

CHAPTER 37

Procedural Order No. 1: From Swiss Watch to Arbitrators' Toolkit

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§37.01 INTRODUCTION

In designing a process to fit the arbitration, timing is everything. Only as details of the dispute emerge do relevant options for the process become clear. However, as the parties' cases take shape, so too do the implications of the procedural options come into sharp relief. This can complicate efforts to obtain agreement on the process. Procedural Order No. 1 usually follows soon after the formation of the tribunal. This has come to be regarded as the best time to consider the options for the procedure and to chart the course for the arbitration. This essay revisits the emphasis on Procedural Order No. 1 and suggests other points during the arbitration when the procedure might be established.

We are pleased to join in paying tribute to Pierre Karrer and his reputation for promoting a managerial and pragmatic role for arbitrators. We hope to contribute to the debate over best practices in designing an efficient arbitral process and to add our voices to those who would dispel the perception that leading Swiss arbitrators are prone to presenting the parties with a fully formed process in 'Procedural Order No. 1'. We hope to foster the continuing spirit of innovation, which our good friend Pierre would agree is among the core roles, powers and duties of Arbitrators.

§37.02 SETTLING THE PROCEDURE BEFORE THE ARBITRATION BEGINS

The range of procedural options available to arbitrators has generated a tension between the *push* to standardise the process in accordance with current trends and the *pull* to customise a bespoke process for the instant case. Those familiar with current

trends may overlook opportunities to customise the procedure or misjudge the right moment to make procedural choices.

Sometimes enthusiastic commercial lawyers are unable to resist settling aspects of the procedure in the arbitration agreement. Out of bad experience or lack of experience, they seize the opportunity to specify features of the procedure only to find later that the specifications are unsuitable for the dispute that actually emerges. By carving these features into the stone of the arbitration agreement, they make it difficult to make adjustments without compromising the finality of the award. By transforming what seems likely to be a desirable feature into a mandatory requirement, they create the risk that the award will be set aside or challenged on enforcement as ‘not in accordance with the agreement of the parties’.¹ Three common examples illustrate the importance of waiting until the time is right to settle the procedure of the arbitration.

First, parties hope to maintain a conciliatory approach for as long as possible when a difference emerges. They may provide for one or more non-binding forms of dispute resolution before an arbitration may be commenced. Contracting for negotiation or for mediation as preliminary stages may encourage parties to find ways to avoid more costly and adversarial forms of dispute resolution. However, lack of clarity on the triggering event for the arbitration stage can frustrate an aggrieved party’s right to seek an arbitrated resolution.² Secondly, the freedom to select a tribunal with specialised knowledge and experience suitable for the disputes likely to arise is an attractive feature of arbitration. However, including these attributes in the clause can restrict the pool of arbitrators qualified to serve when the time comes to select them.³ Thirdly, the benefits of securing a prompt result are obvious. However, including time limits in the arbitration clause for concluding the arbitration can risk depriving a tribunal of jurisdiction before it has achieved that result. Drafting a clause that creates this risk can provoke dilatory tactics that could bring it about.⁴

These examples show the wisdom of leaving much of the procedure until after the arbitration agreement has been deployed, and they offer one reason why Procedural Order No. 1 has achieved its well-deserved status as the focal point for settling much of the arbitral procedure.

§37.03 SETTLING THE PROCEDURE AT THE COMMENCEMENT OF THE ARBITRATION

The importance placed on the first Case Management Conference and on Procedural Order No. 1 for establishing the procedure for the arbitration has significant, if not overwhelming support of the leading arbitral institutions. This can be seen in the Swiss

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1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Art. V(1)(d).
 2. Christopher Boog, ‘How to Deal with Multi-tiered Dispute Resolution Clauses: Note on the Swiss Federal Supreme Court’s Decision 4A_18/2007 of 6 June 2007’, (2008) ASA Bulletin 103.
 3. Nigel Blackaby and Constantine Partasides QC, et al., *Redfern and Hunter on International Arbitration*. 6 ed., 234.
 4. Richard Kreindler and Timothy Kautz, ‘Agreed Deadlines and the Setting Aside of Arbitral Awards’ (1997) ASA Bulletin 576.

Rules, the London Court of International Arbitration (LCIA) Rules and the ICC Commission Report on Techniques for Controlling Time and Costs in Arbitration.

Under the 2012 version of the Swiss Rules of International Arbitration, the tribunal is given broad discretion to conduct the arbitration in such manner as it considers appropriate, and it may hold hearings for the presentation of evidence or for oral argument at any stage of the proceedings. However, the Rules provide that '[a]t an early stage of the arbitral proceedings, and in consultation with the parties, the arbitral tribunal shall prepare a provisional timetable for the arbitral proceedings, which shall be provided to the parties and, for information, to the Secretariat.'⁵ The mandatory requirement of a provisional timetable at an early stage implies the fixing of key features of the process, and contrasts with what is otherwise contemplated as a very flexible process.

The 2014 version of the LCIA Rules provide that 'the parties and the Arbitral Tribunal are encouraged to make contact (whether by a hearing in person, telephone conference-call, video conference or exchange of correspondence) as soon as practicable but no later than twenty-one days from receipt of the Registrar's written notification of the formation of the Arbitral Tribunal.' The Rules then encourage the parties to agree on joint proposals for the conduct of the arbitration in consultation with the tribunal.⁶ Again, the procedure for the arbitration is expected to be established early on.

The 2015 version of the ICC Commission Report on Techniques for Controlling Time and Costs in Arbitration includes a range of recommendations for means to increase the efficiency and reduce the expense of arbitration. Among these, the Commission notes the requirement of the Rules to convene a case management conference when drawing up the Terms of Reference and in describing the scope of the Case Management Conference suggests that '[w]henever possible, the procedure for the entire arbitration should be determined at the first case management conference and reflected in the procedural timetable to be established pursuant to Article 24(2) of the Rules.'⁷ This is perhaps the clearest example of emphasis on Procedural Order No. 1.

Thus, the received wisdom is that the first Case Management Conference is *the* occasion on which the procedure of the arbitration should be fixed; and Procedural Order No. 1, as a product of that meeting, should comprise a complete procedural framework for the dispute. Much like a finely crafted Swiss watch, the procedure is expected to be set in motion and left to run through the rest of the arbitration.

Before considering other views on the right time to settle the procedure, it is worth mentioning some of the things that can and should be settled early on – at the

5. Swiss Chambers' Arbitration Institution, *The Swiss Chambers of Commerce Association for Arbitration and Mediation Swiss Rules of International Arbitration (Swiss Rules)* (Swiss Chambers' Arbitration Institution; 2012), Art. 15, available at https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_english_2012.pdf.

6. London Court of International Arbitration, *LCIA Arbitration Rules* (London: LCIA, 2014), Art. 14, available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

7. International Chamber of Commerce, *ICC Commission Report: Controlling Time and Costs in Arbitration* (Paris, 2012, International Chamber of Commerce), 10.

time of the first Case Management Conference. Perhaps the most important of these is the overall length of the process. This is usually done by scheduling the main evidentiary hearing. In ICC procedure, in which the parties and the tribunal formally execute Terms of Reference, the Procedural Timetable, which is to be appended to the Terms of Reference is considered a separate document that can be revised without the need for formal agreement of all the counterparties to the Terms of Reference. This underscores the delicate balance between flexibility and certainty in the timetable. Nevertheless, the logistical challenges of rescheduling main evidentiary hearings, and even interim hearings, is sufficient to ensure the participants' commitment to securing and maintaining this aspect of the procedure and, in doing so, to create a temporal framework for many of the other procedural choices that must be made.

Beyond the question of the length of the arbitration, there are a number of administrative features, large and small, that can and should be established at this time. These can include: identifying the parties' representatives and specifying the basis on which they can be changed; and specifying means of communication and the format for documents in hard copy and electronic form, communications protocols, and the like. And beyond this, there is the need to establish a process for exchanges of case by the parties, and to deal, at least in principle, with the possibility of disclosure and expert evidence.

§37.04 RECENT INNOVATIONS IN THE ARBITRATORS' 'TOOLKIT'

Despite the historic emphasis on the period at the commencement of the arbitration (and the issues that can usefully be decided at that time), there are now respected sources that recommend procedures that may be adopted at various stages of the process and not merely at the time of Procedural Order No. 1. The 2012 UNCITRAL Working Group Revisions on Notes on Organizing Arbitral Proceedings and the ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders are two such sources.

The Notes on Organizing Arbitral Proceedings are flexible in the recommendations they make for the process of organising arbitral proceedings. The Notes suggest that the consultations over procedure 'can be held in one or more meetings' although they note that 'a special meeting may be devoted exclusively to such procedural consultations' and may be called a "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review" ... *depend(ing) on the stage of the proceedings at which the meeting is taking place.*⁸ (emphasis added) The ICCA Drafting Sourcebook, contains the 'ICCA Checklist: First Procedural Order' which is described as 'a checklist of issues to consider including in a first procedural order in arbitration' advises that 'it may not be appropriate to include all of the issues... [listed]: *some may be better dealt with later, or not at all.*'⁹ (emphasis added)

8. United Nations Commission On International Trade Law, *UNCITRAL Notes on Organizing Arbitral Proceedings* (New York, United Nations, 2012), 2-3.

9. The ICCA Reports No. 2; ICCA Drafting Sourcebook For Logistical Matters in Procedural Orders, available at http://www.arbitration-icca.org/publications/ICCA_Sourcebook.html.

Initiatives such as these emphasise the value of ensuring that the parties and the arbitrators maintain a well-equipped ‘toolbox’ to design processes that will most effectively bring to conclusion their dispute. The concept of a toolbox enlivens the discussion of which tools should be used at various stages of the dispute and whether or not the process should be wholly constructed at the commencement of the arbitration.

§37.05 ISSUES BEST LEFT UNTIL LATER IN THE ARBITRATION

The challenge faced as the arbitration progresses has previously been understood as one of fine-tuning Procedural Order No. 1. Increasingly, though, it is recognized that the Tribunal’s and the parties’ understanding of the dispute and how best to resolve it emerges later. Even the best efforts to design a satisfactory procedure at the first procedural meeting will fail to take account of the developing character of the dispute in a number of important ways. Procedural issues that are relevant to the ongoing design of the arbitral process and that need proactive case management as the case develops may include:

- (1) The extent of and disputes concerning disclosure – the ‘#%&*!’ Redfern schedule;
- (2) The factual evidence actually needed to decide the issues in dispute;
- (3) Expert evidence- nature, extent and manner of development;
- (4) The detail of the evidentiary hearing; and
- (5) Value or otherwise of written openings; ‘educating’ the Tribunal.

These are procedures that can best be designed once a more detailed knowledge of the real issues in dispute emerges from the parties’ exchange of their cases. They demonstrate the value that can be added by proactive case management between the parties and the tribunal as the case progresses.

[A] The Extent of Disclosure and Disputes Concerning Disclosure: The ‘@#%&’ Redfern Schedule

Standard procedural orders normally provide for the deployment of the IBA Rules of Evidence with requests for disclosure (if allowed) being made on the basis of the criteria set out in these rules and with disputes about production being ruled upon by tribunals presented with Redfern schedules.¹⁰ The difficulty with this process is that there is rarely an opportunity for the tribunal to engage with the parties on these issues other than on the basis of the summarised material found in the Redfern Schedule. In the absence of an unusually active correspondence between the parties and the

10. International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (London: International Bar Association, 2010), Art. 3, Documents, 7–10.

tribunal over interim issues in the arbitration, the tribunal will know little more about the dispute than that provided in the parties' respective statements of case.

Under these circumstances, it may be difficult for the tribunal to make rulings on contested disclosure requests on the basis of its rudimentary understanding of the relevance and materiality of the material sought. There can and should be ways devised for a more detailed but nevertheless efficient engagement between the parties and the tribunal on what is actually needed and why, together with the application at the point of decision of principles of proportionality and cost. For example, a brief procedural hearing may be an efficient means to settle these issues.

It may not be possible for the parties and the Tribunal to anticipate at the outset of the arbitration the nature of the disclosure issues that might arise and how best to resolve them, and thus it may be wise to make allowance in Procedural Order No. 1 for the possibility of revisiting the process should disclosure issues emerge.

[B] The Factual Evidence Actually Needed to Decide the Issues in Dispute

After an initial exchange of the parties' cases in which they present the documentary and witness evidence relied upon, it may be possible to identify what is really in issue between them and to narrow the witness evidence needed to resolve the issues. It may be the case that certain evidence will have ceased to be necessary once the issues are joined.

This provides the opportunity for a further, more detailed exchange between the parties and the tribunal on each party's case. This may also serve as an opportunity for the tribunal to indicate to the parties, without prejudging the case, some areas and issues that seem to it to require particular attention in the presentation of evidence. This could be described as a second case management conference.

Opportunities at this point could include: limiting by agreement the further evidence required; identifying preliminary issues that can be ventilated on the way to a full hearing, and that might provide the opportunity to limit what needs to be addressed at a full evidentiary hearing; and resolving the detail of what might be the subject of expert evidence.

[C] Expert Evidence: Nature, Extent and Manner of Development

The cost of deploying expert evidence is significant in many arbitrations. Many expert witnesses command higher fees than the legal representatives of the parties. The capacity of tribunals to deal with the competing views of experts of like discipline may be challenged where the experts have been asked different questions, or have been given access to different materials, or have based their opinions on different witness evidence.

The adversarial nature of arbitration may drive counsel to press experts to take positions that ultimately prove untenable. This can occur when an expert is instructed

to opine on the case that counsel hopes will emerge at the hearing, even where that is no more than wishful thinking.

Effective management of expert evidence is a ‘hands on’ process from the start. Tribunals and parties need to determine the matters on which experts of like discipline will opine. They can then devise ways in which these experts can identify, before expressing views that can be exposed to the tribunal, those aspects of their areas of expertise upon which they can agree, and only after doing that, explain the reasons for their areas of disagreement. Ideally, the experts can be encouraged to prepare a joint report of points on which they agree and then prepare their individual reports on the points on which they differ, rather than beginning by crystallising divergent views, based on different facts, only to be asked afterwards whether there might be some common ground. Since this occurs before the evidentiary hearing and before there has been a determination of the facts on which their evidence is based, it may also be helpful to have their respective views on the various factual scenarios that might emerge at the main hearing. Thus, this management process involves the tribunal ensuring that the experts are working from the same material and that the differences in their opinions, when dependent on witness testimony, are clearly linked to the testimony on which they are based and explain how their respective opinions might vary if other, competing, witness testimony is ultimately accepted by the tribunal.

None of this can safely be prescribed in Procedural Order No. 1, except in outline. This needs to be acknowledged, and subsequent, often regular, case management by the tribunal, foreshadowed.

[D] The Detail of the Evidentiary Hearing

As mentioned earlier, it is not merely possible but essential for the timing of the evidentiary hearings to be set in Procedural Order No. 1. There are however a number of variables that can satisfactorily be settled only as the hearing approaches.

It is common practice for pre-hearing case management conferences to be held some weeks or a month before the evidentiary hearing. Indeed, Procedural Orders No. 1 typically provide for, a pre-hearing case management conference and often set the date for it. One difficulty that can arise, though, is that pre-hearing case management conferences turn out to have been set far too close to the evidentiary hearing to enable the sound management of issues critical to an effective evidentiary hearing. Examples of such issues, which, if left too late, may fail to be dealt with satisfactorily are:

- the electronic and hard copy format of hearing bundles;
- the preparation of agreed chronologies and *dramatis personae*;
- decisions on which witnesses need not to be called for cross examination;
- the manner of interpretation and the identity of the interpreters; and
- the real issues in dispute upon which decisions are required by the tribunal.

It is suggested that earlier pre-hearing conferences than are usually provided for in Procedural Order No. 1 may improve the cost effectiveness and efficiency of

evidentiary hearings. Thus, flexibility for much earlier development of these matters needs to be preserved.

[E] Written Openings and the ‘Education’ of the Tribunal

The extent to which Tribunals commence an evidentiary hearing familiar with the detail of the material exchanged by the parties has been the subject of some debate. Some interesting suggestions have been made for ways that counsel can ensure that the tribunal is well prepared. A little time ago, Lucy Reed suggested that tribunals be paid to meet in advance of the hearing to hold in what came to be described as a ‘Reed Retreat’.¹¹ More recently, Neil Kaplan has suggested that tribunals would benefit from a preliminary explanation by the parties of their cases before the commencement of an evidentiary hearing. This is described as a ‘Kaplan Opening’.¹²

It may be troubling to think that counsel and parties should find it necessary to devise ways to educate a tribunal whose job it is to understand and test the cases put before them for determination. Still, there is often a need to assist even the most conscientious tribunals to understand well the parties’ cases, prior to the evidentiary hearing, and, perhaps, to encourage less conscientious tribunals to be adequately prepared. Depending upon the way the parties’ cases are developed, particularly if they have not followed a memorial process in which the statements of case are combined with the witness statements, there can also be a legitimate need for the pleadings and the subsequent factual and expert evidence to be woven together in a comprehensive way prior to the evidentiary hearing. This has given rise to the provision in many Procedural Orders No. 1 for written openings by parties to be provided to the tribunal before the evidentiary hearing.

It is suggested that the need for written openings, the preparation of which are time consuming and costly, will often depend upon the quality of the parties’ exchanges of case, and may be unnecessary where the respective cases have been prepared in a memorial format. However, the need for written openings can only be assessed accurately after the exchanges of case and should sensibly be planned and provided for at this stage of the proceedings rather than in Procedural Order No. 1. For this reason, as well as those discussed above, it may be helpful to have intermediate case management conferences at which sensible further directions can be developed and at which the process of educating the tribunal can be conducted on an iterative basis.

Alternatives to Reed Retreats and Kaplan Openings could usefully include one or more case management conferences at which the key issues emerging from exchanges of parties’ cases can be ventilated. In such case management conferences, all of the issues mentioned above, including identification of necessary factual witness evidence, the preparation of focused expert testimony, the identification of key issues that can usefully be the subject of ventilation and sometimes preliminary decision, and the

11. Lucy Reed, ‘The Kaplan Lecture 2012 Arbitral Decision-making: Art, Science or Sport?’.

12. Neil Kaplan, ‘If It Ain’t Broke, Don’t Change It’ (2014) 80 Arbitration 172.

design of the evidentiary hearing, can all be dealt with in time to ensure that the procedural design of the arbitration process delivers an effective and efficient process suited to the particular dispute.

§37.06 CONCLUSION

Our thesis therefore is that Procedural Order No. 1 is but the first building block of an efficient arbitral process and that there should be recognised a need for ongoing case management and the generation thereafter of as many procedural orders as are required. These procedural orders, following as they do upon telephonic or in person hearings, should not be looked upon as responses to extraordinary and unforeseen developments, or merely opportunities to adjust Procedural Order No. 1. On the contrary, they should serve as regular occasions in which the arbitrators and the parties work together to ensure that the process that they develop serves them well. To be sure, continued engagement such as this with the tribunal requires a level of cooperation that rises above seizing the tactical advantages that might occur to counsel along the way. Achieving and sustaining this degree of cooperation may prove difficult in some arbitrations, but it is an objective well worth aiming to meet.

Reaching into the arbitrators' toolbox at regular intervals may seem a less elegant approach to the process than designing the entire arbitration at the outset. However, arbitrations rarely proceed like clockwork from the first procedural meeting onwards. Regular engagement between parties and the tribunal to address procedural issues and opportunities in a timely fashion as they emerge is a workmanlike way to develop a process that best serves the needs of the each dispute.