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CASE MANAGEMENT PRACTICES – PROMOTING EFFICIENCY IN INTERNATIONAL COMMERCIAL ARBITRATION

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In popular legal culture, arbitration is often considered to be a creature of superlative efficiency, flexibility and international enforceability. Unfortunately, this vision often discords with reality. The increasing complexity of arbitration has seen an associated increase in the time and costs involved, and these were rated arbitration's worst features in the 2015 White & Case International Arbitration Survey.

However, this need not be the case. Arbitration as a system is specifically designed to provide the parties and the tribunal with a broad procedural discretion in the handling and disposition of any individual case. Through using this discretion to adopt effective case management practices, the tribunal can help avoid the dilation of both costs and time.

This will lead not only to greater efficiency in the immediate case, but also strengthen the broader appeal of arbitration as an alternative dispute resolution process.

Case management practices

As a preliminary step, the tribunal should hold a Case Management Conference (CMC). This will allow the arbitration to be tailored to the specific factual and legal issues of the case. The purpose of this initial conference is to ascertain and limit the key areas of dispute, discuss procedural timetables and identify unreasonable behaviours the tribunal will take into account when allocating costs. This conference should then be supplemented by a Procedural Order.

This initial stage is important because many issues in arbitration that cause delay and increased costs are related to, or within the control of, the parties. Through setting the tone of mutual collaboration on these issues, the parties can limit the costs that they both incur.

Beyond this general advice, as each case is fact specific, it would be a futile attempt to lay down a comprehensive list of 'rules' that practitioners can use in all circumstances. Rather, this article seeks to briefly examine some areas relevant to facilitating the efficient resolution of the dispute.

Importantly, the lessons canvassed below are not merely for arbitrators. As the parties have significant control over the procedure of the arbitration, the individual parties can also seek to have these measures implemented in the interests of efficiency.

Consider a bifurcation of proceedings. Depending on the nature of the dispute, a bifurcation of the arbitration could significantly reduce the potential time and cost involved. For example, the tribunal could determine whether a breach of contract had occurred before examining the question of resulting damages. A negative answer to the breach question would avoid 'wasting'

time and money on the discussion of damages.

Set guidelines on submissions. The tribunal should work with the parties to establish a clear procedural timetable for the filing of submissions, as well as limitations on the maximum length allowed. This requires the parties to focus on the key issues involved and avoid needless repetition.

Use witness statements. Using witness statements as opposed to oral evidence in chief can help overcome the associated costs of a lengthy oral hearing and allow the parties to understand the pertinent issues at an early stage. These witness statements should be restricted to matters of fact to ensure that they do not become overly burdensome and costly in themselves, and so that they are not mere extensions of the parties' submissions.

Limit document disclosure. Limiting the practice of flooding arbitral proceedings with documents, submissions and production requests can significantly improve the efficiency and management of arbitral proceedings. Naturally however, arbitrators also have a duty to grant the parties an equal opportunity to present their case. In light of this, it is important to design an appropriate, limited disclosure procedure tailored to the nature of the case, and assign time limits at the earliest possible stage, such as the CMC. Article 3 of the IBA Rules provides a useful set of guidelines for doing this, and also champions the strict imposition of the time limits.

Set guidelines on expert witnesses. Experts can be a major factor contributing to lengthy delays and high costs. However, effective management through a variety of techniques can reduce the time and cost incurred by their appointment. For example, hot-tubbing can be effective in highly technical arbitrations involving a number of expert witnesses. This is where witnesses deal with each other's evidence together, as opposed to the usual linear fashion. Further, promoting the exchange of drafts at an early stage or requiring the submission of a joint brief will encourage the experts to identify their areas of disagreement, and only produce individual reports on those areas.

Consider the need for an oral hearing. The tribunal should discuss with the parties whether an oral evidentiary hearing is even required. To the extent that it is, the tribunal should consider techniques such as imposing a finite time limit for submissions with the chess-clock system, hot-tubbing witnesses to reduce time spent in examination and using video conferencing to avoid minor witnesses having to incur unnecessary travel costs. Before a hearing, the use of a pre-hearing conference to discuss arrangements for the hearing is useful in promoting efficiency.

Subsequent CMCs. Throughout the arbitration, the tribunal may see utility in holding a second (or subsequent) CMC. This would be designed to identify the issues remaining in dispute, and confining subsequent submissions and material only to those insofar as possible. The processes of the tribunal will naturally need to be renewed as the arbitration progresses to tailor for unforeseeable events and uncooperative parties, which may themselves necessitate further case-management conferences.

Costs orders. Finally, the tribunal can use its discretion on costs to positively influence party

conduct. Through setting clear expectations from the CMC that orders will be so used, alongside considering making them on an interim basis, the parties are given a commercial impetus to behave reasonably and efficiently. An example of where costs orders can be used is where a party repeatedly files its submissions late and raises new arguments well out of time. These can lead to significant blowouts of costs and time, and ultimately culminate in an adjourned hearing. The threat of being forced to pay the costs incurred by the other side as a result of defying the tribunal's directions can therefore be a useful deterrent.

Conclusion

As seen, there are a multitude of case management practices available to the tribunal for effectively managing the case at hand. In each arbitration, the parties involved should be open to considering new processes that will have benefits for them, their opponents and the tribunal in the form of a reduction in wasted time and costs. Only then will arbitration be able to truly live up to its reputation as a cost-efficient method of dispute resolution.

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