

Controlling the Arbitration Process

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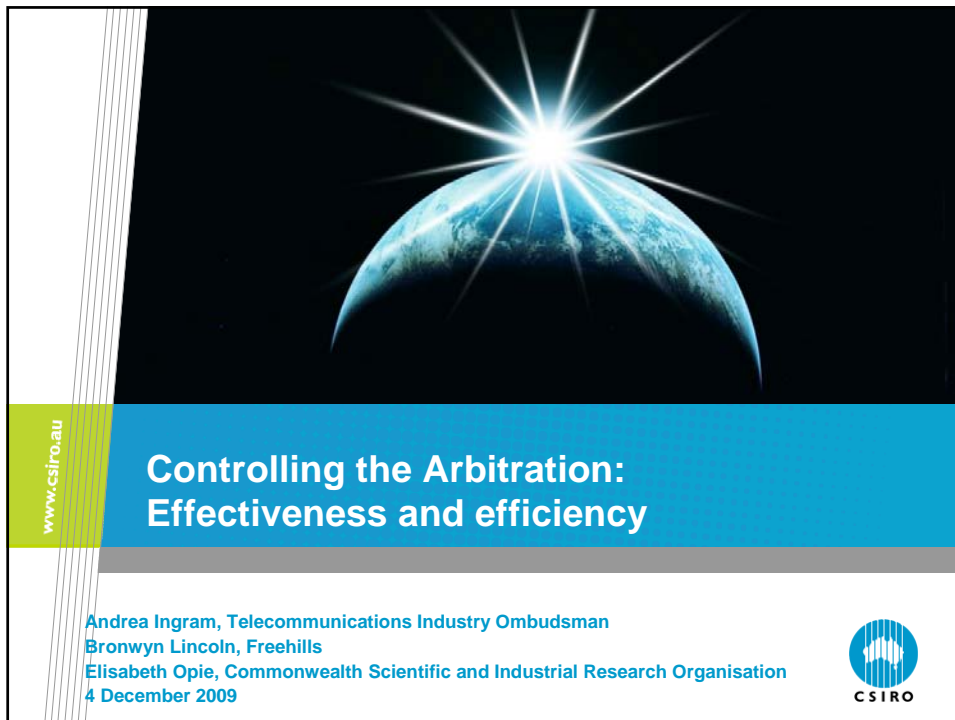
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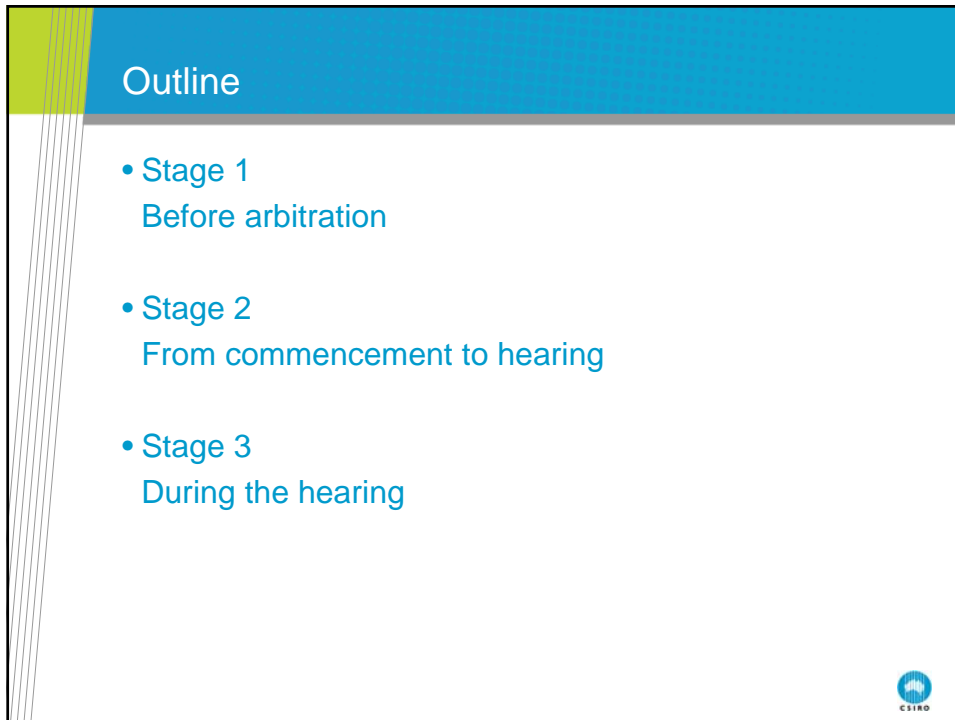
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Controlling the Arbitration: Effectiveness and efficiency

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Outline

- Stage 1
Before arbitration
- Stage 2
From commencement to hearing
- Stage 3
During the hearing



Before Arbitration

- Knowledge and awareness of arbitration
- People factors
- Choice of legal and other advisors
- Competency and specialisation
- Optimising flexibility



Hearing preparation

- The 'commencement to hearing' stage of the arbitral process can include:
 - Interlocutory applications
 - Evidence gathering and evaluation
 - Briefing expert witnesses and commissioning reports
 - Site visits or 'views'
 - Collating documentary evidence for hearing
 - Preparing submissions

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Interlocutory applications

- An interlocutory application is an application to a tribunal for an order before the tribunal makes a final order in the arbitral proceeding.
- Arbitration:
 - provides flexibility to 'fast track' the application and the decision
 - is more conducive to a decision 'on the papers'
 - encourages negotiation amongst the parties
 - does not favour ex parte applications

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Evidence gathering and evaluation

- The evidence gathering process in any dispute resolution process can be expensive and time consuming
- International arbitration:
 - can provide flexibility to achieve efficiency
 - is beginning to favour oral evidence rather than witness statements
 - often adopts a combination of civil and common law document disclosure principles
 - can incur additional costs through translation

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Briefing expert witnesses

- Selecting and briefing an expert and managing the production of a report can be a task in itself
- To date:
 - arbitration has failed to offer a more efficient or effective way of presenting expert evidence
 - however steps such as concurrent cross examination of witnesses can narrow issues quickly
 - counsel must 'be brave' and limit expert evidence to that which is absolutely necessary

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Site visits or 'views'

- Historically a visit by the arbitrators and the parties (including counsel) has been an essential part of international arbitration (particularly project related disputes).
- Technology and a change in mindset has made site visits less common
- Technology can offer a virtual visit and other visual aids can be prepared so as to fully brief the arbitral tribunal 'from their armchair'

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Collating documentary evidence

- IBA Rules on the Taking of Evidence in International Commercial Arbitration
(adopted by a resolution of the IBA Council, 1 June 1999)

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Preparing submissions

- An arbitral tribunal in most cases has the power to rely on written submissions
- Often combined with 'chess clock' hearings
- Written submissions can facilitate a more efficient arbitral process where parties have different languages or where they supplant the need for an oral hearing in the 'place of arbitration'
- Arbitration offers the flexibility for the tribunal and parties to agree on a process for submissions which might not be permissible under civil procedure rules

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Role of solicitors in encouraging efficiency

- Counsel must involve clients – the more the client understands the process and the options, the greater the prospect of a flexible responsive process
- Counsel must actively evaluate the processes as the arbitration process proceeds to ensure that it is efficient and effective in meeting the parties' needs
- The approach during the pre-hearing stage can impact on the efficiency of the hearing itself

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TIO complaint & fee structure

Level of TIO involvement		Cost recovery
Level 1	Simple verbal or email referral to member company's resolution department	\$31
Level 2	Unresolved Level 1 – we write to the company, then assess both sides of the complaint after the company responds to us	\$260
Level 3	Unresolved Level 2 – we become more actively involved in decision-making	\$475
Level 4	Unresolved Level 3 – much more complex - Senior Investigations Officer, Determinations	\$2,250
Review	Assessment of handling of complaint by independent Review Officer	\$500
Enquiry	Administration costs of issues the TIO cannot handle are shared between members as indirect operating costs (\$31)	



Complaint areas

