Introduction

One of the key perceived advantages of arbitration over litigation is the ability of the parties to structure a process which best suits their needs, and the requirements of a particular dispute. However, with the exception perhaps of some very basic (albeit important) decisions as to seat, number of arbitrators and so on, parties often neglect this issue and so fail to maximise this benefit.

The flexibility of the arbitral process, and its consensual nature, are such that it is not possible in the abstract to produce a comprehensive list of all the different techniques which are at the parties’, and the tribunal’s, disposal. It is also the case that some of the issues touched on below would justify (indeed, have justified) substantial articles and analysis in their own right (for example the relative merits of different disclosure procedures). However, this article is intended to provide a relatively high level overview of some of the key available techniques which may be relevant when considering how best to structure an arbitral process for a particular dispute.

The Arbitration Act 1996

For arbitrations which have their seat in England, Wales or Northern Ireland, the freedom to design appropriate arbitral processes is given significant (if sometimes under-utilised) statutory support in the Arbitration Act 1996 (the Arbitration Act). The Arbitration Act was brought into force primarily to address the concern about the cost and delay of arbitrating disputes in London, and so to enable London to compete effectively and efficiently for arbitration business. It is no surprise therefore that the Arbitration Act includes several provisions which are intended to encourage, empower and/or require the parties and the tribunal to take steps to reduce the cost and delay of arbitrations. Some of the key provisions in this regard include:

(a) s 33(1)(b) which requires the tribunal to “adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense . . .”

(b) s 34 which provides that it shall be for the tribunal to decide all procedural and evidential matters, including:

(c) “. . . whether any and if so what form of written statements of claim and defence are to be used . . .

(d) whether any and if so which documents or classes of documents should be disclosed . . .

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.”; and

(c) s 65(1) which empowers the tribunal to limit the recoverable costs of the arbitration, or any part of the arbitral proceedings, to a specified amount.

Contrary to what is sometimes assumed to be the case, there is no requirement, or even presumption, that the rules which govern the procedure in the courts of the country in which an arbitration is taking place will apply, or even be relevant to, the procedure to be adopted in that arbitration. Although some countries have some mandatory rules of procedure, these are relatively unusual and it is typically the position that the parties have extensive flexibility to design the process for their arbitration.

Timing

Issues in relation to the structure of the arbitral process tend to fall to be considered at two moments: the time of drafting of the arbitration clause in the contract; and the time at which a dispute arises. With the benefit of hindsight after a dispute has arisen, it may well appear that the time of drafting the arbitration clause was a critical moment in defining the way in which future disputes will be resolved. It may well be possible to
agree issues at that time which will prove impossible to agree once a dispute has arisen. The extent to which it will be appropriate to delineate the fine details of the arbitral process in advance of a dispute having arisen will, however, of course depend in large part on the predictability of certain aspects of those future disputes.

**Institutional rules**

At the very least, however, parties should be familiar with the rules of any arbitral institution which have been incorporated by reference into their arbitration clause. By and large, the institutional rules do not prescribe detailed procedure. Indeed, they tend to enshrine the parties’ and tribunal’s ability to set their own procedure. There are, however, some relatively significant differences between some of the institutional rules in relation to, for example, the fees payable and the likely timetable, which may impact on both the cost and time for an arbitration.

In addition, there are a number of aspects in which the rules of many arbitral institutions are silent and it may well avoid future disputes if those issues are resolved between the parties in advance. Such issues might include:

(a) the extent of the duty of confidentiality which will be owed by the parties to each other in relation to the arbitration;
(b) the power of the arbitrators to grant interim relief;
(c) the power of the chairman of a three man tribunal to make procedural orders on his own; and
(d) which country’s laws of legal privilege will apply.

**Questions to consider about the nature of the dispute**

There is no one size fits all procedure for arbitration; indeed, that is a part of its attraction. It is therefore necessary to analyse the nature of the particular dispute in order to be able to decide on the optimum structure for the arbitration. The issues which will inform this decision may well include:

(a) whether the dispute is likely to be fact intensive;
(b) whether the dispute is likely to be highly technical;
(c) whether the dispute is likely to be high value, or is otherwise of particular significance to the client;
(d) whether there is the possibility of multi-party disputes and/or parallel related arbitrations being commenced;
(e) whether it is important to a party to be able to appoint its own arbitrator; and
(f) whether savings of time and cost are to be given more weight than obtaining an award which is as fair – and as robust from challenge – as possible.

**Techniques available to customise the arbitral process**

As an initial point, parties will wish to consider whether there should be three arbitrators, or just one. Three arbitrators acting together are often seen as having the advantage of providing balance – and so reducing the risk of a rogue award – and also allowing the parties to select a party-appointed arbitrator. However, three arbitrators will undoubtedly increase the cost and time involved in the process. Although it is common to specify the number of the arbitrators in the contractual arbitration clause, it is not usually necessary; and, in some cases, it may be preferable to leave that decision until a dispute arises (with appropriate default provisions should agreement between the parties not be possible at that time).

At the same time as considering the number of arbitrators, parties will wish to consider whether the arbitrators should have particular technical qualifications. Using an arbitrator with particular industry expertise can reduce the need for time being spent on educating the tribunal. However, such an arbitrator may be less qualified to resolve legal issues without assistance.

Parties should also consider the emphasis which they wish to be given to the written submissions. At one end of the spectrum, hearings can proceed entirely on paper; at the other, submissions can be severely limited in length, scope and/or number, or even (unusually) dispensed with altogether.

As far as documents are concerned, the parties should give thought to whether disclosure should be wide-ranging, common law style disclosure (where all relevant documents, whether helpful or unhelpful to a party need to be disclosed), or more limited, civil law style disclosure (where, broadly, only documents which are to be relied on by a party need to be disclosed), or should be structured along the lines of the IBA Rules on the Taking of Evidence in International Arbitrations (where

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1 See, for example, Article 14 of the LCIA Rules, Article 15 of the UNCITRAL Rules and Article 15 of the ICC Rules.
parties disclose documents on which they rely and are then entitled to make requests for specified documents/categories of documents from their opponent). The cost/benefit of each disclosure approach should be considered.

As far as witnesses are concerned, parties should assess whether there should be a limit on the number of factual witnesses, and/or the scope of expert evidence, and/or whether the tribunal should appoint its own expert. They should also consider whether witnesses should be heard sequentially (as is usual in English High Court litigation) or whether there should be witness conferencing, which allows the tribunal to hear how witnesses respond to the views of others (this procedure, which is sometimes referred to as "hot-tubbing", can be particularly useful for expert witnesses). It may also be helpful to consider whether a protocol should apply to the instruction and use of expert witnesses (for example, the recently published Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration).

It is often useful to hold an early case management hearing to discuss all these issues, as well as other time and cost related subjects, such as the efficiencies which may be derived from appropriate use of IT and/or the bifurcation of proceedings. It may also be helpful to discuss the shape of the hearing itself: parties may want to give thought to the merits of the hearing proceeding on the basis of a "stop clock"/"chess clock", pursuant to which parties are allocated a fixed proportion of the available time at the hearing for all their advocacy (including opening and closing oral submissions and cross-examination and re-examination (and examination in chief, if required) of both factual and expert witnesses).

Conclusion

Of course, there is by no means a guarantee that both parties to the arbitration will share the same view as to the best structure of the arbitration. The parties' own perspective on the nature of the dispute, and their legal and cultural background, may well drive them to different conclusions. However, that should not dissuade parties from seeking to structure the process in the way which best suits their tactical and strategic objectives. Beginning a dialogue with the other side and/or the tribunal about these issues, preferably at an early stage, is to be encouraged as many of these issues can rapidly become moot if substantive steps are taken in the proceedings before these issues are ventilated and resolved.

Notwithstanding the alleged attraction of arbitration as a flexible process, and despite the wide selection of tools at their disposal, it remains the case that parties are tending not to maximise the opportunities to put in place structures for an arbitral hearing which best suit them and the particular dispute.

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