Anatomy of an arbitration Part VII: Arbitration procedure

Choosing arbitration
Drafting arbitration clause
Pre-dispute strategy
Interim measures
Commencing arbitration
Appointing Tribunal
Arbitration procedure
Document production & evidence
Evidential hearing
Award – challenges & enforcement

Unlike court litigation, arbitration does not have a "one size fits all" approach to procedural rules. This flexibility in determining key aspects of the arbitration procedure is one of its main attractions.

Fundamental principles

Party autonomy in determining procedure is paramount in arbitration. This is encapsulated in the Model Law,[1] which states:

> *"Subject to the provisions of [the Model Law], the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".*[2]

In practice, the parties have a high degree of control over proceedings at the outset but this reduces once the tribunal is appointed and assumes control of the proceedings. It is therefore important to consider procedural matters at both the transaction stage, when drafting the arbitration agreement, and at an early stage of any subsequent arbitration.

Drafting your arbitration agreement

Two principal factors will determine the procedural framework of an arbitration: choice of seat and choice of rules.

Choice of seat

The seat will determine the legislative framework of the arbitration, and that will provide important rules as to arbitral procedure. So, for example, if London is selected as the seat, the Arbitration Act 1996 will apply. That sets out both the public policy principles and the procedural framework of the arbitration. Some of its provisions are mandatory.[3] These include:

- provisions conveying certain powers on the courts of England and Wales, for example, to stay legal proceedings, extend time limits and remove arbitrators;
- provisions relating to the status, duties and powers of the tribunal; and
- provisions relating to enforcement and challenge of arbitral awards.

The remaining provisions constitute the default position for certain aspects of the procedure in the event the parties cannot agree.

Procedural rules

The parties can also set out any particular procedural rules they want to apply in the arbitration agreement. Typically, they will adopt the rules of an arbitral institution (such as the LCIA or the ICC), or incorporate the UNCITRAL Rules where the arbitration is ad hoc. However, it is becoming increasingly common for parties to supplement these rules, particularly in relation to disclosure, in the arbitration agreement itself. Another trend is the incorporation of fast-track arbitration procedures where disputes fall within certain criteria (usually based on value).

Procedural building blocks

Guided by and within the limits of the relevant national legislation and the procedural rules, the parties are open to agree on the procedural structure of the arbitration. This need not be the same as for, nor include all the steps common to, court litigation. The parties are responsible for deciding both the steps and also the time limits within which each step must be completed.

However, once a dispute arises, agreement on the procedural structure and timetable is often difficult to reach. In most cases procedural decisions will be taken by the tribunal. Once appointed, the tribunal will record the procedural structure and timetable as a

[1] The UNCITRAL Model Law on international commercial arbitration has been adopted by many countries, either entirely or in part.
[2] Model Law, Article 19(1).
[3] See Arbitration Act, Schedule 1, for a complete list.

procedural order. It is common for a chairman of the tribunal or the other side to propose a *pro forma* procedural order. This should not be accepted without careful consideration.

Procedure will vary depending on the institutional rules used, the composition of the tribunal, and the seat of the arbitration. That said, the basic building blocks are the same. Important issues to consider and document in the procedural order include the following:

Preliminary issues

Are there any issues to be determined before the Tribunal turns to the substantive claims, for example, whether liability and quantum should be dealt with in separate phases of the proceedings and the substantive law that is applicable?

Initial written submissions

- Under some institutional rules,[4] the claimant may choose to have its request for arbitration treated as its statement of case. Under others,[5] the request and answer are the parties' initial opportunity to frame their claim or defence. In both cases, it is important that the initial written submissions contain sufficient detail in terms of issues in dispute and amounts involved to enable the preparation of a procedural order and, if relevant, the tribunal's Terms of Reference.[6] A party may find it difficult to amend its case materially once these documents have been signed.
- Alternatively, a further round of initial written pleadings may be required or desirable, which may add time and expense to the proceedings.

Further written submissions

- The parties will expand on their legal arguments in further written submissions. These are often exchanged as part of "memorials". A memorial will also include witness statements, expert reports and documents on which it relies.
- The parties must decide the following:
  - Is the memorial approach to be adopted or is an approach which makes sequential exchange of the parties' pleaded cases with evidence to follow preferable? Usually, this is more in common law jurisdictions such as England.
  - Are further written submissions to be exchanged simultaneously or sequentially?
  - Is there to be a second round of documents to give the parties an opportunity to reply?

Document production

- In arbitration it is common for a tribunal to order that document production be managed in accordance with the International Bar Association Rules on the Taking of Evidence in Commercial International Arbitration.[7]
- Under the IBA Rules, the document production obligations are significantly less onerous than those in court litigation, although we are seeing litigation-creep in this area.
- However, there will often be an opportunity to request production of particular documents or categories of documents by way of a "Redfern Schedule" which, when complete, shows:
  - the party's document request;
  - the requesting party's reasons as to the relevance of the document;
  - the response of the party to whom the request was addressed; and
  - if the party to whom the request was addressed objects to disclosure, the tribunal's ruling on the matter.
- The tribunals' approach to document production may be guided by its legal background. Civil law arbitrators may be less willing to permit extensive production; common law arbitrators are more comfortable with this. However, these stereotypes are often confounded, and the scope and scale of document production is determined by the nature of the factual matters in dispute.

Oral hearing:

- Once the parties' pleadings, evidence and disclosure have been submitted, there is often an oral hearing in front of the tribunal. In some cases, where the issues are simple or the value low, the matter may be dealt with "on the papers". However, many arbitral laws permit a party to request a hearing.
- Hearings in arbitration are usually run very efficiently. The tribunal will have made themselves available for a specific period only. Often, an arbitration will operate on a chess-clock basis with the advocates given strict time limits for openings and cross-examination of witnesses.
- Consequently, there is heavy reliance on written submissions. The parties will usually prepare pre-hearing submissions and any opening oral submissions may be limited to specific points raised by the tribunal. This will be followed by witness and expert evidence. The witnesses'

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4 E.g. LCIA Rules, Article 15.2.

5 E.g. ICC Rules, Articles 4 and 5.

6 The Terms of Reference are a feature of ICC arbitration. They set out the nature of the dispute and issues to be decided by the tribunal, the arbitration agreement and other key aspects of the arbitration such as substantive and procedural law and the seat and language.

7 Last revised in 2010; more commonly known as the "IBA Rules".

- written statements will be relied on and questions posed by the opposing advocate and the tribunal. Hot-tubbing, where the experts give their evidence together "in the tub", is increasingly used as an efficient means of dealing with expert evidence. Written post-hearing submissions are usually provided shortly after the hearing has finished.

Need for speed?

In some cases, the parties will agree that the arbitration should be expedited. This means that the arbitral tribunal will be appointed quickly and will ensure a degree of urgency is attached to the proceedings and publication of the award. The arbitration will otherwise be carried out in accordance with the relevant procedural rules.

Institutions are also increasingly providing for fast-track arbitration. For example, the Singapore International Arbitration Centre (SIAC) included a fast-track procedure when it revised its rules in 2010. Criteria for adopting a fast-track procedure is usually based on value (for SIAC it is claims under S$5 million) and the procedure provides for the case to be referred to a sole arbitrator and decided on a documents only basis.

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