

# PO1: The end or the beginning?

TagTime Webinar

29 April 2020

Presented by

Professor Doug Jones AO

&

Professor Janet Walker



AMANDA LEE



DR KABIR DUGGAL



# Overview

---

1. Rethinking the approach to fixing the procedure
2. What is best decided in PO1
3. What is best left for later

# Rethinking Procedure: timing

---

PO1 is a good time to settle many aspects of the procedure, Including:



- global time limits for the arbitration
- multi-tiered clauses lacking clear transitions
- arbitrator qualifications specified in the clause



However, it is often used to make decisions on issues that arise later

# Matters best suited to the first CMC and PO1

- ▶ the procedural timetable
- ▶ party representatives (and how they may be changed)
- ▶ means of communication
- ▶ document formatting and means of transmission
- ▶ communications protocols
- ▶ nature and timing of statements of cases
- ▶ disclosure and expert evidence
- ▶ budgeting
- ▶ costs principles

# Ongoing/subsequent considerations

1. The factual evidence needed to decide the issues in dispute
2. The detail of the evidentiary hearing
3. The need for written openings; "educating" the Tribunal
4. The extent of disclosure and issues arising
5. Managing the 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 further CMCs to discuss:
  - » scoping the evidence actually needed
  - » isolating preliminary issues to be ventilated on the way to a full hearing
  - » clarifying the subject(s) 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 management of critical issues:
  - » format for hearing bundles
  - » preparation of agreed chronologies and dramatis personae
  - » settling which witnesses will be cross-examined
  - » interpretation and the identity of interpreters
  - » the real issues in dispute for the tribunal to determine

### 3. “Educating” the tribunal

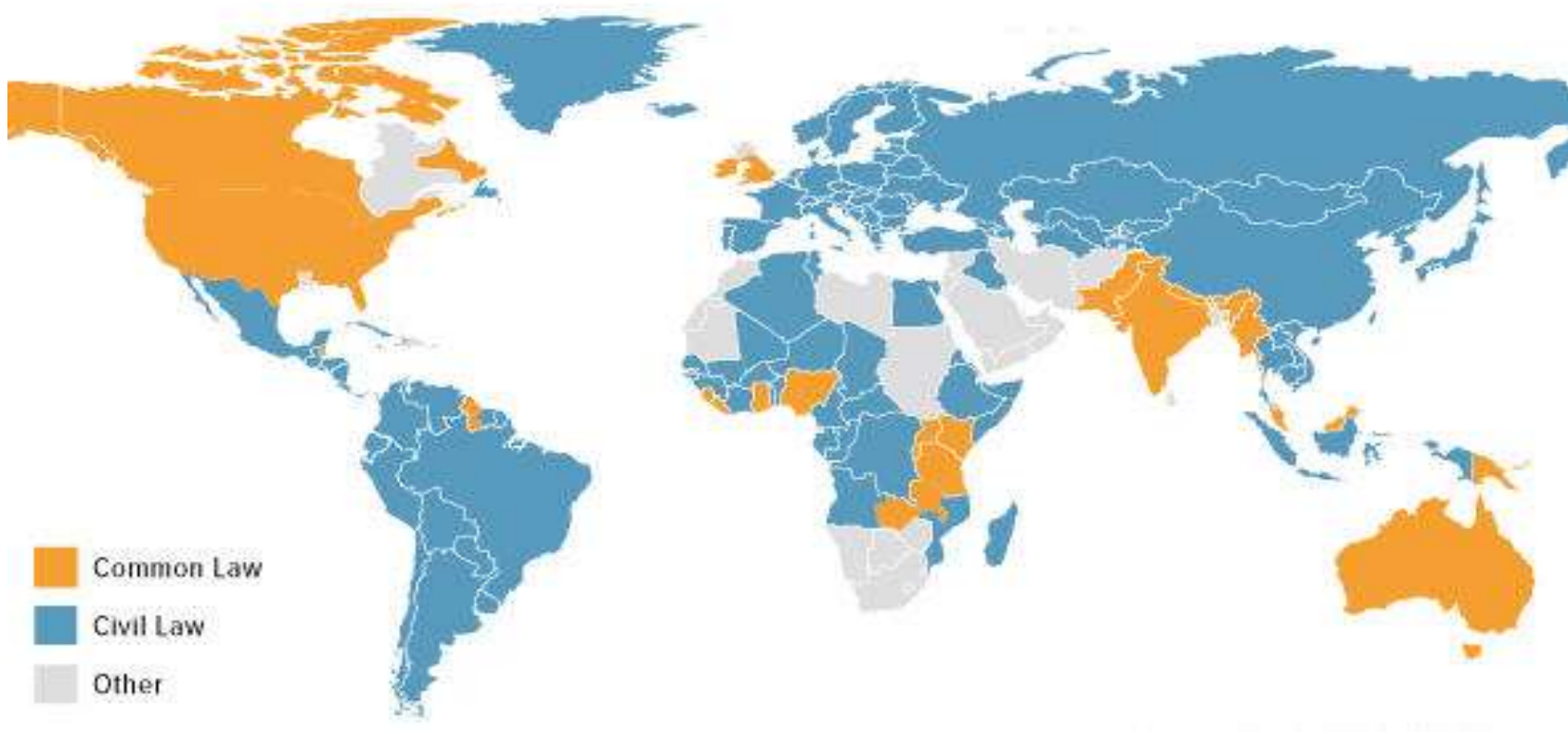
---

- ▶ Ensuring 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. Disputes over disclosure

- ▶ Differing global practice



- ▶ IBA Rules
- ▶ Prague Rules

## 4. Disputes over disclosure

---

- ▶ Traditional approach to disclosure – IBA Rules
  - » Tribunals rule on production disputes through Redfern schedules
- ▶ Parties better understand 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

---

1

Common law concerns transferred to IA

Bias of party-appointed experts

2

Challenges for civil law practitioners

Inexperience with problems faced in common law jurisdictions

3

Current IA practice

IBA Rules on Taking of Evidence and CIArb Protocol

# 5. Expert evidence

---

## Proposed best practice directions

1. Identify disciplines
2. Establish common list of questions
3. Defer production of reports until factual evidence is available
4. Request joint reports identifying areas of agreement and disagreement
5. Then request individual reports only for areas of disagreement
6. Followed by "reply" reports with a "figures-as-figures" analysis

# Conclusion

---

- ▶ PO1 is an opportunity to set the roadmap for the arbitration
- ▶ But it is only the first step on the way to a bespoke procedure
- ▶ Some features are best designed later, as the arbitration progresses



**Professor Doug Jones AO**

[www.dougjones.info](http://www.dougjones.info)



**Professor Janet Walker**

[www.janet-walker.com](http://www.janet-walker.com)

---

# Lights...

---

## Internet Connection

- ▶ get a strong and reliable connection (ideally fibre optic)
- ▶ use a hard-wired/ethernet cable

## Light

- ▶ eliminate natural light
- ▶ use several standing lamps (uplights) with white bulbs to reduce shadows

## Sound

- ▶ find a quiet room
- ▶ cover the walls and hard surfaces to reduce echo
- ▶ use a desktop speaker/microphone (or a headset if needed)

# Camera...

---

## Camera

- ▶ use a separate webcam
- ▶ position camera in the middle of the participants' screen

## Background

- ▶ virtual backgrounds work best against a blank contrasting wall
- ▶ can be a photograph of your study or a neutral scene
- ▶ if not, position yourself in front of a blank wall



# Action!

---

## Screens/computers (2 systems)

### 1. Video system

- ▶ 1-2 additional screens for
  - ▶ participants (try a smart tv)
  - ▶ documents
- ▶ with real-time transcript on laptop screen
- ▶ powerful graphics card
- ▶ docking station or 2-3 ports for multiple displays

### 2. Personal system

- ▶ Laptop with external screen for personal copy of documents, hearing notes, tribunal communications, etc.
- ▶ keep separate from video system to avoid interference

