ARBITRATING WITH EXPERTISE: HOW TO DEVELOP, MARKET, AND FIND SKILLED COUNSEL AND ARBITRATORS FOR SPECIALTY ARBITRATIONS

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SPECIAL ISSUES IN AVIATION ARBITRATIONS

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Aviation industry cases often involves arbitration of disputes. This paper will discuss three unique factors or considerations that are raised in such cases.

1. FAA/NTSB OVERLAY AND USE OF REPORTS AS EVIDENCE.

In many aircraft accidents in the U.S.[1], the National Transportation Safety Board ("NTSB") will investigate the facts and make an analysis of findings particularly as to the "probable cause" of the accident.[2] This investigation is performed in the interest of public safety and for safety recommendations to be made; thus, is not intended to be used as evidence for or against any party. In fact, 49 U.S.C. §1145(d) precludes certain information from the NTSB accident reports from being admissible in evidence in any "civil action."

It is well known in *litigation* of aviation cases that certain findings and conclusions (i.e. "probable cause" opinions) from the NTSB investigation are not admissible in court, although potentially the facts as obtained may be admissible. [3] As the "probable cause" opinion could actually state that there was a product defect with the engine or a component part of an aircraft, such a conclusion could be unfairly prejudicial to a party if admitted before the judge or jury in a products liability action, and thus, there are policy reasons to exclude such evidence.

However, arbitrators are *not* bound by the traditional rules of evidence and they can take the NTSB findings and conclusions into consideration (at least for the weight of the evidence). Potentially the parties can agree to the use of the Federal Rules of Evidence and seek a Motion in Limine on NTSB reports from the arbitral panel, but these rules of evidence generally do not apply as "mandatory" and are merely used as guidance in arbitrations. It is more likely that the arbitral panel will see the NTSB report in full, whether or not counsel make arguments about the weight of the evidence.

Additionally, the NTSB investigation may also lead to an enforcement action against the air carrier, pilot and/or crew under the Federal Aviation Regulations ("FARs"). The orders or enforcement action may be admissible in civil court as well as arbitrations, even though different due process standards applied and different evidence was considered during the Federal Aviation Administration ("FAA") investigation and proceedings. For example, the NTSB may have access to a cockpit voice recording that may also be admissible in civil litigation, but such evidence may actually be *inadmissible* in FAA enforcement actions.[4] Such evidence is, however, normally admissible in litigation and in arbitration of aviation industry cases.

[1] Of course, in other countries, there is also the overlay of the governmental agency that overseas and regulates civil aviation operations, which must be considered in any aviation case. This paper only addresses the U.S. regulatory overlay- The NTSB investigates accidents and provides information and recommendations on safety issues; the FAA regulates U.S. aviation operations and has authority over "enforcement actions" against air carriers and pilots.
[2] https://www.ntsb.gov/investigations/process/Pages/default.aspx
[3] https://www.cshlaw.com/resources/what-information-from-an-ntsb-report-is-admissible-evidence-in-court/
[4] 14 C.F.R. § 121.359

2. SPOLIATION OF EVIDENCE.

Another interesting feature of NTSB investigations is the fact that manufacturers are often invited to attend to inspect and to answer the NTSB's questions. (Pilots, passengers and/or families are not invited and, in fact, attorneys and their retained experts may be excluded from the process.) As part of the NTSB's duty to investigate, it is specifically authorized to "inspect and test," the aircraft, aircraft engine, propeller, appliance, or property on an aircraft involved in an accident.[5] The manufacturers of the engine/power plant, airframe, and other components often take a lead role in product performance evaluation and sometimes destructive testing on site. Some investigations include a full "tear down" of the engine. While it is under NTSB oversight and their direction, the evidence may be altered or destroyed in the process.

Putative plaintiffs may make a spoliation of evidence argument given that the case law actually supports the denial of legal counsel's retained experts to attend or even observe the process.[6] The courts generally assume the NTSB, even using the manufacturers as experts, will document the process, as to make spoliation of evidence less likely. However, it is still possible to face an action (if one can be filed separately in the relevant jurisdiction) against the manufacturers for their role in that process. To the contrary, there does not appear to be a legal basis or case law support to show that the NTSB can be held liable for its spoliation of evidence. Rather, plaintiffs may argue that the manufacturers failed to take reasonable steps to document the tear down process or otherwise negligently or intentionally spoliated the evidence during the process to seek an advantage in a potential case.

The party representatives who are allowed to attend and participate in the investigations are expected to provide candor and truthfulness, and to avoid spoliation of evidence or they may lose their "party representative" status.[7] If manufacturers believe they will face spoliation of evidence or other such claims as a result of the NTSB reports, they will be disincentivized to assist in the process in a full and frank manner. Thus, there are policy reasons against admitting the NTSB reports into evidence is for the protection of the integrity of this investigation process. However, that does not mean that the evidence will be fully preserved and/or documented, which may ultimately result in spoliation motions.

3. DÉPEÇAGE – WHAT LAW APPLIES?

Another issue that is commonly considered in aviation industry arbitrations is the concept of dépeçage, whereby different issues in a single case may be governed by different substantive laws or the laws of various or different jurisdictions. As it comes to products liability, and potential "passenger vs. manufacturer" or "carrier v. manufacturer" liability, a putative plaintiff may have a variety of potential choices of laws applicable, including: (1) the place of the manufacture or design; (2) the manufacturer's principal place of business; (3) the place of the departure or intended destination of the flight; (4) the place where the carrier acquired the aircraft; or (5) the substantive law of agreed upon by parties in an applicable contract.

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[5] 49 U.S.C. §831.09(2)

[6] *See Graham v. Teledyne—Continental Motors*, 805 F.2d 1386 (9th Cir. 1986), *cert. denied*, 484 U.S. 815 (1987).

[7] https://www.wilsonelser.com/writable/files/Legal_Analysis/anatomy_of_an_ntsb_accident_investigation_tobin_tochen_april_2013.pdf

In litigation, particularly with third parties injured during aircraft incidents or accidents, each U.S. state has their own conflicts of laws principles which can include the "most significant relationship" test or the application of *lex loci delicti* (law of the place of the injury).[8] Other countries apply various concepts as well on the issue. However, with arbitration, there is likely a contract between the relevant parties that identifies the substantive law. If not, the most relevant question may be where the defendant's conduct allegedly created the liability (but this question is debated when the jurisdiction includes a strict liability component).[9] Thus, for the personal injury and tort claim components, one choice of law scheme may apply; whereas, for the contract, manufacture, and/or sale of goods component of the same case, a different substantive law may apply based on the contract.

In some contexts, international treaties may apply, such as the Montreal Convention, the 1973 Hague Convention on the Law Applicable to Products Liability, the Foreign Sovern Immunities Act, the U.N. Convention on Contracts for the International Sale of Goods, but they do not necessarily resolve the choice-of-law issue, especially when both parties to the disputes are not from signatory states of the same Conventions. Thus, there is always a consideration as to what substantive law applies to the various issues in the case.

[8] There are some states that also incorporate a "government interest" or "interests analysis" as well.
[9] This discussion excludes the potential for passenger vs. carrier claims as these tort claims are not often arbitrated and have different considerations.

SPECIAL ISSUES IN CONSTRUCTION ARBITRATIONS

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By their very nature, disputes between parties from different countries, who speak different languages and have different cultural, legal, educational, and licensure issues, pose unique challenges at arbitration. This paper focuses on planning and presentation tips for the effective and efficient arbitration of international construction disputes.

1. CONSTRUCTION DISPUTES FREQUENTLY INVOLVE NUMEROUS, COMPETING, AND SOMETIMES CONFLICTING, STANDARDS.

One somewhat unique feature of construction claims is the fact that they are governed by many competing standards:

(1) statutory [e.g., Prompt Pay Act, retainage act, indemnity limitations];

(2) regulatory issues [e.g., building code];

(3) contractual requirements that can,

(a) in certain instances, modify, but not negate statutory and regulatory obligations (e.g., can reduce retainage to 3% instead of 5%);

(b) be comprised of many documents, (plans, specifications, change orders, addenda, flow down documents from above, etc.);

(c) incorporate standards by reference to other documents; and

(4) industry and manufacturer's standards (which are often incorporated into building codes or can be incorporated into the project via submittals).

Conflicts often arise among these standards, so it is important to understand which governs. To that end, many contracts (e.g., AIA standard form construction contracts) specifically state an order of priority to confirm which legal standard controls in such circumstances.

Construction claims can be exceedingly complicated, so they must be simplified to the point where the factfinder can understand them. Graphs, chronologies, charts, pictures, etc. can be very helpful.

2. CONSTRUCTION DISPUTES ARE FREQUENTLY COMPRISED OF NUMEROUS SUBSIDIARY DISPUTES.

There is a unique organizational challenge to handling construction arbitrations. That is, in most construction arbitrations, the case isn't about a single issue; rather, it's about dozens of discreet issues. They typically involve disputed proposed change orders from the contractor; back charges issued from the owner; claims of defective work or delay; surety, insurance and bonding issues; liens and business interruption; and even property damage, personal injury, and wrongful death claims arising from construction accidents.

Each of these issues could warrant its own individual trial and involve its own body of evidentiary documents, fact witnesses, experts, and discreet legal issues. For example, you could have a scheduling expert needed for one thing, a cost expert for another, a trade expert for a defect issue, and a forensic accountant addressing lost profits. Each subpart of the dispute must be treated and prepared as its own mini trial, but then woven together for an effective and coherent case presentation to the arbitrators.

3. SELECTION OF CONSTRUCTION ARBITRATORS.

Depending on the size and complexity of the dispute, parties choose between either a single arbitrator or a panel of arbitrators (normally three). The former is less expensive and allows for a prompt and efficient resolution. The latter allows for more diverse, balanced experience and expertise, and for evidentiary issues, ultimate rulings and awards to be debated among people with different perspectives, backgrounds and expertise.

There are some key considerations in selecting arbitrators for international construction arbitrations. An arbitrator's experience and expertise, along with her case management skills, are keys to ensuring a cost-effective, procedurally fair and just proceeding. Selection of arbitrators is one of the most important predictors of the efficiency and satisfaction of arbitration. Unlike litigation, which has evidentiary safeguards and an absolute right to appellate review for any errors at trial, the losing party at arbitration is normally stuck with the outcome, even if it's wrong based on the facts and the law.

Dispute resolution providers aggressively vet candidates for listing on their roster of arbitrators. For example, the American Arbitration Association has specific qualification criteria and responsibilities for members of the AAA panel of construction arbitrators. The AAA includes arbitrators from various backgrounds, including construction industry professional, construction industry business executive, and legal professionals. A combination of these areas of expertise makes for a well-rounded panel. Counsel must conduct due diligence on arbitrator-candidates to confirm their experience, expertise, and cultural backgrounds to determine their fitness to serve in this important role. As part of this diligence, don't rely only upon the arbitrator-candidate's biographical information. For each arbitrator-candidate you are considering, request professional references, hearing transcripts from previous cases, and any history of having awards vacated by courts. Selection of arbitrators (and "trial counsel") should focus also on ensuring their fluencies in the language, and familiarity with local culture, custom and controlling law.

4. STRATEGIC CONSIDERATIONS IN INTERNATIONAL CONSTRUCTION ARBITRATIONS[1].

Counsel should focus, at the time of contract formation, on drafting the governing law and venue/forum provisions of the agreements. To avoid claim-splitting or duplication of time and expense, these key provisions should be uniform and coordinated in the various project agreements (e.g., Prime contract, subcontracts, and design professional agreements, etc.). There are a multitude of standard forms of construction contracts published by professional organizations in the United States and abroad. A sampling of these template agreements

[1] For an excellent review of additional tools and techniques for effective management of international arbitration of construction disputes, See: International Chamber of Commerce, ICC Commission Report-Construction Industry Arbitrations (2019 update).

includes: the International Federation of Consulting Engineers (FIDIC), Institution of Civil Engineers (ICE), American Institute of Architects (AIA), and the International Chamber of Commerce (ICC).

5. PRE-ARBITRAL STEPS.

A. Mandatory Mediation

Many construction contracts require the parties to attempt to resolve the case cooperatively as a precondition to arbitration. These conciliation efforts take many forms: mediation, meeting of the principals, and dispute adjudication boards, to name a few. Counsel should make every effort to refine issues and narrow the scope of the dispute through these mechanisms. If successful, the parties can preserve their business relationship and save the substantial expense of going through the full course of arbitration.

Because of the multifaceted nature of major construction disputes, it's often impossible to resolve the entire matter at mediation. However, there is often an opportunity to resolve parts of the dispute, stipulate to damages or key facts, or determine the existence of potential third-party payors (such as liability insurers or sureties). Any of these pre-arbitration efforts to resolve the dispute should be treated as strictly privileged and confidential. That protection is often imposed by the contract, or by the governing law. In any event, counsel should require a written, signed agreement from all parties participating in the conciliation so that people can speak freely and share important information. That will promote a candid assessment of each parties' case without concern that disclosure will come back to haunt them at a later arbitration if the case does not settle.

B. The Preliminary Conference

The Preliminary Conference with the arbitrator is another important strategic planning event. This is where you will set the "rules of the road" for the proceeding and hearing to follow. Be prepared to set a firm tracking order for the rest of the case through the completion of arbitration. This includes deadlines to complete discovery, amend pleadings, and identify expert witnesses.

Counsel should be prepared to "frame the issue," with the arbitrator. The arbitrator will seek to have the key issue(s) stated by agreement of the parties, but will order it if parties cannot agree on the statement of the issue(s) to be arbitrated.

Counsel should seek stipulations or request interim orders to establish the admissibility of critical evidence and to preserve this evidence by having a litigation hold order imposed; that step will prevent the loss or destruction of evidence necessary for the arbitration.

Confirm access to necessary witnesses located outside of the jurisdiction for depositions, in person, or remotely, before the arbitration. Request an order regarding the provision of translation services for witnesses not fluent in the language that will be used at the arbitration. Likewise, determine which party will pay for the substantial translation cost associated with converting contracts, deposition transcripts, and other reams of documents from one language into another for presentation at the arbitration hearing.

Be careful about limitations on the scope of discovery (such as those that are imposed in the Federal Rules of Civil Procedure) restricting the number of document requests and interrogatories, and limiting the number and length of depositions[2].

C. The Arbitration Brief

Last, the arbitrator will normally ask each side to file a Summary of Claims and Relief Sought. This is to confirm the scope of the dispute, which in turn, implicates the number of witnesses, volume of exhibits, and length of the proceeding. Be conservatively overinclusive to avoid waiving any rights regarding the scope of the arbitration.

6. THE ARBITRATION HEARING.

When all of the pre-arbitral work is completed, it is "Showtime." The arbitration hearing will provide certainty and finality to the dispute. There is no rule in any country that requires construction arbitration to be *boring*! Accordingly, counsel should present her case with compelling themes, polish and passion.

Counsel need not (and normally *should* not) arbitrate with the razzle-dazzle of a conventional jury trial. However, arbitrators are human and want to create the appearance and reality that they are "doing the right thing." Counsel should focus on the burden of proof, points for persuasion, and proof of facts. To that end, counsel should prepare the witnesses to testify in person, if logistics and financial considerations make it practicable. Visual aids, charts, chronologies, key contract provisions, and other important evidence should be presented through an efficient, reliable trial technology platform to bring the case to life[3].

CONCLUSION

Arbitrations of international construction disputes should not be shrouded in confusion and uncertainty. To some extent, they are like other international commercial arbitrations, but usually contain more issues for adjudication, voluminous documentary evidence and conflicting legal standards. By selecting experienced, effective arbitrators; streamlining claims, evidence and damages; counsel can ensure the effective and efficient presentation of international construction disputes at arbitration.

[2] See, e.g., Fed. R. Civ. P. 26, 33, and 34.

[3] For an interesting discussion about how international construction disputes can be resolved more efficiently while maintaining fairness and access to justice, see: International Arbitration Survey – Driving Efficiency in International Construction Disputes; School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London; and Jason Hambury, Pinsent Masons. (November 2019).

SPECIAL ISSUES IN INTERNATIONAL AND MARITIME ARBITRATIONS

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1. GENERAL POINTERS ON INTERNATIONAL COMMERCIAL AND MARITIME ARBITRATION.

(a) A significant difference between international arbitration and domestic litigation lies in the potential application of several different sets of laws to a single dispute.

(i) The arbitration law of the seat of the arbitration, lex arbitri, ordinarily determines the procedural aspects of the dispute resolution process, and is identified as the curial law. The seat also determines which national Court is to exercise supervisory jurisdiction over the arbitration, for instance in setting aside the Tribunal's award.

(ii) The substantive law governs the issues raised in resolving the merits of the dispute.

(iii) The law governing the arbitration agreement is distinct from both the law of the seat and the substantive law, but either may be indicative of the law parties intended to apply in determining the validity of any arbitration agreement, in the absence of parties' express choice of the law applicable to the arbitration agreement.

(iv) A common international arbitration agreement may read as follows: "*The Contract shall be governed by and be construed in accordance with the laws of England. Any dispute arising out of or in connection with the Contract, including any questions regarding its existence, validity or termination shall be referred to and be finally resolved by arbitration in Singapore pursuant to the rules of the SIAC."*

The seat is Singapore and so the arbitration laws of Singapore will apply to the dispute as prescribed by the International Arbitration Act of Singapore. The merits of the issues in the arbitration will be determined by the laws of England.

(b) The venue or location for the evidential hearing of the substantive dispute may be anywhere, chosen by convenience; but the seat of the arbitration will remain unchanged regardless of the venue of the hearing. The seat may be stipulated by the parties in the arbitration agreement, failing which it will be determined by the Tribunal having considered all relevant factors including connections to the dispute, or as may be inferred to be intended by the parties.

(c) Rules of an arbitral institution, selected by the parties to further govern the procedural formalities, may be super-imposed on the procedural law of the seat *e.g.* the Arbitration Rules of the International Center for Dispute Resolutions (ICDR) - any arm of the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC) or any other arbitral

institution. In the example above, the institutional rules adopted by the parties are that of SIAC.

(d) Domestic or national laws on evidence and procedures applicable in Court do not automatically bind the parties or apply to the arbitration, despite the seat of the arbitration being of an identified country

(i) The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration are often adopted as a matter of guidance by parties, for the Tribunal to apply to the arbitration process. Discovery in particular, is significantly limited to documents clearly identified to be relevant to the case and material to its outcome. The Supreme Court in the United States was moved in March 2021 in *Servotronics, Inc V Rollys-Royce PLC et al*, to consider if discovery assistance from the US Court is available in private commercial arbitration. An *amicus curiae* brief was submitted by the ICC to consider the implications on the conduct of international arbitrations worldwide, and the degree of deference that should be given to an arbitral Tribunal's views.

(ii) Procedures on consolidation of separate but related arbitration proceedings, and joinder of parties that may be connected to the dispute, are different from domestic litigation; often dictated by institutional rules adopted by the parties. In the absence of express provisions allowing for the same, joinder of parties who are not parties to the arbitration agreement and consolidation of proceedings under separate arbitration agreements are not permissible, unless consented to by all parties, to maintain the privacy and confidentiality of the arbitral proceedings.

(e) There is no right of appeal to Court from the findings of the arbitral Tribunal. *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (The New York Convention) limits the right to challenge a Tribunal's award, largely contained to matters of procedural unfairness or breach of natural justice. Certain seats, *e.g.* England by virtue of the English *Arbitration Act* 1996, permit the review by Court of findings of law by the Tribunal in prescribed circumstances. Findings of fact however, are not to be re-opened.

(f) Certain institutional rules, *e.g.* the ICC Rules provide for the scrutiny of awards by the ICC International Court of Arbitration prior to their issuance by Tribunals, to ensure procedural fairness is maintained, towards enhancing the enforceability of the awards.

(g) The cross-cultural nature of disputes referred to in arbitration present a challenge when the substantive law and procedural law of the seat are adopted by parties without a full comprehension of the responsibilities imposed by such laws.

(h) Arresting a Ship as security for satisfaction of an award issued in a maritime arbitration, remains with the domain of national Courts, to support the arbitral process. In contrast, injunctions may be sought from the Tribunal, the Court of the seat of the arbitration, or an Emergency Arbitrator who maybe appointed before the Tribunal is constituted.

(i) International Conventions, such as that on limitation of liability relating to the carriage of goods by sea, or that which allow for multiple forum for dispute resolution, or that which provide for moratoriums in insolvency, may give rise to argument, or to a stay of arbitral proceedings or to anti-suit injunctions. The applicability of the United States Office of Foreign Assets Control (OFAC) sanction add a further dimension of complexity to international trade, that may need to be resolved through expert evidence in arbitration.

2. DEVELOPING AND MARKETING OUR SKILLS.

These are some of my personal views on thriving in a specialist field of practice.

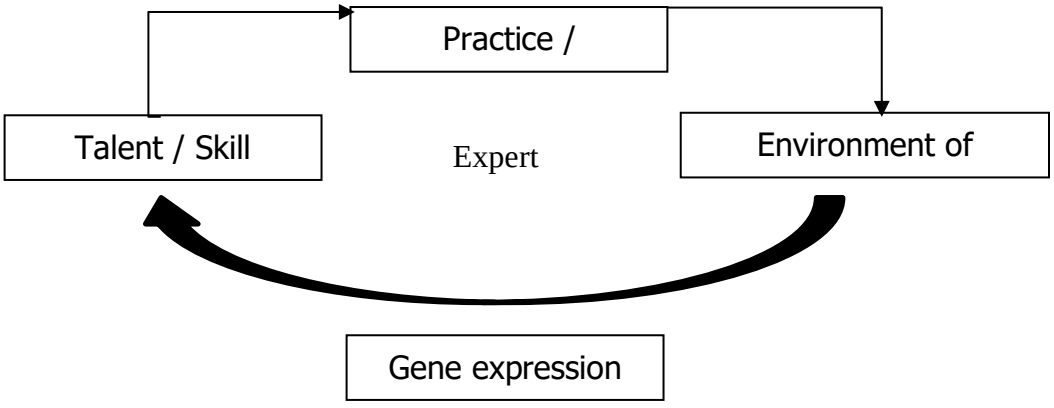
(a) Knowledge & Skill – the obvious place to start is garnering the requisite skill and knowledge; whether it be in maritime law, or any other specialty. International arbitration has its peculiar rules and manner of practice – acquiring the theory is vital to its practice.

(b) Visibility – generate visibility for our skill and knowledge, through active participation in conferences and webinars, writing articles, giving interviews, and maintaining established networks. These are critical for others to know we are available, and have expert services to offer. Making our quality and expertise clearly (but subtly) apparent is key, to enable others to gauge our personality and credibility.

(c) Establish a brand – stand out and differentiate by our authenticity, specialty, integrity and independence. Niche areas offer the opportunity to become an expert, and enjoy a balanced life; to do more in less time, whilst attracting an expert's fee.

(d) Give to get – give to society without regard to outcome or benefit, and we will inevitably attract success. Our mind and soul then act as attractor fields.

(e) The *"Rage to Master"* – passion and deliberate practice over several years, in a supportive environment that values us, stimulates a gene expression and nurtures our talent further.



(f) Be Happy – this naturally engages the Happiness Advantage of creativity and productivity.

3. FINDING SKILLED ARBITRATORS.

Diversity - in gender, ethnicity and generation - is key to a wholesome dispute resolution, taking into account numerous perspectives. Selection of an arbitrator is probably the most important aspect of a successful arbitration, after a sound arbitration clause and good choice of counsel.

(a) Look up professional listings, such as Chambers, Legal 500, arbitral institutions' published list of panel of arbitrators. ArbitralWomen has a list of women arbitrators and ERA Pledge provides links to search for similar lists, including at Arbitrator Intelligence. The ERA Pledge has a checklist of best practices for the selection of arbitrators, released in November 2020.

(b) Seek out previous awards of arbitrators who are shortlisted. Several arbitral institutions release redacted awards.

(c) Search for interviews, articles, podcasts *e.g.* ARBinBRIEF and conference materials. Listen and read to feel if this person is a good fit for your dispute. Independence and intellectual integrity of an arbitrator is key. He/She ought not to be swayed by personalities, but persuaded by the issue and submissions presented.