GAR Global Arbitration Review

Jones shares procedural approaches after GAR-LCIA roundtable

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*In the wake of the GAR-LCIA Roundtable – "Time for a reset? Has international arbitration lost its way?" – leading arbitrator **Doug Jones** shares some further procedural approaches that he has found to enhance the capacity of an arbitral tribunal to focus on the key issues in a complex dispute.*

In a ground breaking initiative earlier this year, GAR and the LCIA brought together eminent practitioners to discuss increasingly common pitfalls that undermine the attractiveness of international arbitration as a form of ADR and ways to reform the arbitral process in the interests of fairness, efficiency and economy.

The roundtable addressed topics such as runaway costs, excessively voluminous pleadings, protracted procedural timetables and over-lengthy awards that fail to narrow down the issues in the earlier phases of an arbitration.

The outcomes included a report, replete with a full transcript and analyses, along with a set of 12 recommendations inspired by the discussion. GAR reported on those recommendations under the headline "Proactive case management… with consequences".

With a view to enhancing the impact of the developments outlined in the 12 GAR-LCIA Roundtable Recommendations, might I take the opportunity of mentioning some further initiatives which I have found enhance the capacity of the arbitral tribunal to focus on the key issues in an arbitration, particularly one of some complexity?

The initiatives could be described under the rubric of proactive case management by tribunals and fall into the following categories:

- focusing disclosure;
- managing party-appointed experts;
- and midstream case management conferences (CMCs)

Focusing disclosure

Document disclosure is one of the most costly stages of arbitration, often swelling to comprise a significant proportion of the total cost of arbitration itself, as was made evident in a recent Australian Centre for International Commercial Arbitration report.

Disclosure is also a common source of delay within proceedings given the time taken to source, review and provide the documents in question.

Proactive tribunal involvement after the exchange of Redfern schedules may prove of considerable utility in streamlining disclosure. It is often lamented that the usefulness of Redfern schedules is undermined by excessively combative counsel (from both the civil and common law traditions) who draft long schedules without focused regard to the spirit of the IBA Rules on the Taking of Evidence in International Arbitration, the content of which is often more formulaic than helpful.

A tribunal's grasp of the issues immediately post-Redfern exchange may often be inadequate to make fully informed decisions on the materiality and relevance of a disputed disclosure, which is obviously desirable.

There are two processes involved in disclosure that are usefully separated in the interests of efficiency: requests for disclosure of documents needed for the merits; and requests for disclosure which arise from the needs of experts to undertake their work.

In respect of merits disclosures, it is often useful after the completion of the Redfern process to require lead counsel to confer and confirm which of the contested requests they wish to pursue (bearing in mind that the preparation of the Redfern requests and responses is often the responsibility of team members rather than that of lead counsel).

The requirement for conferral by lead counsel can usefully be accompanied by the setting of a virtual case management conference (document CMC) at which lead counsel will explain to the tribunal their respective positions on contested requests which survive the conferral process. This has the advantage in many instances of narrowing the contested requests and ensuring that the tribunal's decision on the remaining issues is a fully informed one.

So far as expert requests are concerned, it is often the case that counsel team members who draft these requests translate the experts' needs with a view to ensuring that nothing is omitted, often leading to much more extensive requests than are actually needed by the experts.

A process that I have found useful when considering expert requests is to require a clear statement from the experts in each discipline confirming that the requests made are agreed jointly to include the documents proportionately required by them to do their work, or, where they may have different views of the documents required, a short statement explaining why they have a difference of view.

In the event of substantial differences between the experts, or where the parties themselves have differing views about the expert requests, I then find it of great value to have the experts themselves present at the document CMC to assist in resolving their competing needs.

The application of these processes has, in my experience, led to substantially increased efficiency in the document disclosure process.

Managing party-appointed experts

Managing party-appointed experts, including those who are not versed in best practice for international arbitration, is another area in which proactive guidance by the tribunal pays considerable dividends for the economy, precision and impartiality of the arbitral process.

As I have **written elsewhere**, party-appointed experts may be accurately likened to 'hired guns', in the sense that they are appointed by the parties and their reports are weaponised against the other party and its experts.

The structural problems associated with party-appointed experts materialise in two ways: first, experts might naturally provide their evidence in response to questions generated by their appointing party, in a way that does not meaningfully join issue with the opposing side.

Second, if left to their own devices, experts will produce their opinions based on the factual evidence held at that time by the appointing party, rather than on a common set of data.

In my experience, the following six steps can be deployed to great effect in the early-stage procedure to guide the development of reports by party-appointed experts. These steps, adapted from **a paper I co-wrote with Janet Walker**, can be given effect through CMCs and procedural orders.

1. Tribunals and parties must determine the matters on which experts of like discipline will opine. It may be that on several issues, there is no need for expert evidence at all. Conflict and competency challenges should take place at this early stage before they can seriously disrupt the flow of proceedings.
2. With the tribunal's assistance, counsel and the experts should formulate a draft common list of questions within each expert discipline.
3. The production of expert reports ought not to commence until common factual evidence, both documentary and witness, is available to allow the experts to opine on a common data set.
4. A joint expert report should be produced within each discipline identifying areas of agreement and disagreement which have become apparent through discussion with the opposing experts and the exchange of 'without prejudice'

drafts. Material exchanged by them in this work is protected from later production to the tribunal.

5. Individual expert reports need only be produced on these areas of disagreement. Beyond these areas, the joint expert report should provide a clear, singular source for areas of agreement and the substance of that agreement, thus reducing the volume of material generated.
6. Experts should produce 'reply' reports containing views in the alternative showing what their conclusions would be if the other expert's assumptions and methodologies were accepted by the tribunal. The experts should also have an opportunity to respond to the opposing expert's individual expert reports on areas where there is a divergence. However, these 'reply' expert reports should be strictly limited:
   1. to existing issues already raised by the other party's expert (rather than novel points entirely); and
   2. to differences of opinion, rather than differences in factual or methodological assumptions (which the tribunal will ultimately need to decide).

By explicitly directing the experts to prepare the final report by adopting the opposing expert's assumptions and methodologies, the tribunal ensures that when it ultimately decides to opt for one expert's methodology over the other, it will continue to have the benefit of both parties' experts as to how to proceed.

Proactively managing the party-appointed experts during the process outlined above does more than simply economise on grunt work and costs for the parties and the tribunal. Expertise is absolutely fundamental to arbitration, and is one of its chief advantages as a form of ADR – getting the most value out of experts' insights by capitalising on the flexibility of arbitral process is the very substance of the tribunal's work, not merely an auxiliary benefit.

Midstream CMCs

The final tool, which has already been alluded to in some detail above, is the use of midstream CMCs.

Midstream CMCs can add considerable value to both complex and relatively simpler arbitrations: bringing counsel, experts and the tribunal together in this forum has the dual benefits of facilitating the tribunal's proactive management of the arbitral procedure to ensure ballast is shed early, whilst also giving the tribunal the chance to engage with and begin to understand the key issues in dispute well before the main evidentiary hearings.

The advantages of midstream CMCs could be mapped onto at least the following three axes:

(I) Disclosure

With respect to disclosure, conferencing allows a tribunal to far better understand the materiality and proportionality of documents being disclosed, supplementing the often meagre information that can be gleaned from a Redfern schedule. Engagement between parties, tribunals, and even witnesses may shed light on where any additional evidence is needed, and perhaps even more importantly, where it is redundant.

(II) Experts

Secondly, as already mentioned, it is my practice to hold CMCs with the experts during the expert report process to settle the issues they will opine upon, and also to discuss and review their joint and individual reports. Experts tend to require ongoing reminders from the tribunal as to what is required, especially pertaining to the process of filtering out areas of agreement for treatment in a joint report from the areas of disagreement to be dealt with by producing individual reports.

(III) Whittling down contested issues and educating the tribunal

Finally, an innovative way of using CMCs that has been deployed to great effect in my experience is to convene "issue CMCs" (often combined with document and expert CMCs) well before the main evidentiary hearing, in which the real issues in dispute are identified and distilled.

Crucially, in performing this exercise the tribunal should share the onus with the parties. The distilled synthesis of the issues should be presented in a tabular format in which the issues are listed alongside the corresponding factual and witness evidence that are relied upon for each contention.

This can be particularly useful as the arbitration progresses, because the tabulated schedule can efficiently be built on.

Requiring a distilled synthesis of the issue in tabular format does, of course, demand that the tribunal read and analyse the parties' cases. While it undoubtedly involves additional work, the corollary of this is that the tribunal multiplies by many times its opportunities to engage with and understand the issues in dispute, ultimately leading to a better award.

Cutting to the *raison d' être* of international arbitration

As was stressed by many of the participants in the GAR-LCIA Roundtable, spiralling costs and inefficiency are in danger of becoming the norm in international arbitration. It is encouraging to see such serious consideration being given to issues that cut to the very *raison d' être* of international arbitration, namely, to provide the parties with enforceable awards for their disputes in a timely, expert, and economical manner.

It is hoped that these suggestions add some tools for arbitrators to deploy in pursuance of the aims established by the roundtable.

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