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Stop Clock Hearing Procedures in Arbitration

This article discusses the use of 'stop clock' or 'chess clock' oral hearing procedures in both domestic and international arbitrations and gives practical advice on the planning and preparation of such procedures.

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Introduction

Oral hearings are expensive, especially in international commercial arbitrations. Minimising the length of hearings requiring physical attendance of the arbitral tribunal, the parties, their legal representatives and their lay/factual and expert witnesses can result in significant savings in both time and costs.[1] This explains the prevailing trend in international commercial arbitrations towards 'stop clock' (or 'chess clock') hearing procedures.[2]

What is a stop clock hearing?

A stop clock hearing is one conducted along the following lines.

(1) The duration of the hearing is strictly prescribed in advance.
(2) The time is then allocated between the tribunal and the parties. That is, some of the available time is allowed for the tribunal to question the parties or witnesses.
(3) The time allocated to each party is equal (subject to rules of procedural fairness).
(4) The parties are entitled to use their time as they see fit (whether by opening or closing submissions, evidence in chief or cross-examination). Usually, the preponderance of time will be spent in cross-examination.
(5) Once the allotted time has expired, no further oral submissions or evidence are allowed.

In a minority of cases, the tribunal may seek to micro-manage the process by allotting time limits for particular steps in the hearing (for example, opening submissions, evidence in chief, cross-examination or closing submissions).[3]

The international arbitration experience

Stop clock hearings derive from modern international arbitration practice. There is no available empirical evidence as to the frequency of use of such hearings in international arbitration, though anecdotal evidence suggests that it is a fairly common practice.[4]

Dr Karl-Heinz Böckstiegel is largely credited with developing stop clock arbitration.[5] The essence of the so-called 'Böcksteigel Method' has been described as follows:

"The tribunal informs the parties in good time that each will dispose of a finite amount of time during the hearing … A Leitmotiv (ie recurring theme) of the Böckstiegel Method seems to be to establish a few firm rules and then to invite the parties to do as they please – for better or worse – within these limits."

The UNCITRAL Notes on Organising Arbitral Proceedings[6] elaborate as follows:

"78. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements; (b) questioning its witnesses; and (c) questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

"79. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearing and avoid that one party would unfairly use up a disproportionate amount of time."

Time limited hearings in the ancient world

Stop clock hearings are by no means a modern phenomenon, having been commonplace in ancient Greece and Rome, where 'clepsydrae' (water clocks) were used.[7] Each clock took about 20 minutes to empty its contents. Advocates were given an allowance of water clocks depending upon the importance of the case. Thus, cases were sometimes described as 'wet' or 'dry', the dry cases being those that could be disposed of quickly.[8] One commentator has written:

"In the Roman law courts, water clocks were regularly used, as Favorinus tells us, "to prevent babblings, that

such as spoke ought to be brief in their speeches". Hence the Latin phrases *aquam dare*, literally 'to give water', ie to give an advocate speaking-time; *aquam perdere*, 'to lose water', ie to waste time; 'you are trespassing on my water', meaning 'you are wasting my time' ".[9] (Emphases added)

Pliny the Younger gave an account of his appearance before the Roman Senate in January 100 AD/ACE in an important case involving the prosecution of Marius Priscus, a former African proconsul who was convicted of extortion and other crimes. He said:

"My speech lasted for nearly 5 hours, for I was allowed four water-clocks in addition to my original 12 of the largest size." [10]

The Roman poet Martial pilloried one of the windbag advocates of the time in the following short poem, suggesting that the advocate could satisfy both his thirst and his audience by drinking out of the clepsydra:

"Seven water clocks' allowance you asked for in loud tones, Caecilianus, and the Judge unwittingly granted them. But you speak much and long, and with the back-tilted head, swill tepid water out of glass flasks. That you may once for all sate your oratory and your thirst, we beg you, Caecilianus, now to drink out of the water-clock". [11]

The Australian experience

In recent years, Australian courts have borrowed from international arbitration practice by adopting stop clock hearing procedures. In this regard, the following comments by Justice Mason, a former President of the New South Wales Court of Appeal, speaking extra-judicially in March 1999,[12] were prophetic:

"Why can't our judicial system take a leaf out of the ICC's book? Why shouldn't we offer litigants the option of something equivalent to a stop watch trial, coupled with a commitment by the Court to deliver judgment within a fixed time?"

In Victoria, the Commercial List of the Supreme Court issued a revised *Practice Note* in December 2004 (aka the *Green Book*) recognising that hearings in the Commercial List[13] may be conducted on a time limited basis.[14] Furthermore, the NSW Supreme Court (Equity Division) issued a revised *Practice Note* on 30 July 2007 in respect of proceedings commenced in that court's Commercial List and Technology and Construction List.[15]

More recently, the Federal Court of Australia published a *Practice Note* accompanying the introduction of its Fast Track List pilot scheme in Victoria.[16] Part 11 provides:

"The trial of a case in the Fast Track List will be conducted in so-called chess clock style. Cases will be heard from 10.00 am until 4.30 pm daily with a one-hour break for lunch and a morning and afternoon recess of 15 minutes each. The Judge's Associate will be responsible for keeping track of each party's time used and time available. At the conclusion of each day of the hearing, the parties and the Judge will confirm how much time each party has used and how much time each party has remaining."

To date, however, stop clock hearings have been relatively little used in Australian courts. This illustrates that rule change does not necessarily translate into cultural change.

IAMA Fast Track Arbitration Rules

A distinguishing general feature of fast track arbitration is that the arbitrator's award must be rendered within a period of 150 days from the commencement of the arbitration. The arbitrator has a very limited power to extend the time limit, from 150 days to 180 days. Thereafter, absent the agreement of the parties or the intervention of the court, the arbitrator is *functus officio*.

The overriding objective of the Fast Track Arbitration Rules (2007) [17] of the Institute of Arbitrators and Mediators Australia (IAMA) ('the Fast Track Rules') is that the arbitration should be conducted fairly, expeditiously and cost effectively and in a manner that is proportionate to the amount of money involved and the complexity of the issues. Significantly, for present purposes, the Fast Track Rules introduce stop clock hearing procedures.[18]

The IAMA *Fast Track Arbitration Practice Note* (11 September 2007) explains the operation of the Fast Track Rules. Part 7 ('The Oral Hearing (including Stop Clock Procedures)') illuminates what is envisaged by a stop clock hearing. Paragraph 7.5 of the *Practice Note* deals with a number of practical considerations.

"(a) it is desirable for the Arbitrator to encourage the parties to reach agreement on the amount of time required by each of them so they have a reasonable opportunity to present their respective cases at the oral hearing;

(b) save for exceptional cases, the parties should be allocated an equal time (in hours);

(c) the Arbitrator should discuss with the parties the method of recording the time used by each party in the hearing. Either a person should be appointed by agreement to keep track of each party's time used and the time available, alternatively each party might appoint a representative for this purpose and those representatives shall liaise and agree the amount of time they have used and how much time each party has remaining; …

(f) the Arbitrator should have a discretion to debit the time taken to deal with objections to evidence during the hearing such that a party making an unsuccessful objection shall be debited with time, alternatively a party resisting a successful objection shall have its time debited;

(g) appropriate time should be allocated to allow for Arbitrator interventions – for example in the questioning of witnesses at the end of the witnesses' evidence;

(h) the directions for hearing should make clear that a party is not bound by opposing evidence which it does not challenge but is expected to cross-examine at least one opposing witness with respect to any significant matter which the other party should

be given the opportunity to answer. In other words, a party is not required to slavishly put its evidence to opposing witnesses at the hearing in purported compliance with what is known as the 'rule in Browne v Dunn'."

Appendix 2 to the Practice Note contains a draft procedural order for a stop clock arbitration hearing. This order, as adapted by the author, forms an Appendix to this article.[19]

The Asian experience

Whilst the arbitration rules of the major Asian arbitration centres – in particular, HKIAC, SIAC, KLRCA, JCAA and CIETAC – provide for flexibility in the conduct of arbitral proceedings (and in some cases provide for expedited procedures limiting the duration of hearings[20]), none of them provide any explicit reference to stop clock or chess clock procedures. One may therefore infer that currently there is no established practice of imposition of stop clock hearing procedures by arbitrators in arbitrations conducted in Asia. Anecdotal evidence suggests, however, that chess clock hearings are used in Asian arbitrations, provided that there is agreement between the parties.

Allocation of time

The allocation of time at a hearing conducted with stop clock procedures will usually be determined at the first preliminary conference between the parties and the arbitrator. It may be later if the parties cannot, at the first preliminary conference, make a meaningful estimate of the time required for any oral hearing.

In the first instance, it is for the parties to negotiate and agree the time to be taken up for the oral hearing. Absent agreement, the arbitrator should decide what a reasonable time is for the oral presentation of each party's case. The arbitrator should bear in mind two guiding principles:

(1) that each party should have a fair opportunity to present its case; and
(2) that the parties must be treated equally.

It is sometimes difficult to operate these principles in a manner consistent with minimising the duration of the hearing.[21] Usually, equality of treatment means that each party is to be allocated an equal amount of time. This is not invariably the case, however.

Problems arise where parties expect to call a disproportionate number of witnesses. Take the example of a deep pocketed respondent who intends to call four experts when one would probably suffice. How is the arbitrator to deal with the claimant's request for more time at the hearing for the purposes of cross-examination? An alternative to giving the claimant more time for cross-examination may be to require that the evidence in chief of the experts (or at least a summary of the evidence) be presented orally at the hearing. This would then discourage the respondent from calling unnecessary witnesses.

Ultimately, if the allocation of a fixed time is likely to produce injustice, the arbitrator may decide not to conduct the hearing on a stop clock basis.

Finally, it should be noted that in allocating time for a hearing, some allowance should be made for the questioning of witnesses and parties by the arbitrator (say 30-60 minutes per six-hour hearing day).

Debiting and recording time

It is desirable for the arbitrator to give clear guidance at an early stage as to how the allocated time of the parties is to be debited to each party's 'time bank'.

Paragraph 4 of the draft procedural order in the Appendix to this article addresses the debiting of time. Parties will be debited time where, for example:

(1) they make an unjustified objection;
(2) they resist a justified objection;
(3) a witness engages in unresponsive or time-wasting behaviour.

Paulsson[22] gives the following example of the latter:

"When a competent lawyer asks precise questions, such as "have you ever been employed by Company X?", witnesses must not be allowed to embark on lengthy peripheral speeches, e.g. resuming the highlights of an entire career. This is not only a matter of avoiding irrelevancies, for when the Bockstiegel Method is being followed, such unresponsive digressions constitute a theft of time. It sabotages careful professional preparation tailored to meet the requirements of the Method. In a phrase, it is deeply unfair."

Ultimately, the tribunal will have a discretion in the debiting of time.

As for the mechanics of recording time, the usual way is for each party to appoint a person to track time. That person will liaise with the arbitrator, who should determine any difference between the respective timekeepers at the end of each day. An alternative is for the secretary to the arbitral tribunal (if there is one) to act as timekeeper.

The arbitrator will customarily announce to the parties at the beginning of each hearing day the amount of time that has been used up and remains in each party's time bank. This helps to focus the minds of the parties and to keep them on track.

Can time be extended?

Absent agreement between the parties, the time for hearing will not be extended, save in exceptional circumstances.[23] Whilst the tribunal must always retain the power to revise allocations of time, it should bear in mind that, by doing so, it may create unfairness, as the parties will have conducted the presentation of their respective cases on the basis of the earlier allocation of time.

However, one can never say never. For example, if it is revealed during cross-examination that a party has fraudulently concealed some relevant matter, the opposing party, upon a request made to the arbitrator, could be expected to receive an allocation of further time to investigate that issue. Nonetheless, it should be appreciated that arbitrators will not generally accede readily to crestfallen pleas for more time on the ground that something has arisen which could not reasonably have been anticipated.

The *Anaconda v Fluor* arbitration

There is little empirical evidence of the use of stop clock hearings. One exception is the *Anaconda Operations Pty Ltd v Fluor Australia Pty Ltd* arbitration (2002) ('the Anaconda arbitration'). This domestic arbitration conducted in Australia involved a large engineering and construction dispute where the amounts in issue exceeded AUD $1.5 billion.[24] The arbitral panel comprised three renowned international arbitrators who adopted international arbitration procedures.

The parties collectively called 241 witnesses (including experts). Astonishingly, only 54 days of hearing time were deployed, that is, 50 days for hearing of evidence and 4 separate days for closing oral submissions.[25] This amounted to an average of 25-40 minutes' hearing time per witness. The following table sets out the number of witnesses presented by the parties in each of the arbitration hearings:

	Phase 1 hearing	Phase 2 hearing
Number of witness statements/reports tendered	114	127
Number of witnesses (including experts) presented at oral hearing for cross-examination	75	79
Number of days of hearing	30	20
Hearing time allocated to each party	75 hrs	50 hrs
Average time taken by each witness at hearing *	25 mins	40 mins

** Six-hour day of hearing time*

The solicitor for Fluor has commented:[26]

"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, demeanor and credibility.

"… In Phase 1, the arbitral tribunal held a six week hearing with each party allocated 75 hours … In Phase 2, the arbitral tribunal held a four week hearing with each party allocated 50 hours …

"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."

Practical considerations

A number of observations may be made concerning the use of stop clock hearing procedures from the perspective of an arbitrator or counsel.

(1) The utmost organisation and planning are required in the pre-hearing stage to maximize the use of allocated hearing time. Legal advisers must:
   (i) decide the breakdown of the time between lay and expert witnesses;
   (ii) decide which lay and expert witnesses are not to be cross-examined;
   (iii) decide how much time to allocate to cross-examining each lay and expert witness;[27]
   (iv) (having decided an allocation of time for a particular witness – say one hour) decide what particular issues are to be taken up with that witness;
   (v) (having decided the particular issues) identify the key documents that are to be put to that witness in making the required point.

(2) It forces the parties to focus their presentation at the oral hearing on the dispositive issues.

(3) It emphasises the importance of written advocacy. Thus, instead of lengthy oral opening statements, parties are usually encouraged to deliver comprehensive written opening submissions.[28]

(4) The purposes of the oral hearing therefore are:
   (i) to test the opposing witnesses (especially the credibility of lay witnesses and the competence of experts);
   (ii) to highlight major points; and
   (iii) to demonstrate the flaws in the opposing party's case.

(5) Limited time hearings place great strain on advocates presenting a case. Case presentation in the context of strict timeframes is more challenging than in an open-ended hearing.

(6) Different cross-examination techniques are required. Each cross-examination must be conducted in a surgical manner, almost as a set piece. This requires a direct and focused approach. Meandering cross-examination is strongly discouraged.

(7) In any stop clock hearing where numerous witnesses present evidence by way of witness statement, it is essential to have a procedural direction to the effect that a failure to cross-examine a witness (at all or in respect of a particular matter) does not amount to acceptance of their evidence. Such a direction ensures that a party does not waste valuable time cross-examining witnesses about peripheral issues in their witness statements.

(8) It is necessary for each party's instructing solicitor to manage and co-ordinate carefully the time used by counsel at the hearing. Relevant documents need to be assembled so that time is not lost fumbling for documents in the Arbitration

Bundle. Tellingly, in the *Anaconda* arbitration, the electronic Arbitration Bundle was discarded because it was found to be too slow in retrieving documents.

(9) The importance of a pre-hearing conference is underlined. At this time, the arbitral tribunal should confirm:
   (a) the procedure to be followed at the oral hearing (including the scheduling of expert evidence modules);
   (b) time allocation; and
   (c) administrative aspects (such as transcript, interpreters, timekeeping, etc),

so as to ensure that the oral hearing proceeds smoothly.

Natural justice concerns

The major criticism of the stop clock hearing is that it does not give the parties a reasonable opportunity to present their case. It requires the parties' lawyers to plan the conduct of the arbitration hearing in a manner that accommodates strict time limits. The answers to this criticism are as follows.

(1) The parties will have agreed to an abbreviated process (whether by agreement to adopt particular arbitration rules or to particular procedural orders) that entails a stop clock hearing.
(2) The parties will have been invited to agree on what is a reasonable time to present their respective cases.
(3) Due process is not the same as endless process.
(4) The arbitrator has a wide discretion as to how to manage the arbitral proceedings in an expeditious manner.

Benefits of stop clock procedures

Adoption of time-limited hearings produces overwhelming benefits.

(1) It imposes efficiencies on the parties.
(2) It limits the hearing time (and therefore the cost of the process – particularly the fees and expenses of the arbitrator).
(3) It gives the parties control over the process and avoids them becoming lost in the vortex of an indeterminate process.
(4) It encourages parties to resolve their disputes quickly and get on with their business.
(5) It permits a commercial organisation to plan its affairs appropriately.

Conclusion

Stop clock hearings are now a well-established part of international arbitration procedure. They offer great advantages to clients, but also pose challenges to arbitrators and arbitration practitioners alike. In the author's view, the benefits of stop clock procedures greatly outweigh the disadvantages and can lead to a substantial increase in the procedural efficiency of many arbitrations, whether domestic or international.

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Appendix
Draft procedural order for 'stop clock' hearing

The Arbitrator directs as follows:

Stop clock Procedure

(1) The hearing of the arbitration shall commence on [**complete date**] and shall conclude on [**complete date**] in [**complete city**] in accordance with the following directions, and any further directions made by the Arbitrator.
(2) The sitting hours shall be 9:30am to 5:00pm each day with one hour for lunch and a morning and afternoon break of 15 minutes each.
(3) The time fixed for the hearing, after allowing one hour each day for the Tribunal's interventions and time for administrative and procedural matters, will be apportioned equally between the parties such that:
   (a) the claimant shall have a total

of [**complete**] hours; and

(b) the respondent shall have a total of [**complete**] hours.

(4) Each party is responsible for the way it chooses to use the time available to it.

(5) The following list illustrates categories of activity which will typically be charged against each party's allocation of time:

(a) oral examination of witnesses (irrespective of who presented the witness, but subject to adjustment in the event of consistent unresponsiveness);

(b) oral submissions;

(c) causing an unjustified interruption or prolonging a justifiedinterruption(forexample, an unsuccessful objection will generally be charged against the party that made it, and a successful objection against the party that resisted it);

(d) setting up displays or presentations whilst the arbitral tribunal is sitting;

(e) late arrival of counsel or witnesses;

(f) other unjustified delays, including matters which could reasonably have been dealt with outside the hearing time fixed.

(6) Each party should designate one person to track time. In this task, the designated persons will be instructed by the Arbitrator and shall report directly to him.

(7) A party is not bound by opposing evidence which it does not challenge but is expected to cross-examine at least one opposing witness with respect to any significant matter which the other party should be given the opportunity to answer.

1 ICC Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration* (2007), para 72.

2 Gabriel Kaufmann-Kohler & Blaise Stucki, *International Arbitration in Switzerland* (2004, Alphen an den Rijn: Kluwer Law International), p 67.

3 John Tackaberry & Arthur Marriott (Eds), *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, (4th Edn, 2003, London: Sweet & Maxwell) (hereinafter 'Bernstein'), Vol 2, App 5 at para A55-001.

4 ICC, *op cit* (note 1) at para 78, where consideration of the use of a 'chess clock' is encouraged to monitor the fair allocation of time during an oral hearing.

5 Jan Paulsson, *A Timely Arbitrator – Reflections on the Böckstiegel Method* (2006) 22 Arb Int'l 19.

6 (1996) at paras 78-79 – http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf

7 A clepsydra or 'water clock' has been described as a contrivance for measuring time by the graduated flow of water or other liquid through a small aperture: see Silvio A Bedini, *The Compartmented Cylindrical Clepsydra* (1962) 3 Technology and Culture 115.

8 Franklin A Seely, *The Development of Time-keeping in Greece and Rome* (1888) 1(1) American Anthropologist 25, 37.

9 R W Sloley, *Primitive Methods of Measuring Time: With Special Reference to Egypt* (1931) 17(3/4) Journal of Egyptian Archaeology 166, 176.

10 Betty Radice, *Pliny: Self Portrait in Letters* (1978, London: The Folio Society), p 49.

11 Cited in Jerome Carcopino, *Daily Life in Ancient Rome: The People and the City at the Height of the Empire* (2004, London: The Folio Society).

12 *Changing Attitudes in the Common Law's Response to International Arbitration* (1999) 18(2) The Arbitrator 73.

13 Since 1 December 2008 styled the Commercial Court.

14 At paragraph 15.4 (as amended in December 2007) – http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb855a4f3e3048f/Practice%20Note%20No.%204%20of%202004%20-%20Commercial%20List.pdf

15 Practice Note SC Eq 3 – http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/275aca41db3044e8ca25731e00254943?OpenDocument. Paragraphs 50-53 deal with stop clock hearings.

16 http://www.fedcourt.gov.au/how/practice_notes_cj30.html

17 http://www.iama.org.au/pdf/IAMAAR_FastTrack07.pdf

18 See Schedule 2, rule 11(c).

19 Bernstein, *op cit* (note 3) at para A55-010 contains an alternative form of stop clock procedure order (with annotated comments). See also the form of draft order appended in Mark E Appel, *The Chess Clock: A Time-Management Technique for Complex Cases* (2006) 61(2) Dispute Resolution Journal 83, 85.

20 Chapter V of the JCAA Commercial Arbitration Rules (2008 Edn) provides for expedited procedures (involving a hearing of not more than one day) where a claimant's claim is less than ¥20 million. Chapter IV of the CIETAC Rules (2005 Edn) is to similar effect where the economic value of the claimant's claim is less than RMB 500,000. See http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/pdf/e_shouji.pdf

21 See Alan Redfern and Martin Hunter, *International Commercial Arbitration* (4th Edn, 2004, London: Sweet & Maxwell), p 383.

22 Paulsson, *op cit* (note 5).

23 Bernstein, *op cit* (note 3), para A55-001.

24 The instructing solicitors on both sides subsequently published articles explaining the intricacies of the arbitration: see Peter Wood, *Anaconda v Fluor – a Case Study* (2005) 24 *The Arbitrator & Mediator* 61, and Andrew Stephenson, *Creating Efficient Dispute Resolution Processes – Lessons Learnt from International Arbitration* (2004) 20 Building and Construction Law 151.

25 Following the conclusion of each of the Phase 1 and Phase 2 oral hearings (which were dedicated to the presentation of evidence), the parties were given the opportunity of filing and exchanging comprehensive written closing submissions. Thereafter, there were two days of oral hearings dedicated to closing submissions.

26 Wood, *op cit* (note 24), p 67.

27 In the *Anaconda* arbitration, the expert witnesses were presented at the oral hearing using the concurrent evidence (colloquially referred to as the 'hot tub') method in several expert modules grouping experts according to common expertise. *Editor's note*: this subject will be discussed in Part II of the article by Professor Doug Jones, *Challenges for International Dispute Resolution in the Global Financial Crisis*, which will be published in the October 2009 edition of *Asian DR*.

28 ICC, op cit (note 1 above), para 75.

29 www.barristers.com.au. The author was retained as senior junior counsel for Fluor in the *Anaconda* arbitration.