

Doing things better: designing an arbitration that is fit for purpose

AMINZ Conference, 2 August 2019

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Chaired by Michael Webb

Overview of our interactive session

1. Introduction

2. Arbitration is flexible (5-10 minutes)

- Approach anchored in the Arbitration Act 1996 – wide berth
- Templates available

<https://www.dropbox.com/sh/41mpx78usavrfb8/AAALReU495Cfr3vYDGKZQH6Ka?dl=0>

3. Submissions and evidence (15-20 minutes)

- Memorials versus pleadings
- Fact witnesses and experts
- Document production & Redfern Schedules

4. The Hearing (15-20 minutes)

- Pre-hearing timetable
- How to run the hearing

5. Bringing it all together: your PO1 (15-20 minutes)

6. Questions (20-30 minutes)

- We encourage you to ask questions throughout

1. Introduction

2. Arbitration is flexible

Flexibility

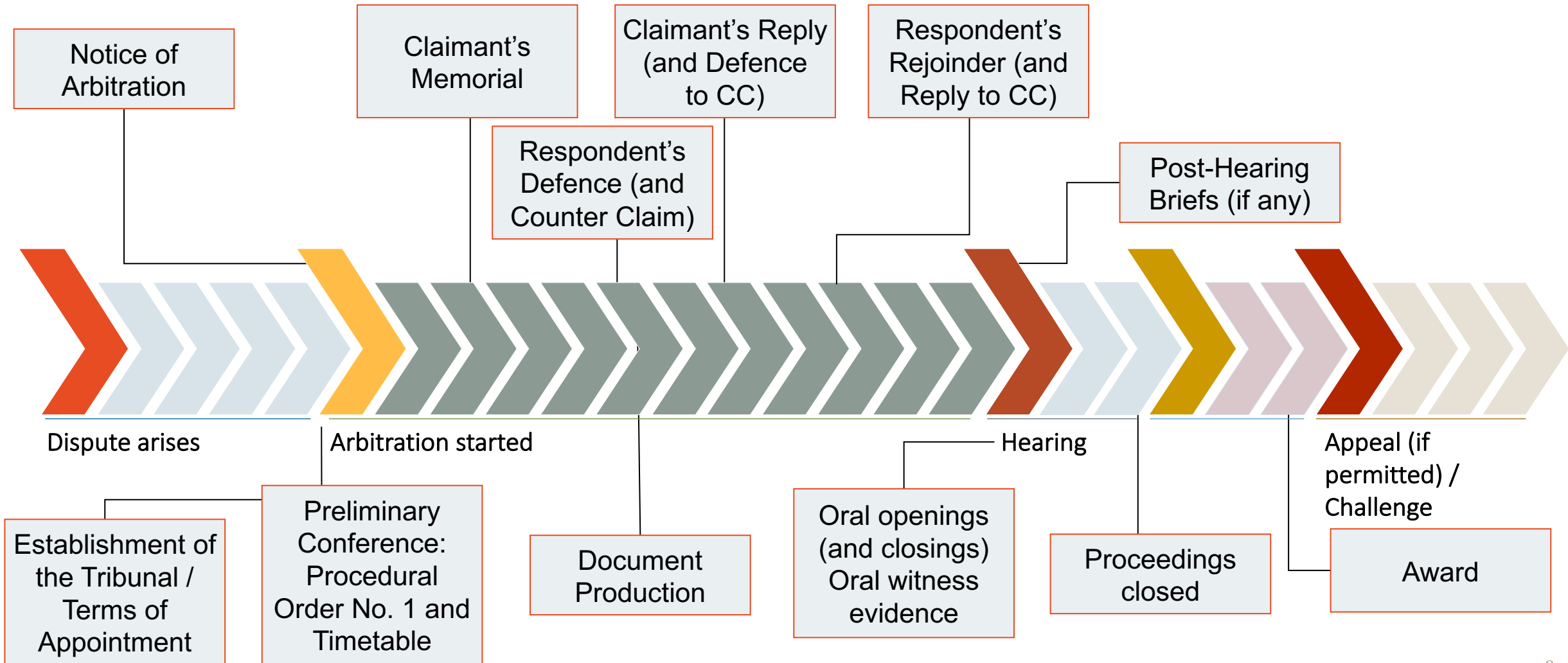
- Session aimed at giving you some practical examples of how to “do things differently” (and better)
- Arbitration is not and should not be “private litigation”
- The Arbitration Act 1996 affords flexibility (within the confines of the parties’ agreement)
- Evidence Act does not apply to arbitrations
 - It’s all about weight

What the Act does (and does not) require

- Applies to arbitrations where the place of arbitration is NZ
- Wide discretion on procedure (esp. art 19, sch 1)
 - The parties are free to agree on arbitral procedure
 - Failing which, the tribunal may conduct the reference as it considers appropriate
 - Tribunal has power to determine admissibility, relevance, materiality and the weight of any evidence
- Few mandatory requirements (sch 1):
 - Equal treatment of parties (art 18)
 - (Loosely speaking) statements of claim and defence (art 23)
 - Notice of hearing, if a hearing is held (art 24)
 - Rules applicable to substance of dispute (art 28)
 - The award shall be in writing, signed and dated (art 31)
 - Natural justice (cf. *Bidois v Leef* (2015) (CA))

3. Submissions and Evidence

Arbitration Timeline – indicative only



Key resources for arbitration lawyers

- AMINZ Rules
- IBA Guidelines on the Taking of Evidence in International Arbitration
- Template: Agreed/proposed list of issues
- Template: Memorial
- Template: Scott Schedule
- Template: Fact witness statement
- Template: Redfern Schedule

Memorial style submissions

Template: Memorial, Scott Schedule

- What are these
 - Your legal arguments, witness evidence and documents all-in-one
 - Your best case in one place
- Advantages
 - Explain to your tribunal what the issues are
 - Your entire case in one submission
 - No need to amend pleadings
- Possible disadvantages
 - Front load the work
 - Perception of increased costs
- Be creative! (e.g. Scott schedule)

Evidence - document production

Template: Redfern Schedule

Document production

- Relevance is not the test
- “Relevance and materiality”
- Save your clients money and agree to targeted document production
- Think about the timing for this
- Developing technologies to manage document production

Evidence – fact and expert witnesses

Template: Fact witness statement

Fact witness evidence

- Will stand as evidence in chief
- Well structured, supporting your legal arguments
- Accompanied by appropriate documents
- In your witness' own words

Expert evidence

- Flexibility over how this is presented
- How does this fit in with your case

4. The (substantive) hearing

Key resources

- AMINZ Rules
- IBA Guidelines on the Taking of Evidence in International Arbitration
- UNCITRAL Notes on organizing hearings
- Template: Pre-hearing Schedule

Key features of an arbitration hearing

- Length of hearing
- Order tends to be different to litigation
- Opening submissions:
 - All parties open at the beginning of the hearing (different to litigation)
 - This affects how you prepare your opening
- Fact evidence: limited direct
- Expert evidence: opening PowerPoint presentations
- “Hot-tubbing”
- Oral closings
 - All parties close at the end of the hearing (versus at the end of their “case”)

Pre-hearing Conference (and directions)

- Send out agenda before the pre-hearing conference listing any issues that are yet to be decided or are contentious.
- Common topics discussed:
 - Witnesses – who will be crossed examined?
 - Allocation of time
 - Hearing Bundle
 - Sequestration / Video conferencing?
 - Logistics: confirm hearing arrangements in place, transcription, setting up the room etc
 - Post-hearing submissions?
 - Any additional information required prior to hearing: list of issues; chronology etc

Hearing Schedule

TIME	DAY 1: WEDNESDAY, 24 APRIL 2019
10.00 – 10.30 am	Organisational Matters
10.30 – 11.30 am	Claimant's Opening Statements
11.30 – 11.45 am	Morning break
11.45 am – 1.30 pm	Claimant's Opening Statements
1.30 – 2.30 pm	Lunch
2.30 – 3.45 pm	Respondent's Opening Statements
3.45 – 4.00 pm	Afternoon break
4.00 – 5.30 pm	Respondent's Opening Statements

Hearing Schedule

TIME	DAY 2: THURSDAY, 25 APRIL 2019
10.00 – 10.55 am	Respondent's Opening Statements (Counterclaim)
10.55 – 11.05 am	Morning break I
11.05 am – 12.00 pm	Claimant's Opening Statements (Counterclaim)
12.00 – 12.10 pm	Morning break II
12.10 – 12.15 pm	Direct examination of [Fact Witness]
12.15 – 1.15 pm	Cross-examination of [Fact Witness]
1.15 – 2.15 pm	Lunch
2.15 – 2.45 pm	Cross-examination of [Fact Witness] cont.
2.45 – 3.00 pm	Re-direct of [Fact Witness]
3.00 – 3.20 pm	Presentation by [Claimant's Quantum Expert]
3.20 – 3.35 pm	Afternoon break
3.35 – 5.30 pm	Cross-examination of [Claimant's Quantum Expert]
5.30 pm	Adjourn

Hearing Schedule

TIME	DAY 3: FRIDAY, 26 APRIL 2019
10.00 – 10.30 am	Re-direct of [Claimant's Quantum Expert] / Questions from Tribunal
10.30 – 10.50 am	Presentation by [Respondent's Quantum Expert]
10.50 – 11.30 am	Cross-examination of [Respondent's Quantum Expert]
11.30 – 11.45 am	Morning break
11.45 am – 1.00 pm	Cross-examination of [Respondent's Quantum Expert] cont.
1.00 – 2.00 pm	Lunch
2.00 – 3.00 pm	Cross-examination of [Respondent's Quantum Expert] cont.
3.00 – 3.30 pm	Re-direct of [Respondent's Quantum Expert] / Questions from Tribunal
3.30 pm	Adjourn

Hearing Schedule

TIME	DAY 4: SATURDAY, 27 APRIL 2019
10.00 – 11.30 am	Claimant's Closing Statements
11.30 – 11.45 am	Morning break
11.45 am – 1.15pm	Respondent's Closing Statements
1.15 – 1.30 pm	Discussion of timetabling for post-hearing submissions and Tribunal's closing remarks
1.30 pm	Adjourn

Flexibility of Hearing Schedule

- During the actual Hearing, adjustments can be made as required.
- Commonly added clause in pre-hearing direction:

“The Tribunal notes that the timings in the Hearing Schedule are approximate only. There will be a continuous flow of witness testimony. Consequently, if the cross-examination of a witness takes less time than anticipated, the next witness should be ready to appear at the conclusion of the previous witness’ evidence.”

5. Pulling the strands together: your first Procedural Order No. 1

Terms of appointment and choice of arbitrator

Templates: Terms of appointment

- Any requirements of the arbitration agreement or applicable rules
- Professional qualifications, education and training
- Experience/recommendations
- Availability

Interviewing your prospective arbitrator

1

Pre-appointment interviews are acceptable (see CIArb guidelines on interviewing)

2

Care required

- Communications limited to providing general description of dispute
- Areas of discussion “out of bounds” are arbitrator’s views on matters related to the case (see for example IBA Guidelines on Party Representation)
- Keep accurate notes of the discussion

3

Practical steps to take: avoid discussion of merits of case and do not accept payment or other gratuity

4

Avoid hypothetical questions on issues of law and fact

5

If conducted inappropriately risk of jeopardizing the integrity of the arbitral process and provide a basis for arbitrator challenge

Your first procedural conference

Templates:

- Preliminary conference checklist
- Procedural Order No. 1 with timetable

Issues to consider

- Rules to govern your arbitration (in addition to the Arbitration Act)
- Do you need an issues hearing?
- Resolution of a preliminary issue?
- Do you want an expedited arbitration?
- Timetable matters

Any questions?