

PRELIMINARY VIEWS
Which way is the wind blowing?

This article examines the question *“To what extent, if at all, should an adjudicator, arbitrator or judge be entitled to deliver a preliminary view as to the likely outcome of litigation – based on progress to date - during case management?”*

The problem inherent in issuing a preliminary view is that it could convey the message that the matter is done and dusted. Is there then any point in continuing or is it all too late? How much scope, if any at all, does this leave a dissatisfied party to challenge that view and turn the matter around? If the answer is none, then is there any value in issuing the view earlier rather than later?

On the other hand if it concentrates the mind on matters that need to be addressed, is this giving an unfair advantage to the dissatisfied party? After all, is it not for the parties to choose their grounds and to present argumentation. The arbitrator is not supposed to be an investigative magistrate directing the litigant’s attention towards the matters that he feels go to the root of a matter. The task of the arbitrator is to decide the matter put to him by the parties.

It is a different matter where the tribunal signals that a matter is now closed and that the tribunal has heard all it needs to hear on the matter in order to reach a decision but no view is expressed as to the decision. Nothing here pre-empts the parties revisiting the issue briefly in summing up. It is a necessary part of management of the proceedings. It is the role of the tribunal to determine how much time will be allocated to the various aspects of the hearing. Thus section 33 Arbitration Act 1996 imposes a duty on the arbitrator to *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*

Further more, section 33(2) provides that *the tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.*

Accordingly subject only to the agreement of the parties section 34 sets out the powers of the arbitrator to decide all procedural and evidential matters. The relevant matters over which the arbitrator exercises power are detailed in section 34(2) as follows :-

- (a) when and where any part of the proceedings is to be held;*
- (b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;*
- (c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;*
- (d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;*
- (e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;*
- (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;*
- (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;*
- (h) whether and to what extent there should be oral or written evidence or submissions.*

Again, it is a different matter where an arbitrator issues a preliminary award, since the decision is final. If a party disagrees then they have to explore the potential to appeal or otherwise challenge the enforceability of that decision. This is similar to an application to a court for a preliminary decision before further proceedings.

The European Court of Justice and the European Court of Human Rights sometimes issue preliminary opinions. It is normally anticipated, that apart from further insights and greater depth the final opinion will not differ significantly from the preliminary opinion.

C.H.Spurin