

Best Offer Arbitration

- Philip Davenport, Lecturer, School of Building, University of New South Wales.

The idea for "Best Offer Arbitration" comes from an address by Professor Garbesi of Loyola Law School, Los Angeles to a symposium *Engineers and Lawyers* at the University of NSW in November 1991. The purpose of this paper is to demonstrate how the idea might be translated into practice in Australia.

The basic idea is:

1. both parties to the arbitration put their case to the arbitrator;
2. each party then makes its "best offer" of settlement to the other party and notifies the arbitrator of the amount;
3. the arbitrator selects the offer which in the opinion of the arbitrator is the more just and fair;
4. the arbitrator gives no reasons and costs follow the event.

It might be argued that "Best Offer Arbitration" is a gamble. Is it any more of a gamble than any arbitration? At least the Claimant will be cautious about exaggerating the claim and the Respondent will attempt to make a realistic offer. In a "Best Offer Arbitration" a ceiling can be put on costs and the risks inherent in a long arbitration can be eliminated.

"Best Offer Arbitration" is not suited to all arbitrations but it deserves recognition as a category of ADR. Below is a draft of a submission to "Best Offer Arbitration". In the case of some disputes the draft could be amended to make the agreement one for "Expert Appraisal". However, this is not recommended. One important advantage of arbitration over "Expert Appraisal" is that the award of the arbitrator can be enforced under section 33 of the uniform Commercial Arbitration Act whereas, in the case of Expert Appraisal, the successful party must sue to enforce the Expert's decision.

While it would be possible to have a full arbitration hearing, with legal representation, examination on oath of witnesses, cross examination, addresses, etc., the draft is in the form of a simple arbitration with written submissions only. The arbitrator's decision is made by reference to considerations of general justice and fairness as provided in section 22(2) of the uniform Commercial Arbitration Act.

Draft for Submission to Best Offer Arbitration

The Claimant and Respondent named in the Schedule agree to submit the claims and counterclaims, if any, described in the Schedule to arbitration by the Arbitrator named in the Schedule, and the Arbitrator agrees to arbitrate the disputes, on the following terms:

trate the disputes, on the following terms:

1. Each of the Claimant, the Respondent and the Arbitrator must sign this agreement in triplicate and the last to sign must stamp the agreement [if stamp duty is payable] and forward a copy of the agreement to each of the others.
2. Within 14 days, the Claimant and the Respondent must each lodge security for the Arbitrator's fee with the person named in the Schedule in the amount stated in the Schedule.
3. Within 14 days, the Claimant must submit a written statement of the Claimant's claims.
4. Within 28 days, the Respondent must submit a written defence to the claims and statement of the Respondent's counterclaims, if any.
5. Within 42 days, the Claimant must submit a reply to the defence and a defence to the counterclaims.
6. Within 56 days, the Respondent must submit a reply to the defence to the counterclaims.
7. The respective submissions must be furnished to the Arbitrator and to the other party and must include all the arguments and information which either party wishes to put to the Arbitrator. Neither party can raise any claim or counterclaim other than one detailed in the Schedule.
8. Within 63 days, each party must submit its best offer of settlement. The offer must be of an amount in dollars [even if only \$1.00] which the party offers to pay the other party in full settlement of all the claims and counterclaims, but excluding the costs of the arbitration.
9. Within 70 days after the commencement date, the arbitrator must deliver an award without reasons. The award must be for the amount of one or the other offer. The Arbitrator is to select the offer which the Arbitrator considers to be the more just and fair.
10. The times will run from but not include the commencement date stated in the Schedule.
11. Upon delivery of the award, the Arbitrator will be entitled to the fee stated in the Schedule. The whole fee must be paid by the party against whom the Award is made. If the fee is not paid within 7 days after the delivery of the award, the Arbitrator may apply the security to payment of the fee.
12. When the Arbitrator has been paid, the arbitrator must direct the release of any balance of the security to the party entitled to it.
13. Each party must bear its own costs of the arbitration.

Schedule

1. Arbitrator:
2. Claimant:
3. Respondent:
4. Claims:
5. Counterclaims:
6. Security to be lodged by each party: \$.....
7. Person with whom security is to be lodged:
8. Commencement date:

Signatures

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Claimant Respondent Arbitrator

Arbitration

General Arbitration Course

The Institute of Arbitrators Australia will conduct a residential General Arbitration Course at University House, the Australian National University, Canberra, from 5 to 8 May 1992.

The Institute of Arbitrators, Australia, established in 1975, is the leading national body concerned with the promotion of arbitration as a means of dispute settlement and professional development in the fields of commercial arbitration and assisted dispute resolution.

Each year, the Institute holds both a General and an Advanced Course in arbitration. Both courses may be attended by non-members of the Institute, but attendance at a General Course is required prior to attending an Advanced Course.

The General Course aims to provide a broad education

in arbitration law and practice for people from a wide variety of backgrounds who would benefit from the development of knowledge and skill in arbitration. The Advanced Course is designed to provide further training for those seeking to be registered and graded as practising arbitrators. Attendance at both courses is a prerequisite for sitting the Institute's annual examination.

Programmes and registration forms for the General Course will be mailed to all members of the Institute of Arbitrators, Australia. Non-members may obtain copies by writing to:

A.C.T. Chapter Secretary
 The Institute of Arbitrators, Australia
 PO Box 1250,
 Fyshwick, A.C.T. 2609
 Fax: 062 800 4842

Book Review Update

Commercial Arbitration Law and Practice

Jacobs, Law Book Co, Sydney 1990, 2 Volume, Looseleaf, \$325.00.

- John Tyrnil

A review of the subscription service Jacobs, Commercial Arbitration Law and Practice was published in Issue #18 at page 9. The purpose of this brief note is to inform Newsletter subscribers that the author and publishers have been quite busy since the release of the two volume looseleaf subscription service.

There have been five releases to date involving hundreds of pages of updated material to reflect changes in legislation, recent developments in case law and treatment of a wide range of additional issues.

This level of activity should appeal to subscribers and certainly makes Jacobs compelling for students of, and those involved in, commercial arbitration.

In the review published in the Newsletter in June 1991, the comment was made that the review indicated "a most practical approach in anticipating and commenting upon issues which are likely to arise in practice". A brief perusal of the update material bears that comment out. The Jacobs subscription service is covering and commenting upon most important issues regarding commercial arbitration and other methods of dispute resolution. □