Anaconda v Fluor: a Case Study

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The *Anaconda v Fluor* arbitration was one of the largest and most complex domestic disputes litigated recently. It was listed by American Lawyer on its website as in the largest 10 arbitrations in the world in 2002 and 2003. It was a multi-layered dispute between Fluor Australia Pty Ltd, a wholly owned subsidiary of the American engineering and construction contractor Fluor Corporation on the one hand (Fluor), and a joint venture consisting of the Australian mining company Anaconda Nickel Pty Ltd (now Minara Resources) and the Swiss metals trader Glencore International AG on the other (Anaconda). Whilst the parties are Australian companies, their parent companies are significant international corporations.[2]

By an Engineering, Procurement and Construction Contract ('EPC Contract') concluded in 1997, Fluor was engaged to design and construct a nickel/cobalt extraction refinery in the outback of Western Australia, at a place called Murrin Murrin, for a lump sum contract price of A$801 million. The schedule for construction of the massive metallurgical refinery was very short.

The EPC Contract between Anaconda and Fluor provided for the resolution of any disputes by a single arbitrator agreed between the parties or failing agreement by a single arbitrator nominated by the President of IAMA.

In early 1999, during the start-up of the plant, problems arose. Formal notices of dispute were given by the parties to one another in September/October 1999. Those disputes were unsuccessfully mediated in early 2000.

At an early stage it was agreed between the parties that the huge array of issues and the large number of claims justified the division of the disputes into two phases of determination. It was agreed that Phase 1 would be heard and determined before Phase 2. Phase 1 was to determine the large claims and the important issues of contractual construction. It was thought by some that the determination of the Phase 1 issues may have contributed to a resolution of some of the Phase 2 issues.

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2. Glencore International AG reports that it has total assets of US$23.5 billion and in the 2004 had a turnover of US$72 billion. See Glencore International AG corporate website at <www.glencore.com/pages/financial_overview.htm>. Fluor Corporation, a Fortune 500 company headquartered in California, reported revenues of over US$9 billion in 2004. See Fluor corporate website at <www.investor.fluor.com/marketguide.cfm>.

Ultimately, it was agreed that in Phase 1 the following claims would be heard and determined:

(a) Claims by Anaconda (and the *quantum* claimed)
  (i) 18 design and construction defect claims – A$365 million
  (ii) *Trade Practices Act 1974* (Cth) claims:
    (A) A delayed completion claim – A$99 million
    (B) A design claim – A$631 million
  (iii) Two claims for liquidated damages under the project contracts:
    (A) claims for liquidated damages for delayed completion – A$25 million
    (B) claims for liquidated damages for short falls in ramp-up production – A$23 million.

  Total Phase 1 claims by Anaconda: A$1.143 billion

(b) Claims by Fluor (and the *quantum* claimed)
  Eight contractual claims – A$102 million

The Phase 2 claims concerned 97 smaller (in comparison with the Phase 1 claims) defect claims in which Anaconda claimed the sum of approximately A$348 million.

Accordingly, the total claims made against Fluor by Anaconda were in the order of A$1.491 billion and claims made by Fluor against Anaconda totalled about A$102 million.

On the basis of the *quantum* claimed alone the litigation represents one of the most significant matters in Australian legal history.

The Evidence

Almost all of the issues in the arbitration concern the adequacy of Fluor's design and construction of the Murrin Murrin plant. There was a wide range of technical issues in dispute.[3] There was a colossal amount of evidence prepared by the parties.

In Phase 1, Anaconda delivered 39 factual witness statements from 21 witnesses and Fluor delivered 88 factual witness statements from 45 witnesses concerning Anaconda's claims. Concerning it's own claims Fluor delivered 20 witness statements and Anaconda 1 witness statement. Anaconda delivered 27 expert reports from 18 different experts and Fluor delivered 67 expert reports from 27 different experts. Anaconda's written closing submissions in Phase 1 ran to 600 pages, and Fluor's written closing submissions were of about the same length.

In Phase 2 Anaconda delivered 59 witness statements from 27 factual witnesses and Fluor delivered 51 witness statements from 43 factual witnesses. Anaconda delivered 54 expert reports from 24 experts and Fluor delivered 84 reports from 36 different experts. In Phase 2, Anaconda's closing written submissions ran to 997 pages and Fluor's written closing submissions ran to 1,380 pages.

Discovery in this arbitration was a huge exercise with both parties establishing electronic databases to handle the relevant documents. Discovery was not limited—the parties made general discovery. In the early stages the parties attempted 'limited' discovery, but the number of claims was

3. The technical issues included diverse disciplines such as hydrometallurgy, fluid dynamics, corrosion, the adequacy of exotic ceramic materials, solids liquids separation, crystal formation and scaling, computer generated reliability models, computer generated Metsim models of the metallurgical processes in the plant as well as issues concerning the design of a wide range of items of mechanical plant and equipment.

so large, and the background issues so broad that ultimately the parties made general discovery. The parties discovered in excess of 1.5 million documents, some of those documents being many ring binders in size.

Anaconda discovered the Murrin Murrin plant's Data Acquisition System (DAS). The plant contains thousands of tags which continuously measure data from various plant stream flows. Those measurements are recorded in the DAS system. At the end of each month Anaconda provided to Fluor a computer tape with all of the DAS readings as well as data from its on site testing laboratory.

In September 2001, after orders made by the arbitral tribunal, Fluor and its experts were permitted to attend the Murrin Murrin site and take a number of samples from the various plant streams (the Sampling program).

The Timetable

Although the litigation was particularly hard fought, at an early stage the parties recognised the enormity of the matter, and the need to mould the processes to be adopted in resolving the disputes to provide an efficient and commercially viable means of resolution. In July 2000, the parties agreed to amend the dispute resolution procedure contemplated by the EPC Contract to provide for the appointment of a panel of three arbitrators, with each party nominating one arbitrator and the third arbitrator, who would be the presiding arbitrator, chosen by the two nominated arbitrators from a list of six names created by each party nominating three.

By late November 2000, the Arbitral Tribunal had been appointed and entered upon the arbitration. Fluor appointed Professor John Uff QC, an engineer, experienced English silk and international arbitrator, and one of the authors of *Keating on Building Contracts*.[4] Anaconda appointed Mr Phillip Naughton, a London silk, experienced international arbitrator and mediator. The President chosen by the two nominated arbitrators was Mr Jan Paulsson, a partner of Freshfields Paris and a leading figure in international arbitration. Mr Paulsson is a member of the ICC, the London Court of Arbitration (Vice President) and the IOC Court of Arbitration for Sport and general editor of *Arbitration International*.

The Arbitral Tribunal proceeded to use some of the processes and procedures utilised in international arbitration for the resolution of the disputes.

The Chronology for the Resolution of the Anaconda/Fluor Dispute

The arbitral tribunal appointed in the *Anaconda v Fluor* litigation were extremely busy international arbitrators, resident in the Northern Hemisphere. Accordingly, at the preliminary directions hearing in London on 28-29 March 2001, in consultation with the parties, they set the hearing date for Phase 1 of the arbitration and made clear to the parties that the time allocated for the

4. Donald Keating and Anthony May, *Keating on Building Contracts* (Sweet & Maxwell, 2001).

hearing was reserved and would not be changed.

The chronology of Phases 1 and 2 of the *Anaconda v Fluor* arbitration is set out below:

Date	***Event***
Phase 1	
23 February 2001	Delivery of points of claims and factual witness statements in support concerning both Anaconda's claim and Fluor's counterclaim.
28-29 March 2001	Preliminary hearing (London)
11 July 2001	Delivery of defence and lay witness statements in support.
17-18 September 2001	Arbitral Tribunal site visit to the Plant at Murrin Murrin and directions hearing concerning the Phase 1 oral hearing
September 2001	The Sampling programme
19 October 2001	Exchange of expert reports.
9 November 2001	Delivery of factual witness statements in reply.
21 December 2001	Exchange of written opening submissions.
28 January - 28 February 2002 and 25 February - 22 March 2002	Phase 1 oral hearings. Stop clock hearing with each party allocated hearing time limited to 75 hours.
13 May 2002	Exchange of written closing submissions.
27-28 May 2002	Final oral closing submissions, each party allocated one day or five hours. (London)
9 September 2002	Phase 1 - Interim Award
21 October 2002	Simultaneous written submissions on the issues of costs.
4 November 2002	Simultaneous written submissions in reply on costs.
13 December 2002	Phase 1 award on costs
Phase 2	
15 November 2002	Delivery of Anaconda's Phase 2 points of claim and factual witness statements in support.
13 February 2003	Delivery of Fluor's defence and lay witness statements in support.
13 May 2003	Exchange of expert reports.
7 July 2003	Arbitral Tribunal site visit to the Plant at Murrin Murrin and directions hearing concerning the Phase 2 oral hearing
14 July 2003	Exchange of reply expert reports.
8 September 2003	Exchange of written opening submissions.
22 September - 17 October 2003	Phase 2 oral hearings. Stop clock hearing with each party allocated hearing time limited to 50 hours.
15 December 2003	Exchange of written closing submissions.
5 and 6 February 2004 or 5 hours. (London)	Final oral closing submissions. Each party allocated one day

August 2004	Expected date for delivery of Phase 2 award.

By the adoption of a number of procedures utilised in international arbitration, *Anaconda v Fluor* was to be arbitrated to final award within three and a half years of the delivery of the Phase 1 points of claim. The timetable contemplated the conclusion of the arbitration approximately four years earlier than if the matter were litigated in the traditional way.

In particular, the procedures adopted which facilitated this outcome included:

(a) the early setting of hearing dates at the preliminary conferences;
(b) the insistence by the arbitrators on the maintenance of the hearing dates, come what may;
(c) the delivery of witness statements with the pleadings, avoiding delay, the need for requests for particulars and significant amendments to the pleadings;
(d) the engagement of a specialist arbitrator with a defined role in respect of interlocutory steps, who heard and determined interlocutory disputes without delaying the interlocutory timetable;
(e) the engagement of expert facilitators to promote the identification of issues of agreement and disagreement between expert witnesses; and
(f) the utilisation of a limited time or '*chess clock*' hearings which saved almost a year in actual hearing time, and limited time closing addresses.

Early Setting of the Hearing Dates and their Maintenance

The Phase 1 hearing date of 28 January 2002 was set by the arbitral tribunal when it met with the parties in London on 28 and 29 March 2001. Although some of the dates of the interlocutory steps between the directions hearing and the hearing date were slightly extended, the parties quickly understood that the tribunal would not brook any amendment to the hearing dates. Both parties understood that delay in achieving any of the interlocutory milestones would ultimately impact only upon their final preparations for the hearing, and as a result, by and large most milestones were maintained. In both Phases, Anaconda amended the nature of its claims, necessitating the provision of additional evidence. However, as the hearing dates were fixed, the parties were required to accommodate the amendments and the delivery of additional materials within the framework of the certain hearing dates, and they did so.

The time for preparation of the hearings was particularly short. However, as both parties utilised large legal teams, each party retaining four or five barristers for both phases, and the hearings themselves were limited in time, there was not the need for the length of preparation time one would usually need for a trial or long hearing.

The Phase 1 and 2 hearings commenced on the dates originally scheduled and neither party made any application for adjournment of either hearing.

The Delivery of Witness Statements with the Pleadings

As a result of the delivery of the witness statements with the pleadings the requests for further and better particulars which were made were narrow in ambit, and generally the arbitral tribunal resisted directions for the delivery of detailed particulars. The witness statements that were delivered were very detailed. Also, although there were amendments of the pleadings, as the witness statements containing the evidence in support of each party's case had been delivered, pleadings were amended without significant impact upon the interlocutory timetable.

Engagement of a Specialist Arbitrator with a Defined Role in Respect of Interlocutory Steps

Both parties made general discovery in this litigation. An enormous number of documents were discovered. Significant issues arose between the parties concerning claims for privilege. It was not convenient for the arbitrators from the point of view of time and location to rule upon those disputes. The parties worked cooperatively to settle upon an efficient and effective process to resolve the privilege disputes. They referred the privilege disputes to a separate arbitration by an eminent Queens Counsel from the Victorian bar. Five separate hearings were conducted before that arbitrator concerning disputed privilege claims relating to about 32,000 documents. The arbitrator was able to review all the documents which were the subject of those disputed privilege claims. The parties thus did not have the usual concerns which arise when disputed privilege claims are determined by the ultimate arbitrator, who a party might prefer does not see some of the documents which are ultimately ruled to attract privilege. The arbitrator delivered five separate awards concerning the disputed claims for privilege during mid-2001. The swift resolution of those disputes meant that the hearing date was maintained. The use of a separate arbitrator with a defined role is a mechanism which ought be considered for more general application in very large disputes.

Expert Facilitator

In both phases of the arbitration, the arbitral tribunal appointed both a technical expert and an expert in *quantum* matters to facilitate pre-hearing meetings of party experts in order to identify and record issues of expert agreement and disagreement. The technical facilitator was not appointed as an advisor or assistant to the arbitral tribunal or as a tribunal expert. Rather, the technical facilitator was required to call and attend meetings of the experts to understand their evidence, and to attempt to elicit agreement between them and to record principal issues of disagreement. The technical facilitator then reported those matters of agreement and disagreement to the arbitral tribunal prior to the commencement of the hearings.

The arbitral tribunal directed the parties that all discussions between the parties' experts were to be conducted:

(a) independently and on the basis of their professional opinion;
(b) without prejudice; and
(c) privileged from disclosure,

and the tribunal directed that the experts were to be so instructed.

The breadth of the issues arising from the expert reports, the large number of experts, and the geographical locations of them made the role of the technical facilitator concerning issues of liability very difficult. Both parties engaged experts from all parts of the world, including the United States, the United Kingdom and continental Europe. In Phase 2, the technical facilitator organised one week of meetings between experts of like disciplines concerning certain issues in San Francisco, and one week concerning other issues in Melbourne. The parties were required to ensure the attendance of their experts at these meetings. Those that could not attend were involved by phone or video link. The legal representatives of the parties did not attend. The minutes of the meetings recording items of agreement and disagreement were circulated by the facilitator to the experts and the parties and the settled minutes

were provided to the arbitral tribunal. Some important agreements were achieved, which reduced the breadth of issues canvassed in the oral hearings. The notes of agreements reached, and disagreements were important matters for cross-examination in the oral hearings.

The *quantum* facilitator was the principal in a well known local construction and project management consultancy. Because the number of witnesses concerning issues of *quantum* was far more manageable and those witnesses were resident in Australia, he was successful in identifying a significant number of matters of agreement between the parties concerning the *quantum* evidence and reducing the matters of disagreement. He facilitated meetings of both the experts and the lay witnesses concerning issues of *quantum*. Ultimately, he produced reports to the arbitral tribunal on each claim, identifying the amounts claimed by Anaconda's witnesses, any agreements between the witnesses concerning the *quantum* of each claim, and the principal matters of disagreement concerning the *quantum* of each claim. This process reduced the hearing time required and identified the expert and *quantum* issues of significance, and these were the issues to which the parties devoted time during the oral hearings. Interestingly, notwithstanding the huge sums of money claimed in the two phases, the parties found it necessary to devote only limited time in the oral hearings to issues of *quantum*, about two days in total in each of the phases. This was largely due to the effectiveness of the *quantum* facilitation process.

'Stop Clock' or 'Chess Clock' Limited Time Hearings

Before the hearings commenced, the arbitral tribunal was given very detailed written opening submissions, setting out the context of each claim, or its defence, and references to the written evidence.

Accordingly, by the time of the oral hearings the arbitral tribunal was in a position to fully understand all the claims, their defences, and the major disputed points. It needed, however, an opportunity to see and hear the witnesses, to assess their competence, demeanour and credibility.

In both Phase 1 and Phase 2, the parties sought a longer hearing than the time ultimately allocated by the Tribunal. In Phase 1, the arbitral tribunal held a six week hearing with each party allocated 75 hours. That six week period was broken by a two week recess, which coincided with the Salt Lake City winter Olympics and Mr Paulsson's commitment to sit on the Court of Arbitration for Sport.

In Phase 2, the arbitral tribunal held a four week hearing with each party allocated 50 hours. Counsel for both parties were initially pessimistic that the hearing time allocated by the tribunal would be sufficient to properly agitate the issues.

For the purposes of the hearing each party appointed a time keeper and the time keepers maintained a daily record of the time used by each party. At the end of each day's hearing the chairman of the tribunal settled the time report and the time used and the balance of time available to each party was published to the parties. In organising the hearing time available to the parties, the tribunal also allocated approximately one and a half hours per day hearing time to itself, which it used when members of the arbitral tribunal questioned witnesses, or gave administrative directions. The arbitral tribunal sat from 9.30am to 5.00pm each day.

In the course of the hearings the arbitral tribunal directed the timekeepers that time utilised (or wasted) in the course of the hearing was debited to one or other of the parties. Prior to the hearings the tribunal directed that the following list of categories of activity would typically be charged against each party's time:

(a) the late arrival of counsel or witnesses;
(b) oral submissions;
(c) the examination of witnesses (irrespective of who proposed the witness, but subject to adjustment in the event of consistent unresponsiveness);
(d) causing an unjustified interruption or prolonging a justified interruption (thus, for example, an unsuccessful objection was generally charged against the party that made it, and a successful objection against the party that resisted it); and
(e) setting up displays or presentations whilst the tribunal was sitting.

It directed that caucuses between the parties while the tribunal was sitting would be charged 50/50.

It was incumbent upon counsel to ensure that cross-examination was direct and focused. The tribunal directed that the rule in *Brown v Dunne*[5] did not apply. It did, however, give directions that a party was not bound by opposing evidence which it did not challenge, but was expected to cross-examine at least one opposing witness with respect to any significant matter which the other party should be given an opportunity to answer, or make clear in ample time prior to the end of the hearings that it considered a witness's written evidence to be wrong with respect to an important element of its contentions or defences.

The tribunal formally directed that each party was wholly responsible for the way it chose to use the time available to it. Indeed, the tribunal also directed that at the outset of the hearing each party could choose to make an opening submission, and it advised that the parties could rely on the arbitrators having read the materials, and that the arbitrators would be assisted by indications of emphasis rather than by reiteration. Accordingly, it advised that such openings were not expected to exceed one hour. As a result, the opening submissions were extremely short, about 30 to 40 minutes each.

The arbitral tribunal also directed that expert witnesses on issues of liability, and lay and expert witnesses on issues of *quantum* were to be presented for cross-examination in connection with modules, each module concerning a separate technical discipline. The procedure for each module was as follows:

(a) the experts made their presentations;
(b) cross-examination of Anaconda's experts;
(c) cross-examination of Fluor's experts; and
(d) expert caucuses, including questions from the arbitral tribunal or the facilitator.

5. *Brown v Dunn* (1893) 6 R 67.

In this way, experts of like discipline were present during the cross-examination of other experts of that discipline, and even if not cross-examined could be asked questions by the tribunal or the facilitator.

It was necessary for a solicitor of each party to carefully manage and coordinate the time used by the barristers involved in each team. Not all barristers in arbitration practice are suited to a hearing of this kind. Counsel who cross-examine by tedious fence building, often to make a point of limited forensic importance, should not be retained for a limited time hearing. Most barristers will need to dramatically alter their cross-examination technique. It was usual during this arbitration for Counsel to be allocated 30 to 45 minutes to cross-examine an expert on a detailed report.

Both parties concluded that in presenting their expert evidence it was a better use of time to allow the experts to make a presentation of their evidence than to utilise all of the time cross-examining the opponent's expert. Accordingly, many of the experts utilised their time to provide a presentation of the contents of their report before they were cross-examined.

The tribunal also permitted experts of like discipline to cross-examine one another. This was a particularly time efficient and effective method. For example, in Phase 1 of the arbitration an extremely eminent Fluor witness commenced cross-examining his Anaconda counterpart. It was apparent to all, including the Anaconda expert, that the Fluor expert was a commanding figure in his particular field, and when he invited his Anaconda counterpart to withdraw a large section of his report rather than be cross-examined by him about it, the Anaconda expert agreed to withdraw that section. Cross-examination by counsel concerning that section of his report could have taken many days if conducted in an unlimited time hearing.

Part way through the Phase 1 hearing, the tribunal observed that it had used only a small percentage of the time per day allocated to it, and it offered both parties an additional five hours each of that unused time, increasing the parties total allocated time to 80 hours each. Ultimately, the Phase 1 and Phase 2 hearings finished early on the final allocated day as neither party used all of the time allocated to it.

Limited Time Oral Addresses

In both Phase 1 and Phase 2 of the arbitration, the parties produced very detailed written closing submissions. In both phases, however, the oral addresses were limited to five hours, with each party effectively being provided with a day to address. Again, counsel were required to be focused in submissions to refer to paramount issues. Some counsel actually found it difficult to use all their allocated time, as they were anxious not to repeat submissions that had been made in the written documents. These oral addresses were an opportunity for the arbitral tribunal, at the height of its knowledge of the issues, to clarify submissions or be directed to relevant evidence.

Conclusion

The procedure adopted in the *Anaconda v Fluor* litigation was partly necessitated by the size of the matter. However, most of the advantages of arbitration over litigation were realised. Many of the procedures adopted are not new or particularly novel, but they provided significant savings in time to the parties. Those savings in time also equate to savings in costs.

There is no reason why those processes, and other innovations, ought not be used more generally in arbitration practice.