PROCEDURAL EFFICIENCY IN INTERNATIONAL ARBITRATION

The recent domestic arbitration, *Anaconda Operation Pty Ltd v Fluor Australia Pty Ltd* (the Anaconda Arbitration) conducted before three international arbitrators (Paulsson, Uff QC and Naughton QC), gives insights into how international arbitration processes can provide procedural efficiencies well in excess of that provided by domestic courts. The case also provides assistance to domestic arbitrators when considering procedures which should be adopted so that domestic arbitrations achieve their marketed objectives of:

(a) speed; and

(b) efficiency.

In the Anaconda Arbitration, the preliminary conference took place in Scotland on 30 August 2000. The procedural steps agreed by the parties included:

1. the claimant simultaneously delivering written contentions and all factual witness statements on which it intended to rely;

2. the respondent simultaneously delivering its written defence and all factual witness statements;

3. the exchange of expert evidence;

4. the opportunity to provide reply expert evidence dealing with issues which had been the subject of the earlier exchange;

5. discovery which was relatively conventional, although in some respects the English Rules in relation to proportionality were adopted. A "fourth arbitrator" was engaged to deal with disputes in relation to discovery;

6. The time for the hearing was limited to six weeks, with that time split between the Tribunal and the parties. The time available to the parties was split equally between them.

The matter was set down for a hearing to commence on 28 January 2002, some 16 months after the preliminary conference.

By about September 2001 it became apparent that the ambit of the arbitration was far greater than the parties or the Arbitral Tribunal had previously understood. Accordingly, at the Tribunal's initiative, the arbitration was split into two, with the first arbitration to take place on the originally allotted days beginning 28 January 2002.

Notwithstanding this bifurcation, the January hearing heard the evidence of 114 witnesses, of whom 75 were called for cross examination (35 were witnesses of fact with the other 40 being experts).

The nature of the dispute required consideration of two of 15 discrete areas of the processing plant, the subject of the arbitration (each of the 15 areas will be considered in the second hearing to be conducted in September of this year).

To assist in narrowing the issues associated with the expert evidence, the Arbitral Tribunal appointed two "independent assessors". Despite their title, the role of the Assessors was not to express a professional opinion as to the correctness of the expert testimony which had been filed by the parties, but to convene and chair meetings between experts of like discipline. The Assessors then produced schedules which identified the relevant issues and stated the respective party appointed experts' views in respect of those issues. Significant areas of agreement were identified. The remaining areas of disagreement were ultimately the issues on which the arbitrators had to determine. The hearing time also concentrated on the contentious issues so identified.

The discovery process required the production of an enormous amount of documentation. Most of this documentation was exchanged by way of electronic images with a simple database. It is estimated that in total (both electronic and hard copy material) 1.4 million documents (in excess of 5.6 million pages) were exchanged.

The Hearing

The hearing, which occupied 30 sitting days, was conducted over an eight week period, because one of the arbitrator's commitments required a two week break after four weeks of hearing. Accordingly, the arbitration commenced, as originally scheduled at the first preliminary conference of 30 August 2000, on 28 January 2002. It concluded, as planned, on 22 March 2002.

Each sitting day was approximately six hours from 9.30 a.m. to 5.00 p.m., with 1½ hours of breaks. This gave a total hearing time of 180 hours to be shared between the Tribunal and the parties. The Tribunal allocated to itself approximately 30 hours (initially) and gave each of the parties 75 hours each for the presentation of their case. Each party was entitled to use the time allocated to it in any manner it saw fit. However, given the nature and size of the dispute each party spent the vast majority of its time in cross examination of their opponent's witnesses. The claimant alone chose to open but did so in a few hours.

The limitation of hours placed significant strains on the parties in determining what issues were absolutely critical to their respective clients' positions. Neither party was limited in the amount which it could submit in writing. Accordingly, submissions played a significant role in the advocacy.

As the matter progressed the Tribunal:

(a) agreed to sit longer on occasions, thereby providing a few extra hours over the 30 day duration of the hearing;

(b) "gifted" 10 hours of Tribunal time to the parties which was split between them in equal proportions. Ultimately, the parties consumed the following time:

(i) Claimant - 79 hours and 52 minutes; and

(ii) Respondent - 79 and 25 minutes.

The hearing concluded early on the last day of the scheduled time with neither party using the whole of the time allocated. In theory, either party could have made application to use the remaining four to five hours. Neither did, presumably because both had regarded the time as sufficient, notwithstanding the obvious size and complexity of the case.

The parties then retired to prepare written final submissions with an oral presentation of two days in May 2002.

The Arbitral Tribunal, displaying significant efficiency, notwithstanding the European Summer break in August, delivered its Award in early September 2002, approximately two years after the preliminary conference.

Lessons Learnt

1. At a very early stage in the interlocutory steps it became apparent that the arbitrators were serious about maintaining the original timetable. Accordingly, both parties applied the necessary resources to ensure that the various interlocutory steps were completed as near to the specified time as possible. This discipline has improved in the second phase of the hearing.

2. Despite the enormous factual and opinion based evidence provided by both parties, the arbitration started on the allotted date and concluded within the allotted time. This is in stark contrast to court proceedings where the start date is often delayed because of slippages in the interlocutory steps. The fact that this timetable was maintained is a credit to the Arbitrators who managed the process and the parties who generally complied with the timetable.

3. There was no need for extensive requests for further and better particulars or interrogatories which significantly slow down domestic arbitrations and court proceedings in this country (particularly outside New South Wales). Further and better particulars are designed to put a party on notice of the case that it will meet at the trial. The concept was developed when written evidence was not delivered. The delivery of full written witness statements early in the process means that the need for particulars is severely limited. However, the parties need to be careful to draw their contentions so that the relevance of the evidence is immediately apparent and, preferably, so that

the contentions cross refer (by footnote or other device) directly to the evidence said to support the contention.

4. One of the major hurdles in the case was the volume of discovery. The parties did agree that English rules of proportionality should apply in some cases. However, given the nature of the issues and the amount in dispute, this probably did not provide much relief to the parties, who otherwise followed a conventional discovery process (unlike most international arbitrations). At a domestic level, this continues to be a challenge which has not been thought through by the local profession.

5. A limited time hearing is an enormous advantage in disputes of this nature. It requires both legal teams to narrow their cases and to jettison marginal and poor arguments. While there is no limit to the written material which can be provided to the Tribunal it is important for the parties to closely consider the volume which they expect the Tribunal to read and digest. Any party wasting time at the hearing did so at severe penalty to the presentation of its own case. Accordingly, openings were short and cross examination surgical. This is in stark contrast to the usual domestic arbitration experience, where openings have been known to go as long as 50 sitting days (ie 10 weeks, more than the whole of the hearing for the Anaconda Arbitration), and cross examination extended.

6. From the parties' point of view such processes have significant advantages over the traditional court or domestic arbitration processes because of their speed and, ultimately, cost. A case such as the Anaconda Arbitration is no doubt expensive in absolute terms. However, in relative terms, it remains significantly cheaper than conducting the matter by way of court proceedings or pursuant to usual domestic arbitration practice. This occurs because, first, the time for the interlocutory processes prior to a hearing is significantly shorter. In courts and domestic arbitration, adjournments are too readily given, resulting in parties generally approaching timetables set at interlocutory hearings or preliminary conferences as not mandatory. The domestic process, which is burdened with highly technical rules about particularisation and discovery, is significantly slower. These rules rarely result in any additional value being added to the process.

7. Secondly, if the Anaconda Arbitration had been conducted in a Supreme Court or using traditional domestic arbitration practice then the hearing would have been much longer. Some of those who have reviewed the nature of the evidence have suggested that in a Supreme Court or domestic arbitration the case would have exceeded one year.

8. The costs of court proceedings and domestic arbitration are such that many matters settle not by reference to their merits but rather the capacity of the parties to endure the legal costs associated with the process. Accordingly, the Anaconda Arbitration is an example of how efficient processes can be adopted and a result achieved which, while expensive, is within the means of the parties and within a timeframe which is acceptable from a commercial perspective.