Pleadings in arbitration

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The exact form and content of pleadings in arbitrations has been the subject of healthy debate in the courts over recent times. In fact, not every arbitration will require pleadings at all. Arbitrators may adopt a 'look and sniff' approach where an inspection of the subject matter and written submissions on the papers is all that is warranted by the circumstances. There does not seem to be a 'hard and fast' solution that can be applied by participants in arbitration or even arbitrators themselves.

It may be trite to say that the exact content of a pleading will depend heavily on the issues in dispute. These observations are hardly surprising. Yet one question that has been consistently raised in actions which have found their way to the courts is whether or not the pleadings in arbitration should mirror those used in court proceedings.

This issue also raises the spectre of curial intervention and the role of the courts in respect of issues such as pleadings in arbitration proceedings.

After all, by appointing a private arbitral tribunal to determine the issues, the parties have chosen what should be more a economical —and, hopefully, faster — solution to their dispute. What role should the court play?

In an ideal world, the exact form the pleadings will take and the nature and the content should be settled at the first preliminary conference with the arbitrator. But what happens when the points of claim or counterclaim that are delivered fall way short of what might be expected in the circumstances of the case?

This article will endeavour to explore:

- the form of pleadings — current legal views;
- the purpose of pleadings;
- the source of the arbitrator's power with respect to pleadings; and
- the role of the court with respect to pleadings.

Form of pleadings in arbitration

Subject always to any specific terms of the arbitration agreement, there appears to be

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two separate schools of thought that influence the form and content of pleadings in an arbitration.

Arbitration pleadings should mimic those of the courts

The first school of thought advocates that where the proceedings are complex, where there are multiple legal issues to be determined and where the amounts claimed are significant, that pleadings should, as far as possible, mirror court pleadings. In this respect reference is made to the decision of *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd & Ors*.[1]

In that decision White J remarked as follows:

> Arbitrations may be concerned with very large amounts of money and very complex problems calling for pleadings and discovery and a long hearing or they may be concerned with very simple straight forward problems (albeit for large sums) requiring no more than a view and perusal of a few documents. In the latter type of case no pleadings or oral evidence may be necessary and the arbitration might be conducted quite informally:S14. In the former type of case, however, it seems to me that the interests of justice and the avoidance of excessive costs and delay require that the arbitration be promptly 'put back on the rails' of procedural justice, as it were, if an early ruling by the arbitrators threatens to deny one party a reasonable chance, first to understand the claims and secondly, to frame its defence and evidence in a meaningful way.[2]

Supporters of more comprehensive and formal court-like pleadings contend that unless the pleadings are particularised fully and clearly, then the other party will be prejudiced in that it will not know the case it has to meet at the hearing. Additionally, if a claim is poorly pleaded it will no doubt add to the cost of the arbitration in terms of evidence required, disclosure obligations and most likely increase the length of the arbitration hearing.

In reaching its decision in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd & Ors*[3] the Court reviewed the interpretation of s 47 of the *Commercial Arbitration Act 1990* (SA) (the Act) and the role of the courts in respect to procedural arbitration matters.

Section 47 relevantly provides:

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1 (1990) 55 SASR 327.

2 At 332.

3 (1990) 55 SASR 327.

> The court shall have the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in Court.

The Court expressed the view that courts had an important general supervisory role to play over arbitrators in relation to procedural matters and pre-hearing matters to ensure that procedural fairness and justice were followed. The decision favoured curial intervention in the arbitration process.

Arbitral process should be kept distinct from court procedure

The second school of thought is based on the premise that the arbitral procedure should be kept distinct and separate from court procedure. Advocates of this approach consider that it is the role of the court to aid arbitration rather than to adopt a general supervisory role. Arbitration processes have been criticised in the past for adhering to court processes and so have lost the expected advantages (of savings in time and money) of conducting arbitration over litigation. The difficulty lies in achieving a balance. A party should not be disadvantaged in the arbitration process and interlocutory applications should be given due consideration in cases where, for example, the pleadings fail to disclose a cause of action. A party should not be denied access to a remedy if the appropriate application will achieve a result that conforms to the principles of natural justice.

In this respect, reference is made to *Imperial Leatherwear Co Pty Ltd v Macri & Anor*[4] a case that again considered the application of s 47 of the uniform *Commercial Arbitration Acts* and the role of the courts in arbitration procedure.

In reaching his conclusion and advocating against the courts adopting a 'general supervisory role' in arbitration, Rogers J noted:

> So far as the letter of the Act is concerned, it gives the parties the greatest possible freedom in the conduct of the arbitration. Even the requirements of s 22 may be relaxed. The laws of evidence need not be followed (s 19). The sole requirement in the 'letter and spirit' of the act is the call of natural justice which, whilst requiring that each party have a proper opportunity of putting its own case, and meeting the case for the other party, does not regard adherence to court procedures as necessary.[5]

4 (1992) 22 NSWLR 653.

5 At 666.

The basic principle behind this proposition is that the arbitral process should be allowed to continue without being weighed down by interlocutory processes such as lengthy requests for particulars or complaints about disclosure and interrogatories.

In a recent unreported decision of the Supreme Court of Queensland, Justice Moynihan, in *John Holland Pty Ltd v Federal Building Industries Pty Ltd (in liq)*[6] favoured the approach of Rogers J. In this case, the Court was asked to consider an application pursuant to s 47 of the Act in respect of the pleading of a global claim for delay and disruption. The Court held that the purpose of s 47 was to allow courts to make orders in aid of arbitration that arbitrators do not have the power to make. The Court gave examples of orders for security for costs, third party disclosure, a *Mareva* injunction or orders for the preservation of property.

In *John Holland* the Court also noted that the respondent had been given ample opportunity to remedy the deficiencies in its pleading and had failed to do so. In the circumstances, the appropriate order was to strike out the embarrassing pleading. This leads on to the next issue, being the exploration of the purpose of pleadings and the role of the arbitrator.

Purpose of pleadings

The primary purpose of a pleading is to ensure that the other party knows exactly the case it has to meet at the hearing of an action. This is an essential element of natural justice, without which a hearing or determination simply cannot proceed. This is accurately summarised in the textbook by Bullen, Leake and Jacobs *Precedents of Pleadings* as follows:

> Firstly, the object of pleadings is to define with clarity and precision the issues or questions that are in dispute between the parties and fall to be decided by the court.
> Secondly, the object of pleadings is to require each party to give fair and proper notice to his opponent of the case that he has to meet to enable him to frame and prepare his own case for trial.
> Thirdly, the object of pleadings is to inform the court what are the precise matters in issue between the parties which alone the court may determine, since they set the limits of the action and which may not be extended without due amendment properly made.
> Fourthly, the object of pleadings is not only to provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, but also to constitute a permanent record of the issues

6 [2001] QSC 326 (7 September 2001).

> and questions raised in the action and decided therein so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them.[7]

In relation to the role of pleadings in arbitration, the comments of Ipp J in *Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* are particularly apposite:

> It is, of course, open to an arbitrator to dispense with pleadings. In this case the arbitrator ordered that pleadings be filed. Given the complexity of the issues that arose between the parties, that was a sensible ruling. Such a ruling having been made, the parties were entitled to assume that the ordinary rules applicable to pleadings would, in substance, apply. In particular, both parties were entitled to assume that, for the purposes of preparing for and conducting the proceedings, the issues in the arbitration were only those identified by the pleadings and that the pleadings would furnish a sufficiently clear statement of the issues to allow each party a fair opportunity to deal with them.[8]

If pleadings are not properly particularised the whole scope of the arbitration procedure may be affected. A poorly pleaded case may increase the scope of disclosure, the number of witnesses to be called and the type of expert evidence required. When issues are properly defined, the scope of claims may be reduced, overall conduct of the arbitration be streamlined and possibly result in a shorter and relatively cost effective process.

In all of the circumstances, it may be that the cases are really not divergent at all, but instead call for an approach that ensures the principles of natural justice are met in all of the facts and circumstances.

So perhaps the questions facing arbitrators with respect to pleadings are, as follows.

- Given the nature, facts and circumstances of the claim, are pleadings required? If 'yes', current indications are that the more complex the issues in dispute, the more likely that pleadings will at least be similar to those delivered in court. If pleadings are required, it is reasonable for a party to assume that the pleadings will properly disclose the cause of action and allow the other party to know the case it has to meet at the hearing.
- So it is back to the original question: what if a matter is complex and the pleadings fall well short of what would be expected in terms of a properly particularised pleading?

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7 (12th ed) Sweet & Maxwell London 1975 pp 7 and 8.

8 [2000] WASC 259 (12 September 2000).

Following the decision of the Supreme Court of Queensland in *John Holland*[9] one could expect that a party to an arbitration would be justified in seeking the assistance of the court at an interlocutory stage if the failure to deliver pleadings was rendering the arbitration process unjust.

But is it necessary to resort to a court application? Does the arbitrator have the power to issue orders with respect to pleadings as required?

Source of the arbitrator's power with respect to pleadings

The arbitrator is armed with sufficiently wide powers to deal with issues arising out of pleadings.

Section 14 of the Act provides as follows:

> Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit.

This section gives the arbitrator very wide powers with respect to the conduct of the arbitration. It has also been confirmed by the High Court of Australia that when parties submit their disputes to a private arbitral tribunal then they confer on that arbitrator full discretion as to how the arbitration should be conducted and what procedure should be adopted. This was the approach of the court in *Esso Australia Resources Limited v Plowman*,[10] where Mason CJ observed:

> It is well settled that when parties submit their dispute to a private arbitral tribunal of their own choice, in the absence of some manifestation of contrary intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision.

In this respect, an arbitrator may adopt a more flexible approach, subject always to the terms of the arbitration agreement. One option, while not insisting on pleadings that are similar to court requirements, is to require the delivery of witness statements, or some other exchange of detailed information (such as Schedules), that properly particularise the claims and the defences that are to be relied upon. This will ensure that each party knows, with the appropriate level of clarity, the case it has to meet and how to prepare for the hearing.

Arbitrators can take a proactive role in ensuring that this process is fulfilled in

9 [2001] QSC 326 (7 September 2001).

10 [1995] 69 ALJR 404.

accordance with the powers granted by s 14. This may go a long way to enhancing the reputation of the arbitration process, preserving the lawyer's reputation for recommending the process and possibly encourage a commercial result in a realistic timeframe.

The role of the court in respect of pleadings

It seems clear from the cases discussed above that it is appropriate for the court to make orders pursuant to s 47 of the Act to *aid* the arbitration process, rather than to take a general supervisory role. This was the view expressed in *John Holland.*[11] So does the arbitrator have the power to strike out pleadings that fail to disclose of action, or is the remedy an application under s 47?

The text *Russell on Arbitration*[12] suggests that an arbitrator has no power to strike out any substantial ground of claim before him. In support of this proposition, the text refers to an old decision of *Wilson v Conde D'Eu Ry*[13] which held that an arbitrator could not summarily strike out all of the claims that constituted a dispute.

However, Justice Bollen, the dissenting judge in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd & Ors*[14] suggested that if the arbitrator is the master of the proceedings 'it must follow that the arbitrator has power to adjudicate the validity or propriety of the form of the points of claim'.[15] Nonetheless, the Court in that case did not consider the power of the arbitrator to strike out pleadings.

The courts have also drawn a distinction between the powers that enable an arbitrator to determine a dispute and those which result in a summary dismissal of a claim without making any determination as to the substance of a dispute. The courts have held that an arbitrator does not have the power to summarily dismiss a claim because an arbitrator is charged under its contract with the parties to make a determination. Thus an arbitrator does not have the power to summarily dismiss a claim for want of prosecution on the part of a claimant.[16]

It is clear that the arbitrator has the power to enforce compliance with the orders of the tribunal. In this instance reference is made to an English decision of *Crawford v AEA*

11 [2001] QSC 326 (7 September 2001).

12 20th ed Stevens London 1982 p 256.

13 (1887) 51 JP 230.

14 (1990) 55 SASR 327.

15 At 342.

16 *Bremer Vulkan Shiffbau Maschinenfabrik v South India Shipping Corporation Limited* (1981) AC 909.

Prowting Limited.[17] This case took the point a step further and noted that if the arbitrator ordered particulars and the party failed to comply with these orders, this may necessarily result in award in favour of the other party. By doing so, an arbitrator may effectively enforce compliance with his interlocutory orders or give an award against that party in default if the default persists. In making his decision Bridge J noted:

> I think there is force in that, but it seems to me the answer may well be (and it is unnecessary to decide it) that an arbitrator can require that some interlocutory step — the delivery of a pleading, for example — shall be taken by a certain date, intimating that failure on the part of the claimant to take the step by that date will result in an ex parte hearing on that date which, in the absence of proper particularisation of the claimant's claim, would necessarily result in an award in favour of the respondent. That may be rather cumbrous way of achieving the same effect as the courts achieve more directly by the exercise of their power to dismiss for want of prosecution.

From these cases it is clear there is ample authority that an arbitrator has the power to order delivery of points of claim and to direct that further and better particulars of the case pleaded.[18]

The case of *John Holland*[19] is now the leading authority for the answer to the question of whether the arbitrator has the power to strike out pleadings. The decision looked at the cases and concluded that s 47 of the Act confers jurisdiction on the court, not the arbitrator, to strike out a claim where it is demonstrated that the claim constitutes an abuse of process. In reaching its decision reference was made to *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical and Electrical Engineers Pty Ltd*[20] a decision, that specifically confirms that the court, not the arbitrator, pursuant to s 47 of the Act, has the power to strike out a claim as an abuse of process and where no cause of action is shown in the points of claim. In that case Smith J noted that:

> As the law currently stands the arbitrator could do nothing about such a case and would have to let the claim take its course.[21]

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17 [1973] QB 1 at p 8 per Bridge J.

18 See also *Crighton v The Law Carr General Insurance Corporation Limited* (1910) 2 KB 738 at 745. and *Rheem Australia Limited v Federal Airports Corp* (1990) 6 BCL 130 at 135.

19 [2001] QSC 326 (7 September 2001).

20 [1990] 2 VR 386 p 403.

21 At p 403.

In the case of *Nauru Phosphate Royalties Trust*, Smith J recognised that a claimant in an arbitration is obliged to define its case in a manner that discloses a cause of action and gives sufficient particulars to enable a defendant to understand the case it has to meet and thus satisfy the principles of natural justice. The Court in that case confirmed that the arbitrator has the power to order that further and better particulars of a claim be provided and in that respect Smith J commented as follows:

> I can see no reason why, for example, a judge controlling a building cases list or arbitration could not require the plaintiff to particularise the 'nexus' or justify its assertion that it is not possible to do so.[22]

While it is now clear from the decision in *John Holland*[23] that the power to strike out pleadings is reserved for the court pursuant to s 47 of the Act, not the arbitrator, it is not every case that will warrant court intervention. The Supreme Court of Queensland has declined to support the view of the court of South Australia and will be likely to restrict intervention via s 47 to those cases where the circumstances of the case and the principles of a fair hearing require appropriate orders to be made. The authorities do not condone the application of court rules to arbitration.

Conclusion

What follows from this consideration of the authorities may be summarised as below.

- It is the duty of the arbitrator to ensure that the rules of natural justice are adhered to in the proceedings (s 44 of the Act).
- It is clear that the arbitrator has the power to order delivery of points of claim and to order a party to deliver further and better particulars (s 14 of the Act and the cases cited above).
- It follows that the arbitrator then has the power to determine the propriety of the points of claim.
- When considering the validity of the pleadings, it appears that arbitrator's powers fall short of being able to summarily dismiss a claim although orders may be issued for particulars.
- An arbitrator cannot make a determination in an action according to law unless the pleading properly discloses a cause of action, clearly defines the issues and so

22 At p 406-407.

23 [2001] QSC 326 (7 September 2001).

allows for fair hearing without ambush or surprise.

- The courts, in aid of the arbitration process, may strike out a pleading if it is an abuse of process and fails to reveal a cause of action.

In the light of the most recent authorities, the position is that the arbitrator, although having the power to order and control pleadings, cannot strike them out for failing to disclosure a cause of action and so the courts must entertain applications under s 47 of the Act. In adopting this approach, the courts are assisting the arbitral process and ensuring that the rules of natural justice are upheld.

In hearing and determining such applications the court still faces the question of whether the pleadings should mirror court pleadings. It is the writer's submission that the real question is not whether the court procedure should be slavishly followed, but how the rules of natural justice are to be fulfilled. The guiding principle is that the pleadings delivered in an arbitration (as in court) must allow the other party to know the case he or she has to meet at the hearing and enable the arbitrator to conduct an orderly, efficient, cost effective and just determination of the dispute. If the answer to the question is 'no', then appropriate orders must be made. ⌘