ACICA Explanatory Note: Memorials or Pleadings?

ACICA
Australian Centre for International Commercial Arbitration

Introduction

As the use of arbitration as a means of resolving commercial disputes increases, more businesses and lawyers are being exposed to international arbitration, bringing diverse expectations and experiences to the arbitral process.

Many first-time users of arbitration envisage a process akin to a private court, with essentially the same procedures as would be followed if the dispute were resolved by litigation before a judge. However, arbitration is not meant to be "*private litigation*" and there is a risk that the arbitration process will under-perform in terms of cost and efficiency if it is approached this way.

One of the main areas in which the difference between common law litigation and arbitration is most pronounced, is the way the written phase of the proceedings is approached:

- in litigation in common law jurisdictions such as Australia, the written phase of the proceedings typically occurs in a staggered fashion, with the parties providing limited (mostly factual) information at the beginning, in the form of "*pleadings*", and only later exchanging the evidence on which they rely (documents, witness statements, expert reports), and later still, the legal authorities and arguments; whereas
- in arbitration, particularly in international cases, the process tends to be more front-loaded, with the parties often filing what are known as "*memorials*" (sometimes also referred to as "*Statements of Claim*" or "*Statements of Defence*"), in which each party sets out its complete factual and legal case, attaching all of the materials on which it relies (documentary evidence and legal authorities). In many cases, the parties also attach witness statements and expert reports to their memorials, though in other cases these are filed separately.

Although the "*memorials*" approach is well understood and widely used internationally, it is less well understood in some jurisdictions – especially in common law jurisdictions.

The purpose of this explanatory note is to briefly describe the difference between the "*pleadings*" approach and the "*memorials*" approach, providing an overview of the pros and cons of each.

Pleadings

The pleadings approach has its origins in English civil procedure and is therefore associated with common law (English-derived) jurisdictions such as Australia, Singapore and Hong Kong.

Strictly speaking, the term "*pleading*" means a document in which a party sets out its position on the facts of the dispute and identifies the issues for decision by the trial judge (or arbitrator). In the English civil procedure tradition, the purpose of a pleading is to inform the other party of the case it has to meet.

There is some variation in pleadings practice across common law jurisdictions. Generally speaking, the pleadings approach involves a procedure in which the factual and legal components of a case are split and established in a sequential fashion:

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- in the first stage, the parties file documents (pleadings) that set out their positions on the facts of the dispute – these documents normally take the form of a Statement of Claim from the plaintiff/claimant and a Defence from the defendant/respondent, with additional documents such as a Reply and Counter-Claim as necessary;
- in the second stage, the parties exchange the documentary evidence on which they rely, followed by their respective witness statements and expert reports; and
- in the third stage, the parties set out their positions on the law, in the form of "*submissions*", identifying the legal rules and authorities on which they rely.

After these stages are complete, a hearing will be held, at the outset of which the parties' counsel will often make further oral submissions on the legal issues. The focus of the hearing will then shift to examination of witnesses and experts.

Although many sets of international arbitration rules use terms that common law practitioners may associate with the pleadings approach (such as "*Statement of Claim*" and "*Statement of Defence*"), the use of these terms does not necessarily indicate that the arbitration rules strictly require the pleadings approach. Rather, these terms generally give the parties discretion as to the approach they will adopt. It is common practice in international arbitration to prepare a Statement of Claim or Statement of Defence using the "*memorials*" (i.e. narrative) approach, as described below.

Even when the pleadings approach is followed in arbitration, the parties rarely proceed in the same strict manner as they would if their dispute was before a common law court. The flexibility offered by arbitration allows the parties to tailor the approach to suit their case, and this often results in a hybrid of the pleadings approach and the memorials approach (for example, the parties file memorials, attaching everything except expert evidence, which is filed at a scheduled date later in the proceedings).

Memorials

The memorials approach has mixed origins, with elements of the civil law (Romano-Germanic) procedural tradition and features of United States litigation practice.

Memorials have long been used in public international law proceedings (disputes between States). In the last decade, the memorials approach has been received into contemporary international arbitration practice, in part due to the use of memorials in the growing field of investor-State arbitration.

In the memorials approach, each party presents its entire case, with all supporting documents attached, in a consolidated document (the memorial), the first of which is filed at the beginning of the process (usually shortly after the arbitral tribunal is constituted). The supporting documents include not only documentary evidence but also witness statements and expert reports (though, as noted above, expert reports and witness statements are sometimes filed separately where a hybrid approach is used).

Unlike the pleadings used in court proceedings in most common law jurisdictions, a memorial is narrative in nature, with all relevant factual and legal issues presented in a unified case theory. There is variation in the way memorials are written but a memorial will usually explain the party's case in a compelling way, with

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an executive summary, a factual section, a legal section and a section on requested relief. The claimant's memorial may be referred to as a "*Memorial of Claim*" or a "*Statement of Claim*", with the respondent's memorial being a "*Counter-Memorial*" or "*Statement of Defence*", but the approach to the substance is the same.

In an arbitration where the memorials approach is used, unless the proceedings are bifurcated (i.e. split into jurisdiction and merits phases, or merits and quantum phases), there will ordinarily two rounds of memorials filed by the parties:

- in the first round, the Claimant files its Memorial (or Statement) of Claim and the Respondent then files its Counter-Memorial (sometimes called a Statement of Defence); and
- in the second round, the Claimant files its Reply and the Respondent then files its Rejoinder.

Often the document production process will occur between the two rounds (i.e. between the Respondent's Counter-Memorial and the Claimant's Reply), though arbitration practice varies in this regard, depending on what is appropriate or required for the case at hand.

The memorials approach is either assumed or recommended under many of the leading sets of arbitration rules. For example, the ACICA Rules 2021 provide that "[t]*he Claimant should, as far as possible, annex to its Statement of Claim all documents and other evidence on which it relies or contain reference to them*" (Article 29.3). What signals the memorials approach in this provision is that it calls for the claimant to submit all the materials on which it relies with its Statement of Claim. Similar provisions are included in the ICC Rules, SIAC Rules, HKIAC Rules and LCIA Rules.

Practitioners should be aware of the wide-spread use of memorials when they engage in international arbitration.

Pleadings or memorials for arbitration?

Although the memorials approach is widespread in international arbitration today, in some common law jurisdictions (including Australia), there is debate regarding whether it is better to adopt the pleadings approach or the memorials approach in arbitration.

International arbitration practitioners tend to identify the following as the main advantages of the memorials approach:

- First, the memorials approach ensures that the arbitral tribunal gets a reasonably complete picture of each party's case relatively early in the proceedings, whereas in the pleadings approach the tribunal receives the facts and the law separately and often will not get a complete picture of the dispute until the hearing (or close to the hearing).
- Second, by requiring the parties to produce all of their evidence early, the memorials approach encourages parties (and their lawyers) to assess the evidentiary strengths and weaknesses of their case early in the proceedings, whereas the more gradual forensic process that applies in the pleadings approach allows parties to defer this assessment (and, in some cases, continue with a case that they cannot prove).

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- Third, by requiring the parties to set out their complete positions in the first round of the written phase of the proceedings, the memorials approach may enhance the prospects of early settlement; in the pleadings approach, the window for settlement tends to open later as the parties' cases are not fully presented until shortly before the hearing or trial.
- Fourth, because the memorials approach results in higher costs earlier in the proceedings, it can act as a filter on frivolous claims; the pleadings approach, on the other hand, generally has a flatter costs profile and may therefore have less of a deterrent effect on frivolous claims.
- Fifth, in the memorials approach the parties will provide extensive written arguments with supporting evidence, such that hearings can be shortened to focus on the key legal and evidentiary issues. Hence, international arbitration hearings are often a maximum of two weeks (sometimes shorter but occasionally longer in complex cases). In contrast, there is usually more oral advocacy with the pleadings approach, such that a hearing that would be two weeks in a memorial-style arbitration may run for two months or longer in court proceedings (or in a domestic arbitration following a pleadings-style approach).
- Finally, the memorials approach is better able to accommodate different legal traditions, because it is narrative based and allows the parties to present their cases in essentially any way they wish (provided they present their case in full, with supporting materials attached); the pleadings approach, in contrast, depends to an extent upon a shared understanding and acceptance of certain practices and conventions, which may be alien to parties from civil law jurisdictions.

However, in the eyes of some common law practitioners (particularly practitioners with backgrounds in litigation), there are certain potential attractions to the pleadings approach:

- First, in a matter where the facts are relatively straightforward, the pleadings approach may identify the disputed factual issues faster (through the early process of admissions and denials) than would be the case if the facts were presented in memorials.
- Second, the pleadings approach can be more efficient from a forensic perspective in so far as witness statements are only adduced once the parties have (through the process of admissions and denials) established which points of fact are disputed and require witness testimony, whereas in the memorials approach the parties (or certainly the claimant, who files the first memorial) are required to prove facts that may not be disputed.
- Third, the pleadings approach may be more cost-effective in that it does not require the parties to spend as much money at the beginning of the proceedings (especially proving points of fact), when the parameters of the dispute are not yet known. Note, however, that although the pleadings approach may deliver cost savings early in the proceedings, these savings may be lost when it comes to the hearing, which will often need to be longer if the pleadings approached is used.

As noted above, the flexibility of arbitration is such that the choice between the pleadings approach and the memorials approach is not binary: parties can, and often do, use a hybrid of the two approaches. Experienced international arbitrators know how the assist the parties in this regard.

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Conclusion

International arbitration is a cross-cultural process and it is important that parties and their lawyers be aware of the potential for legal cultures to clash on matters of procedure.

Overall, the choice of whether the memorials approach or the pleadings approach should be adopted is a matter for the parties and, failing their agreement, the arbitrators. The choice is not binary: it is open to the parties to agree to use whatever hybrid of the two approaches they consider most appropriate for their dispute.

Parties and legal representatives coming from a common law litigation rather than international arbitration background may be inclined to prefer the pleadings approach. Before progressing with this approach, careful consideration should be given to the potential cost savings and efficiency gains that often come with the memorials approach to arbitration, with or without separate witness statements and expert reports.

Where both common law and civil law traditions are represented in the disputing parties, the memorials approach (or a hybrid of it) will usually be more suitable and should ordinarily be adopted.

Lawyers acting for parties from common law jurisdictions such as Australia should take care to consider the legal tradition of their opponent. An arbitration is less likely to be efficient and cost-effective if it is burdened by procedural misunderstandings and the use of procedural devices that are familiar to one party but alien to another. Practitioners who are used to following the pleadings approach should take steps to familiarise themselves with the memorials approach, and vice versa.

Finally, the parties and their advisers should also be alert to the legal traditions of their arbitrators: the pleadings approach may suit some arbitrators (such as retired judges from common law jurisdictions), but there is less point insisting on a pleadings approach when the arbitral tribunal includes practitioners from more commercial backgrounds, arbitrators with predominantly international arbitral experience, or arbitrators who have little familiarity with common law procedure.

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