Module 5:
Pleadings in Arbitration

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- It is nearly always the case that the claimant's notice of arbitration and the respondent's answer to the notice will only contain a general indication of the parties' positions.
- Normally insufficient for the arbitration to proceed on that basis.
- Further directions of pleadings normally necessary
- Often the parties' arbitration agreement expressly stipulates that certain rules are to govern the arbitration, in which case the tribunal should check whether those rules contain mandatory directions for pleadings.

Article 16 – Statement of Claim

- HKIAC Rules Articles 16 and 17 govern the contents of pleadings. Other major rules contain similar provisions.
- Article 16 – Statement of Claim
  - 16.1 Unless the Statement of Claim was contained in the Notice of Arbitration (or the Claimant elects to treat the Notice of Arbitration as the Statement of Claim), the Claimant shall communicate its Statement of Claim to all other parties and to the arbitral tribunal within a time limit to be determined by the arbitral tribunal.
  - 16.2 The Statement of Claim shall include the following particulars:
    a) a statement of the facts supporting the claim;
    b) the points at issue;
    c) the legal arguments supporting the claim; and
    d) the relief or remedy sought.
  - 16.3 The Claimant shall annex to its Statement of Claim all supporting materials on which it relies.
  - 16.4 The arbitral tribunal may vary any of the requirements in Article 16 as it deems appropriate.

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Article 17 – Statement of Defence

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- 17.1 Unless the Statement of Defence was contained in the Answer to the Notice of Arbitration (or the Respondent elects to treat the Answer to the Notice of Arbitration as the Statement of Defence), the Respondent shall communicate its Statement of Defence to all other parties and to the arbitral tribunal within a time limit to be determined by the arbitral tribunal.
- 17.2 The Statement of Defence shall reply to the particulars of the Statement of Claim (set out in Article 16.2(a) to (c)). If the Respondent has raised an objection to the jurisdiction or to the proper constitution of the arbitral tribunal, the Statement of Defence shall contain the factual and legal basis of such objection.

Article 17 – Statement of Defence (Cont.)

- 17.3 Where there is a counterclaim, set-off defence or cross- claim, the Statement of Defence shall also include the following particulars:
  a) a statement of the facts supporting the counterclaim, set-off defence or cross-claim;
  b) the points at issue;
  c) the legal arguments supporting the counterclaim, set-off defence or cross-claim; and
  d) the relief or remedy sought.
- 17.4 The Respondent shall annex to its Statement of Defence all supporting materials on which it relies.
- 17.5 The arbitral tribunal may vary any of the requirements in Article 17 as it deems appropriate.

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- Art 17.5 gives the Tribunal the power to vary the requirements provided in these articles.

- Further pleadings (e.g. Reply and Defence to Counterclaim; Rejoinder and Reply to Defence to Counterclaim etc) may be ordered if the circumstances warrant.

- Further pleadings may be necessary where it is already apparent from the Answer to Notice of Arbitration that there will be a counterclaim

- They may also be necessary when major new arguments are only raised in a Defence or a Reply.

- Traditional court pleadings may be agreed or ordered if it is thought appropriate.

- Traditional court pleadings principles are contained in Order 18 of the Rules of the High Court.

- Court pleadings are supposed to contain only material facts.
- See Rules of the High Court O 18 r 7(1), which provides that "*subject to the provisions of this rule and rules 7A, 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be,* ***but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits***"

- Rules of the High Court O 18 r 11 provides that "*a party may by his pleading raise any point of law*".

- However, it is well established that it is sufficient for the pleader to state the material facts but not the legal result. Also, if, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. See **Re Vandervell's Trust (No 2)** [1974] Ch 269

Article 18 – Amendments to the Claim or Defence

- Art 18 governs the Tribunal's power to amend.
- It provides:
- Article 18 – Amendments to the Claim or Defence
  - 18.1 During the course of the arbitration, a party may amend or supplement its claim or defence, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the circumstances of the case. However, a claim or defence may not be amended in such a manner that the amended claim or defence falls outside the jurisdiction of the arbitral tribunal.
  - 18.2 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) if a party amends its claim or defence.

- Notwithstanding the power to amend, it is important that the pleader do apply his best endeavours to get things right the first time.

- An application to amend, even if granted, will almost always be visited with an adverse costs order.

- An application to amend may not necessarily be granted. It may be refused on grounds of delay or prejudice. The tribunal has a wide discretion, although it will strive to ensure that the substantive rights of the parties are properly adjudicated upon.

- Important for pleadings to be properly prepared.

- Unpleaded issues, evidence or arguments may not be allowed to be run at the substantive hearing.

- Even if they are allowed by the tribunal, this always gives the other side a potential ground to set aside or resist enforcement

- Function 1 of pleadings – identify allegations (and evidence or legal arguments) that a party seeks to rely upon.
- This is to give notice to the other side, and the tribunal, of the allegations (and evidence or legal arguments)
- Informs the other side as to what evidence (factual or expert) is necessary to be called / adduced
- Informs the other side as to what interlocutory applications may be necessary
- This is important to ensure fairness and ability to present case

- Function 2 of pleadings – identify relief sought / counterclaim mounted.
- After all, the order sought by a party is arguably the most important thing
- This is also important to ensure fairness and ability to present case

- Function 3 of pleadings – identify issues between the parties
- Difference between admission, non-admission and denial
- Important to ensure fairness and enable the tribunal to manage the case

- Further and better particulars of pleadings normally regarded as unnecessary
- Even in the context of court pleadings, there was an amendment in the CJR in 2008 adding a new O 18 r 12(3B) which states that "*no order shall be made [for further and better particulars] unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*"
- Further and better particulars unlikely to be ordered in international arbitration where speedy finality is emphasized

- On discovery / production of documents, international arbitration normally follows the civil law tradition, as opposed to the common law tradition of general discovery
- Parties may be required to attach documents on which they rely with their pleadings in arbitration.
- Specific discovery requests may then follow.

- Legal arguments may be ordered to be contained in the pleadings.
- But it is probably unnecessary to cite all possible authorities and argue the law extensively at that stage
- After all the guiding principle should be fairness
- A general proviso to that effect in the first procedural order, or in the pleading itself, should be sufficient

- First procedural directions may make provisions up to the close of pleadings, and that the parties and the tribunal can then discuss what further directions to give.

- This might be thought to be desirable such that the parties and the tribunal will be assisted by the pleadings as to what further directions are appropriate.

- In most cases, save for a case of extraordinary simplicity, it is probably better to be prudent in the directions at the initial stages.
- Very often, after pleadings are filed, the issues would be much clearer
- “Bespoke” directions on discovery, evidence, expert evidence etc could then be given.
- Unlikely for substantial delay to be caused by this approach (as opposed to the “directions all the way” approach)

- Sometimes witness statements are also ordered to be filed with pleadings.
- That may result in ill-focused evidence and therefore wastage of time and costs.
- Even where that is ordered, provisions for further rounds of witness statements after close of pleadings should be made.

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- Where evidence is directed to be filed with pleadings, expert evidence creates particular problems.
- Without well-defined issues, very difficult for expert evidence to be focused.
- Well-defined expert issue is seldom possible without full pleadings.

- There are some enlightening developments in the practice of ordering expert evidence in the court setting. See **Shenzhen Futaihong Precision Industry Co Ltd v BYD Co Ltd** [2019] 2 HKC 175 (CA)
- CA noted the potential of much wastage of time and costs if expert evidence not controlled.
- CA also noted the importance of well-defined expert issues.
- These considerations should be important also in arbitration contexts.

Q&A

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