

AFIA Conference

PO 1: THE BEGINNING, THE END, OR IRISH HORSES FOR COURSES?

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Today's **talk**

1. Rethinking the approach to fixing the procedure
2. The role of PO1
3. Settling the procedure as the arbitration progresses

Timing is **everything**

- PO1 is optimal time for fixing many aspects of the procedure
- Classic examples of premature determinations:
 - multi-tiered clauses lacking clear transitions
 - arbitrator qualifications specified in the clause
 - global time limits for the arbitration

The first CMC

Many rules identify first CMC as the time to fix the procedure, with **PO1 as a complete framework**:

- the procedural timetable
- party representatives (and their capacity to be changed)
- means of communication
- formatting of documents in hard and electronic copy
- communications protocols
- exchange of cases
- disclosure and expert evidence
- budgeting
- costs principles

Source: Swiss Rules, LCIA Rules, ICC Commission Report on Techniques for Controlling Time and Costs in Arbitration

Recent innovations in the arbitrator's "toolkit"

2012 UNCITRAL Working Group Revisions on Notes on Organising Arbitral Proceedings

- consultations on procedure can be held in one or more meetings

ICCA Drafting Sourcebook For Logistical Matters in Procedural Orders

- contains the "ICCA Checklist: First Procedural Order"
- leaves discretion to Tribunal to deal with issues at later stages

New approach: Flexibly foreshadow possible procedural adaptations allowing for proactive case management of issues as they arise

Issues that may be left **until later in the process**

1. The factual evidence necessary to decide the issues in dispute.
2. The detail of the evidentiary hearing
3. Value or otherwise of written openings; "educating" the Tribunal.
4. The extent of and disputes concerning disclosure
5. Managing expert evidence

1. The factual **evidence**

Initial exchange of cases puts parties and the tribunal in a better place to determine the necessary evidence

- Consider setting a second CMC to discuss:
 - limiting the further evidence required
 - isolating the preliminary issues which can be ventilated on the way to a full hearing
 - resolving the detail of what might be the subject of expert evidence

2. The detail of the **evidentiary hearing**

Some variables can only be settled closer to the hearing

Pre-hearing CMCs are often held too late for effective case management of critical issues, including

- electronic and hard copy format for hearing bundles
- preparation of agreed chronologies and *dramatis personae*
- decisions on which witnesses will be cross-examined
- manner of interpretation and the identity of interpreters
- the real issues in dispute for the tribunal to determine

3. Written openings and “educating” the tribunal

Ensuring that tribunals are familiar with the details of the case at the commencement of the hearing

Some techniques include;

- a “Reed Retreat”
- a “Kaplan Opening”
- specify written openings before the evidentiary hearing
- a further intermediate CMC

4. The extent of and disputes over disclosure

Standard approach to disclosure - IBA Rules

- Tribunals rule on production disputes through Redfern schedules

Parties understand better the relevance and weight of the material sought but rarely engage with tribunal outside the Redfern schedules

- PO1 can acknowledge that disclosure may be revisited as the issues crystallize

5. Expert evidence

Expert evidence can increase time and cost due to:

- divergent views of relevant facts and issues
- party-appointed experts pressed to be "hired guns"
- unnecessary use of multiple experts
- unfocussed subject matter for experts appointed

Proactive management foreshadowed in PO1 can help

Recommendations

- PO1 is but the **first building block** in an efficient process
- **ongoing case management** and POs can add value
- tribunals should foster **a productive approach** discouraging attempts to seize tactical advantages along the way
- Tribunals should encourage **regular engagement** with the parties to address procedural issues and maximise opportunities as they arise