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DUTIES DURING PREPARATION FOR HEARING

Introduction

1. Many of the duties relevant when making final preparations for the hearing have already been discussed. The principal ones are:

(a) The duty to provide natural justice, i.e. to allow each party to fully and effectively present its own case and to respond to the others case. Of particular importance is the avoidance of surprise. Prejudicial surprise occurs at a hearing where a party learns of new argument or evidence which it could not reasonably have anticipated.

(b) The duty to ensure that the hearing is structured in such a way that the arbitrator will gain an adequate understanding of each party's case.

(c) The duty to minimise the time and cost of the hearing.

Pre-trial conference

2. To perform those duties in a substantial arbitration an arbitrator will usually hold a pre-trial conference, even if only by telephone. A pre-trial conference galvanises all concerned to address essential issues in advance, rather than leaving them to the hearing when it may be too late.

3. In a traditional arbitration some of the matters which might usefully be considered at the pre-trial conference include:

(a) Confirmation of date, place, time and duration of hearing.

(b) Confirmation that the pleadings are closed. Often they will require amendment in the light of discovery and/or exchange of briefs since the pleadings were originally drafted.

(c) Exchange of briefs, has this been completed? If not, timetable for completion. Sequential advantages over simultaneous exchange? Expert briefs to follow lay witness? Affidavits rather than briefs to save some personal attendances? Will unsworn but signed statements suffice for that purpose?

(d) Exhibits: see High Court formula for exchange of draft exhibit lists with briefs, all then incorporated in a common chronological bundle according to pre-conceived terms as to basis upon which produced. If that formula is adopted, it

will be convenient to distribute to the parties a copy of RR 441N to 441P of the High Court Rules.

(e) Site inspection: desirable?

(f) Arbitration agreement: pleadings evidence and issues still within the dispute as defined therein?

(g) Housekeeping arrangements: venue hire, numbers attending, if oral evidence is it to be recorded and if so how?

(h) Working documents for arbitrator: synopsis of submissions, chronology, authority bundles, working copies of pleadings and other filed documents, especially if multiple member tribunal.

4. Less work will be required if the arbitrator has used the AMINZ model Procedural Directions for a Domestic Commercial Arbitration. Under those directions some of the pre-hearing arrangements discussed above will already have been taken care of. Broadly speaking the model directions provide for:

(a) Pleadings (para 1.1 1.4) with conventional provision for statements of claim, statements of defence and counterclaims and slight variations from court procedure in the case of replies and rejoinders.

(b) Exchange of documents the request to produce, objections to production, rulings on objections, etc. are broadly the equivalent of traditional approaches to discovery although note the adoption of the IBA Rules On The Taking Of Evidence for relevant discovery principles (paras 2.2 2.5). New to most New Zealand lawyers is the wholly desirable procedure of requiring a party to produce with its pleadings at the outset those documents on which that party seeks to rely (para 1.2).

(c) Exchange of witness statements (in New Zealand often referred to as briefs) follows the approach with which most New Zealand court lawyers will be familiar[1] subject, however, to (i) provision for supplemental or reply statements and (ii) exchange of expert reports after the exchange of lay witness statements (headings 3 and 4 of the Model Directions).

(d) Provision is made for agreed bundles of documents without any formal directions as to the sequence between the parties in arriving at the agreed bundle (heading 6).

(e) Pre-hearing submissions unlike more traditional practice, the model helpfully provides for a formal exchange of pre-hearing submissions by both parties before

the substantive hearing (s 7). Further, these are taken as read at the hearing unless otherwise ordered (para 7.1(d)).

5. The AMINZ model directions will undoubtedly prove very useful as a model to adopt with or without modifications. They will, of course, need to be supplemented by tailor-made directions in most cases to address some of the pretrial details discussed in para 3 above. It may also be desirable to divide the AMINZ model directions into two, or possibly three, stages preliminary meeting (pleadings, own documents, discovery), post-interlocutory meeting (witness statements) and pretrial meeting (agreed bundle, pre-hearing submissions, date, venue, evidence recording details, etc.).

Preparation by arbitrator

6. It is generally now accepted that an arbitrator has a duty to prepare. Whatever the traditional English model, one can no longer expect to be introduced to the evidence and argument through the mouths of witnesses and counsel at the hearing.[2] The modern expectation is that arbitrators will have read all the briefs, and such submissions as may have been timetabled for delivery, prior to the hearing. The hearing (if indeed a hearing is necessary) can then focus upon the particular matters that remain in issue.

7. That expectation that an arbitrator will be familiar with the materials by the time he comes to the hearing has been captured in the AMINZ model directions. Pursuant to those directions the arbitrator will have received not only all of the witness statements and expert reports (headings 3 and 4) but will also have received the agreed bundle of documents (para 6.5 although see the desirability of a direction as to a specified date) and the pre-hearing submissions of both parties (heading 7). This is associated with no more than short opening statements by both parties (para 8.2) and limiting the oral evidence of witnesses to confirmation of their witness statements together with discussion of issues which have arisen since preparation of the statements (para 8.3).

Assistance to parties

8. In making those arrangements, and at the hearing itself, an arbitrator must maintain an appropriate balance. On the one hand he must ensure that each party is given a full opportunity of presenting that partys case (art 18). On the other he must treat the parties with equality (art 18). In cases where the parties are legally represented this is not normally a difficulty. More challenging are the cases in which either or both of the parties are unrepresented.

9. If a party is not told how to exercise its procedural rights, either in the agreement or in adequate directions from the arbitrator, the full opportunity of presenting that partys case may be a hollow one. The arbitrator would seem to have a duty to give such directions and explanations as would suffice for the ordinary litigant. Further, the fact that one party lacks a qualified or

experienced advocate could be expected to alert the arbitrator to the need for particular clarity when explaining procedural requirements.[3] On the other hand, there is no duty to protect the procedural interests of unrepresented lay litigants at all costs. It is a question of balance. If arbitrators go too far in attempting to assist a party perceived to be labouring under a procedural difficulty, they run the risk that the parties are no longer treated with equality for the purpose of art 18 and that the award is invalidated by undermining their own impartiality.[4]

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[1] See RR 441A to 441I of the High Court Rules
[2] Newman and Hill *The Leading Arbitrators Guide to International Arbitration* pp 78 and 79.
[3] *Acorn Farms Limited v Schurniger* [2003] 3 NZLR 121, 131, 132.
[4] Ibid p 132.