



International Arbitration:

Managing Risk in High Growth – High Risk Markets

A Conference for In-house Counsel and Executives
Involved in International Arbitration

Wednesday, September 10, 2008

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Conference on International Arbitration

Panel 4: Reducing Time and Saving Cost

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

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What is the Scott Schedule?

- A tabular presentation of the key issues involved in the dispute, setting forth the claimant’s and respondent’s positions and the reasons therefore.
- Sometimes referred to as the “Official Referee Schedule,” but is more commonly described after the inventor, a former Official Referee (predecessor to Circuit Judge) in England.
- Commonly used in Construction and Property disputes, but can be useful in any complex arbitration matter.

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

How is the Scott Schedule Prepared?

- The schedule includes input from both the claimant and respondent.
- Typically, the original submission is created by the claimant, including a list of relevant issues, the claimant’s position on those issues, and the evidence supporting each position.
- The respondent then replies to each of those issues. This generally includes a statement of:
 - Which of the claimant’s allegations are admitted or agreed;
 - Which of the claimant’s allegations are denied;
 - For allegations that are denied, the reasons(s) for that position.

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

- There is no “required” format. The format will vary according to the nature of the case.
- Some venues do have standard forms that must be used for certain specific types of dispute – e.g., England’s Consumer Trader & Tenancy Tribunal’s Scott Schedule form for construction disputes involving allegations of defective workmanship or material claimed.

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

- **Composed of a number of columns for the issue involved, claimant’s position, quantum claimed, and referenced to documents, followed by columns for the respondent’s response.**
- **Normally, either the Tribunal will specify column headings or the claimant and respondent will determine an agreed format.**

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

Example of Scott Schedule Format

Item No.	Items of Changed Work Claimed	Claimant's Case: Basis for Entitlement	Claimant's Valuation	Respondent's Case: Agree or Deny and Why	Respondent's Valuation

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What is the Objective of Using the Scott Schedule?

- **Reduce the time and cost involved in the arbitration hearing and decision phases.**
 - **Assist the arbitrators to identify issues that are agreed by the parties, and focus on the remaining issues that are crucial to the dispute.**
 - **Assist the arbitrators focus on the disputed issues that relate to the most significant monetary amounts claimed.**
 - **Eliminate the need to constantly refer to vast volumes of pleadings.**
 - **Provide a convenient tool to ensure that all important issues are addressed in the evidence-taking and decision-making processes.**

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

Other Potential Benefit of the Scott Schedule

- **Can increase the possibility of the parties reaching a settlement on at least some portion of the issues.**
 - **Forces each party to identify areas in which they agree, or have no basis to disagree, with the other party.**
 - **Allows parties to identify any items on which the difference in their positions is less than the cost to litigate them.**

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

Acceptance by Industry Organizations

- Recommended by the “Final Report on Construction Industry Arbitrations” commissioned by the ICC Commission on International Arbitration.
- Consistent with the United Nations Commission on International Trade Law (“UNCITRAL”) “Notes on Organizing Arbitral Proceedings” (¶43, “list of points at issue”).
- Consistent with the International Bar Association’s “Rules on the Taking of Evidence in International Commercial Arbitration,” regarding the collection of evidence from party-appointed experts.

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

The Scott Schedule is particularly well-suited for quantum issues.

- **Identification of calculations, assumptions, and factors that are agreed between the parties.**
- **Quantum proof can be conveniently set out in tabular format.**
- **Assists with identification of “global” claims and claims that do not clearly establish a cause-effect relationship between entitlement issues and damage amounts.**

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EXTRACTS FROM TYPICAL SCHEDULES

I: SCHEDULE FOR ADDITIONAL WORK AND DISPUTED VALUATION

(1) Item no.	(2) The items of extra work claimed	(3) Claimant's case: by whom ordered and when	(4) Claimant's valuation	(5) Respondent's case	(6) Price, if any, admitted by respondent.	(7) For use by arbitral tribunal
	On excavating the foundation trenches it was necessary to go below the depth on the drawings by 0.75 m over a length of 400 m between marker posts 4 and 5.	No specific order, except that on several occasions on ... and ... the claimant was directed by the engineer's representative to 'go deeper'. The claimant is entitled to have the work measured and valued. However, the measurements were agreed at the time with the engineer's representative and included in the claimant's monthly statements. The claimant also wrote to the engineer on ... and received no rejection of the statement submitted following completion of the works.	0.75 x 400 @ \$50 (contractual rate at item 5A/7 of Bill of Quantities) = \$1,500	The item is not an extra; the claimant was obliged to include excavation to any depth in its rates and was merely instructed as to what it had to do. The measurements were made for record purposes only; the statements were interim; neither the engineer nor the respondent is bound to certify or to pay for the work, which is in any event wrongly claimed.	Nil. (In any event, the length was 300 m and the rate should be \$30 - see item 5A/8 of the Bill.)	

Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues

Some Traps to Avoid When Using the Scott Schedule.

- As mentioned, development of the Scott Schedule is an iterative process. The process must be controlled to prevent too many rounds of rebuttal and surrebuttal.
- Respondents may try to use the schedule to push for an unreasonable level of detail in the claimant’s presentation.
- Avoid attempts to jam too much information into the schedule. A Scott Schedule of 25, 50 or 100 pages defeats the purpose of having a convenient reference tool.



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U.S. NEWS

The Wall Street Journal

Saturday/Sunday September 6-7, 2008

Digital Data Drive Up Legal Costs

BY GARY FIELDS

“Massive amounts of money have to be spent to reconstruct the archived and perhaps disorganized information if there is litigation,” he said. “The solution begins with corporations and other business entities understanding that litigation is part of the due course of their business.”

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Work E-Mails: The New Smoking Guns

By Christine Caulfield

Law360, New York (September 05, 2008) -- Two Credit Suisse brokers charged Thursday with conspiring to deceive investors via e-mail have joined an infamous group of those undone by their electronic missives

Like one-time investment banker Frank Quattrone, former Bear Stearns Cos. managers Ralph Cioffi and Matthew Tannin and others before them, brokers Julian Tzolov and Eric Butler should serve as a warning to employees that e-mail can come back to haunt you.



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INTERNATIONAL ARBITRATION SEMINAR

Is it the best option?

September 10, 2008

KBR

HISTORICAL REASONS TO ARBITRATE

1. Time/Speed – Arbitration is faster.
2. Cost – Arbitration costs less.
 - Discovery
 - Motions
3. Predictability/Finality
 - Arbitrator vs Jury
 - No Appeal
 - Collectability
 - Impartial Forum

SPEED – Sample Trial Dockets

1. State District Court

Harris County - 84% of Civil Cases Resolved
in less than 18 months.
- Recent trial 12 months.

2. Federal Courts -	2002	2003	2004	2005	2006	2207
Southern District						
Average Time to						
Disposition – Civil -	18.9	20.8	19.5	15.3	18.8	20.3
<u>% over 3 years</u>	<u>1.9</u>	<u>1.2</u>	<u>1.1</u>	<u>3.3</u>	<u>5.0</u>	<u>4.1</u>
# Of Cases	99	65	61	176	229	180

Arbitrations – 5 Selected Studies on Speed

1. ICC - (Europe) Filed July, 2005, still open, 3 + years – award expected this year.
2. ICC – (Mexico) Filed February, 2005 – March, 2008, 3+ years
3. ICC – (Mexico) Filed January, 2005, Award. July 9, 2007, 30 months
4. ICC – (Mexico) Filed December, 2004, still open, 3 years 11 months – Award expected this year.
5. ICC – (New York) Filed March, 2006, still open, 2 + years

Costs

	<u>Arb Fees</u>	<u>Third Party</u>	<u>Attorney's Fees</u>
1. Europe	\$402,500	\$4,000,000	\$8.4 million
2. Mexico	\$352,000	\$264,000	\$4,500,000
3. Mexico	\$430,000	\$2,500,000	\$2,371,000
4. Mexico	\$600,000	\$4,500,000	\$4,840,000
5. Barracuda	\$200,000	\$800,000	\$3,400,000

Predictability/Finality

1. How many have had an award that ignored the Law? Decide issues on grounds neither party submitted? Ignored express contract terms?
2. How many have wished they could appeal from an Award?
3. How many have been frustrated with the mobility to get either a discovery issues resolved, or a procedural order enforced?
4. Anyone experienced with panels “splitting the baby” to get a unanimous decision? Splitting in general? Reactions?
5. Any concerns that some companies abuse the process because there are no real sanctions for non compliance?

Thoughts/Observations

1. Many of original justifications for Arbitration are no longer true.
2. Inability or unwillingness to make interim decisions have led to an explosion in costs.
3. Failure to fix a time schedule leads to delays and increased costs? – No sense of urgency.
4. No tracking or reporting mechanisms?
5. No way to curtail abuses by parties? Throw it all in?
6. No system is perfect but there is room and need for improvement.