Court of Appeal and Supreme Court over nothing more than a rent review.

[6] Holmes & OReilly supra at pp 8 and 9 opine that the point in issue is not whether these decisions are useful to the commercial community, but whether their value outweighs the cost of the appeals apparatus. Appeals increase

the cost of arbitral dispute generally, not just in those cases which are actually appealed. They also point out that, as in New Zealand, a significant number of the reported decisions concern procedural aspects of appeals themselves, e.g. time limits, rights of further appeal, leave principles etc.

[7] Simplified version of Art 3 of IBA Rules on the Taking of Evidence etc 1999http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

Modify the above as required for individual case.