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About the IBA, The Section on Business Law and the International Litigation Committee

The International Bar Association (IBA) is the world's foremost international association of lawyers, with a membership of some 14,000 individual lawyers in 130 countries, as well as 131 Bar Associations and Law Societies. Its principal aims and objectives are:

— To encourage the discussion of problems relating to professional organisation and status.
— To promote an exchange of information between legal associations worldwide.
— To support the independence of the judiciary and the right of lawyers to practise their profession without interference.
— To keep abreast of developments in the law, and help in improving and making new laws.

Above all, though, it seeks to provide a forum in which individual lawyers can contact, and exchange ideas with other lawyers.

The IBA has three Sections: the Section on Business Law, the Section on General Practice and the Section on Energy and Natural Resources Law. The largest is the Section on Business Law which has in the region of 10,500 members. Within the Section on Business Law there are 27 Committees, each specialising in a particular area of Business Law.

Section on Business Law

The Committees of the Section on Business Law aim to study and discuss the legal and practical aspects of issues relating to their particular topic from an international viewpoint.

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The International Litigation Committee

The International Litigation Committee (Committee O) of the Section on Business Law of the International Bar Association is one of the newest and fastest growing Committees of the IBA. It currently has over 1,350 members from throughout the world.

Each year the International Litigation Committee presents a series of programmes on litigation at the annual Conference of the Section on Business Law. It also presents regional programmes. In order to make these programmes most beneficial, the Committee has developed a format of collecting papers of general interest on programme topics from distinguished lawyers throughout the world and compiling them in a text suitable for general distribution. These texts provide an excellent reference tool as to

litigation practices and procedures in various countries throughout the world. In previous years, the Committee has published books on *Pre-Trial and Pre-Hearing Procedures Worldwide, Enforcement of Foreign Judgments Worldwide* and *Obtaining Evidence in Another Jurisdiction in Business Disputes.* These publications are available through Graham & Trotman and the IBA. Membership information with regard to the Committee on International Litigation can also be obtained through the IBA.

Committee members benefit greatly both personally and professionally from contacts made at IBA activities and through the annually published directory of members with qualified colleagues in other countries specialising in the same or similar areas of the law to whom they may refer for professional assistance in their own international practice.

Further details of the IBA are available from:
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PREFACE

Charles Platto, Editor
Chairman, International Litigation Committee
Section on Business Law, International Bar Association

This is the fourth in a series of books prepared under the auspices of the International Bar Association containing articles by distingished attorneys on important aspects of litigation in countries throughout the world. This book contains papers from some 25 individual jurisdictions, as well as a special summary paper on European law, that were prepared for the 1990 Biannual meeting of the International Bar Association in New York on the subject of Trial and Court Procedures Throughout the World.

Since procedures vary so much from country to country, in an effort to provide for uniformity of discussion, the authors from each country were asked to cover the topics and questions listed in the following outline:

1. Brief explanation of court system.
2. Are any motions made or materials submitted before the trial starts? Is there a pre-trial order? Do procedures vary from court to court or judge to judge?
3. How does the trial proceed?
   (a) What is the role of the judge?
   (b) Is there a jury? How is it selected?
   (c) What is the role of the lawyers?
   (d) Are witnesses called? Are they subject to explanation and cross-examination? By the lawyers, by the judges?
   (e) Is a transcript made? Are cameras or other recording devices permitted in the courtroom?
4. How is the case decided? By judge? Written decision? Findings of fact? Instruction to jury.
5. If a jury, can the judge set aside the verdict? On what grounds?
6. Are appeals permitted? (Details of appellate system will be reserved for our next book).
7. Any other special or unusual aspects of trials or hearings in your system?

The editor would like to thank International Litigation Committee Vice Chairman Paul Storm of The Netherlands and International Litigation Committee Secretary William Horton of Canada who chaired the program on Trial

and Court Procedures in New York. The speakers on the topic, who also prepared papers for the book for their respective jurisdictions, were Charles Plant – England; Professor Peter Schlosser – Europe; Marcelo Bombau – South America; Samuel Haubold - United States; Robert Cosman – Canada. A special note of thanks is due to outgoing International Litigation Committee Vice Chairman Lyn Stevens and his colleague, Kerry Fulton, of New Zealand, who collected papers from the Asia-Pacific region. In addition to the general program on trial procedures, a program on securities trials was presented. The program was chaired by International Litigation Committee Vice Chairman Leon Boshoff of London. Speakers included Tom Newkirk, chief litigation counsel to the U.S. Securities and Exchange Commission, Richard Steinwurtzel and Art Matthews – United States; Claude Thomson – Canada; Richard Fleck – England; Philippe Noel – France; Olaf Nissen – Germany; and Kunio Hamada – Japan. Finally, the trials program in New York was brought to life through a mock trial. Special thanks is extended to the Honourable Peter Dorsey, United States District Judge for the District of Connecticut, who presided over the trial, and to the trial lawyers, Albert Krieger of Miami and Shaun Sullivan of New Haven.

As always, the editor would like to especially thank Madeline May, Rachel Youngman and Ruth Eldon of the IBA staff and Fergal Martin of Graham & Trotman, as well as Robert Turner, a senior legal assistant at Cahill Gordon & Reindel, whose invaluable assistance in organizing the New York program and the material for this book is most appreciated.

Charles Platto
Chairman, Committee on International Law,
New York, New York, March 1991

Contents

CONTENTS

Asia and the South Pacific

Trial and Court Procedures in Australia

Peter J. Perry*
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Introduction

The majority of commercial trials in Australia are heard by the state Supreme Courts and the Federal Court of Australia ("the Federal Court"). This paper considers the trial and court procedures of the Supreme Court of New South Wales, particularly its specialist Commercial Division, and the Federal Court. New South Wales is the most populous and litigious state of Australia. The jurisdiction, powers and procedures of these courts are prescribed by legislation, court rules, decisions on the legislation and rules, practice notes and directions and their inherent jurisdiction as superior courts. For a more detailed examination of the Australian court system see the chapter by the author in *Pre-Trial and Pre-Hearing Procedures Worldwide* (1990, Graham and Trotman, London).

A civil trial is distinguished by certain fundamental characteristics, subject to limited exceptions: a trial is adversarial; continuous; controlled by the parties usually through legal representatives; oral in form; conducted in a public forum; and subject to the rules of evidence.

The trial is the culmination of the adversarial approach to litigation inherited from England. This approach is predicated upon the philosophy that the best resolution to a dispute is obtained when the opposing cases are presented in an open court before an independent judge or judge and jury. The competition of factual allegations and legal arguments in a forum regulated by court rules permits all parties to present effectively their cases.

In major commercial litigation, the parties will be represented by both barristers and solicitors; complex matters demand both senior and junior counsel at the trial as well as a team of solicitors to prepare the case for trial and to assist in its presentation at trial.

*The author acknowledges the assistance of Bradley T. Russell in the preparation of this paper.

The parties, through their legal representatives, control the litigation: parties commence or defend the proceedings; define the questions of fact to be decided; complete all factual investigations and present these facts to the court, subject to admissibility under the rules of evidence; and formulate and argue the propositions of law to be applied.

The basic purpose of the trial is therefore three-fold: to determine the questions of fact posed by the parties; to apply the appropriate rules of law to these facts as found; and thereby to formulate a judgment and orders resolving the dispute. The evidence and legal arguments are presented in an open public court, a quality which is a central part of the character of courts of law and important in maintaining public confidence in their integrity and independence.[1] Such a characteristic distinguishes judicial activities from those of administrative officials. Provision does exist for in camera hearings to be conducted in a closed court or in a private chamber. The Supreme Court of New South Wales may conduct the business of the Court in the absence of the public, for example, where the public's presence would defeat the ends of justice or where the business involves the guardianship, custody or maintenance of an infant.[2] The Federal Court may exclude the public if its presence would be "contrary to the interests of justice".[3] Broad public policy considerations therefore determine whether a court is closed. An order that proceedings be heard in camera alone does not prohibit the disclosure and publication of evidence given in the private session. A further specific order for confidentiality or non-disclosure is required for that purpose.

Proceedings in open court are fully reportable and will not amount to either contempt or defamation as long as the report is accurate and published in good faith.[4] The courts on occasions limit this freedom for reasons of policy such as to protect the identity of witnesses or parties. The Federal Court specifically may restrict publication in order "to prevent prejudice to the administration of justice or the security of the Commonwealth".[5]

Traditionally matters have been presented to the courts orally. There is a tendency for evidence and arguments to be reduced to writing to facilitate and expedite the trial process. Commercial reality requires an efficient court system and the courts have appropriately responded. The Commercial Division has framed its rules but maintained flexibility to ensure "the speedy determination of the real questions between the parties".[6] In a reflection of technological advances, the Federal Court may take evidence from a witness by telephone or video link.[7]

Commercial trials are generally heard by a single judge; juries are infrequently involved. When called, the role of the jury is to make findings of fact evaluating witnesses and assessing the weight to be attributed to each piece of evidence, subject to the judge's rulings as to admissibility and probative value.

[1] *Russell* v *Russell* (1976) 134 CLR 495 at 520.
[2] s.80 Supreme Court Act, 1970 (New South Wales) ("SCA")
[3] s.17(4) Federal Court of Australia Act, 1976 (Cth) ("FCA")
[4] *Re Consolidated Press Ltd; Ex parte Terrill* (1937) 37 SR (NSW) 255 at 257.
[5] s.50 FCA.
[6] Supreme Court of New South Wales Practice Note No. 39, paragraph (1).
[7] Federal Court of Australia Rules ("FCR") 0 24 r 1A.

The judge also directs the jury on the law to be applied. When sitting alone, the judge performs both functions.

The role of the judge is therefore adjudicatory rather than inquisitorial as is the practice of civil law jurisdictions. There has been a growing tendency for judicial intervention in pre-trial stages to proscribe procedures otherwise open to parties in order to prevent delays and ensure court efficiency. However this tendency does not diminish the precept that judges should not be too actively involved in the conduct of the proceedings before them; the distinction between judge and advocate is clear.[8]

The courts may order that a question of law or fact be decided separately from any other such questions, either before, during or after the trial.[9] Typical applications of this power are trials of preliminary points of law, trials of preliminary issues and separate trials as to liability and damages. The latter are ordered in particular circumstances: where the issues bearing on liability and quantum are distinct; where calculation of damages is not possible until a future time; and where it is otherwise convenient to do so. This approach has flaws: there may be an unnecessary duplication of evidence; and there may be non-final findings made at the liability trial pending the damages trial, thereby complicating the timing of the appellate process as only final findings may be appealed.

The rules of evidence determine the form and much of the substance of a trial. These rules are numerous and often complex, and cover diverse topics: court procedures such as the order of addresses and the method of acquiring and adducing evidence; the form in which a question may be put to a witness; issues relating to witnesses such as competency, compellability and corroboration; the admissibility of evidence and the uses which may be made of admitted evidence; and issues relating to proof such as the adequacy of proof required and what facts actually constitute proof.

Pre-trial Procedure

The originating process will identify and refine the issues between the parties. Pre-trial procedures are designed to maximize a party's awarenesss of the evidence of his opponent to avoid the "trial by ambush" epithet often attributed to the adversarial system. The specific procedures to be employed are determined as preliminary directions hearings at which parties seek and increasingly judges impose directions as to the manner in which the matter will be conducted and the timing for the various stages. Indeed the Commercial Division imposes a standard Usual Order for Hearing designed to reduce the time required to prepare for trial and the length of the trial itself and to minimize costs.[10]

There are a number of valuable evidence gathering procedures available. Discovery requires a party to identify and make available for inspection by his opponent all documents in the party's "possession, custody and power" relating to any matter in issue in the proceedings. Interrogatories are written questions which the other party must answer in writing and verify by affi-

[8] *James* v *National Coal Board* [1957] 2 QB 55; *R* v *Apostilides* (1984) 53 ALR 445.
[9] Supreme Court of New South Wales Rules ("SCR") Pt 31 r 2; FCR 0 29 r 2.
[10] Supreme Court of New South Wales Practice Note No. 39, Annexure 1.

davit. Subpoenae are court orders issued on the application of parties, that either a person, document or both be present at the trial. Each of these three procedures and the other significant pre-trial procedures are examined by the author in *Pre-Trial and Pre-Hearing Procedures Worldwide.*

There is no pre-trial oral examination of parties or witnesses. The courts may order that written statements of the oral evidence of intended witnesses be exchanged before the trial, indeed this is the usual order of the Commercial Division.[11] In such a situation, a party may not lead evidence from a witness, the substance of which has not been included in the served statement. An affidavit which is to be relied upon must be served on each other interested party a reasonable time before the occasion for its use.[12]

Expert witnesses may testify as to their opinion of a given factual situation involving matters requiring a sufficient degree of specialized knowledge to place them beyond the scope of an ordinary witness of fact. Experts often provide opinion evidence on questions relating to such matters as medicine, science and commerce; the definition of technical terms; and the identity of handwriting. Contradictory experts are often called by opposing parties and it therefore falls to the court to determine which, if any, expert is to be accepted. The courts usually order the exchange of expert's reports. In the Commercial Division, evidence may not be led from an expert which has not been included in a served report.[13] The Commercial Division also may direct that the experts, whose reports have been exchanged, consult at a "without prejudice" meeting, in order to narrow any points of difference between them and identify to the court the remaining points of difference and the reasons.[14]

Except in jury trials, the courts may appoint a court expert on application of a party or even of its own motion in the Supreme Court of New South Wales.[15] A copy of the expert's report will be sent to each party who may cross-examine the expert.[16] The use of a court appointed expert is rare.

Orders for the inspection, sampling or observation of property may be made by the courts to enable the proper determination of any matter in question.[17] Property includes any land, documents or other chattel.

A notice may be served on an opponent to admit facts or the authenticity of documents. A recipient of such a notice is taken to have made the admissions detailed in the notice, unless he responds by serving a notice disputing the facts or the authenticity of documents.[18]

The courts may order the compilation of an agreed bundle of documents. The bundle includes all relevant documents which have been discovered by the parties in the pre-trial discovery process.[19]

[11] Commercial Division Usual Order for Hearing 1(a); SCR Pt 36 r 4A(1); FCR 0 10 r 1(2)(a)(xvii).
[12] SCR Pt 38 r 7; FCR 0 14 r 7(1).
[13] SCR Pt 36 r 13A(3); FCR 0 10 1(2)(da); Supreme Court of New South Wales Practice Note 39 (11(c)(i).
[14] Supreme Court of New South Wales Practice Note 39 (11)(e).
[15] SCR Pt 39 r 2(1)(a); FCR 0 34 r 2(1)(a).
[16] SCR Pt 39 r 3(2); FCR 0 34 r 3(2).
[17] SCR Pt 25 Div 2 r 8; FCR 0 17 r 1.
[18] SCR Pt 18 rr 2 and 5; FCR 0 18 r 2.
[19] FCR 0 10 r 1(2)(ca).