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Securing the Advantages of Arbitration

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The commencement of an arbitration through the appointment of a tribunal does not of itself ensure that the subsequent arbitral proceedings will be timely and cost efficient. It is necessary for the parties through their counsel, with the assistance of the tribunal, to quickly address the procedures to govern the proceedings and at the same time to set a timetable leading up to agreed hearing dates. Failure to address these matters at an early stage can result in a lengthy and inefficient mode of dispute resolution. This article suggests ways to ensure that the advantages of arbitration, in terms of time and costs, are achieved by the parties.

It is often said that arbitrations can be conducted more efficiently and are thereby less expensive and more expeditious than conventional litigation. This can be so, but anyone with much arbitral experience is aware of arbitrations that have dragged on for years and match the expense and slowest pace of cases in the court system. In short, the perceived arbitral advantage can be easily lost, or otherwise fumbled if parties and counsel do not at the outset address governing procedures and a timetable for the proceedings. In this article, I will attempt to briefly, and from a practical perspective, offer some thoughts on how to secure the advantages of arbitration.

Few counsel restrict their practise only to conducting arbitrations. For the most part, at least in my experience, counsel conducting arbitration also conduct litigation in the courts and are often times more experienced in conventional litigation. The familiarity of counsel with Rules of Court governing court cases may account for many counsel simply adopting the same or similar procedure for arbitrations and conducting them as if they were court cases. It is understandably easier for counsel to adhere to procedures familiar to them than to attempt to tailor the procedures to the issue(s) arising in a particular arbitration.

Few arbitration clauses in commercial contracts dictate the procedures to be followed in the ensuing arbitration. By and large the statutes governing arbitrations leave procedure steps and matters up to the parties and the arbitrator. Even when the arbitration clause provides an applicable set of rules, they usually allow scope for the parties to tailor the procedures to be followed in the particular proceedings.

In order to ensure that the efficiencies and economies of arbitration are in fact gained by the parties, it is incumbent upon counsel, with the assistance of the tribunal, to consider at an early stage what procedures are applicable and how they can be tailored in light of the issues in dispute. I will offer some suggestions in that regard. The first is that the arbitrator, or panel as the case may be, be involved in establishing the governing procedures. An experienced arbitrator can assist in focusing upon cost effective procedures.

Conducting oral examinations for discovery, or questioning as it is sometimes called, is ingrained in civil litigation. Few, if any, counsel conducting a case in the court system would omit this procedure, which often involves the examinations of many persons over lengthy periods of time, if only to protect themselves if the party they represent fails to succeed in the litigation. However, this procedure should not be considered as always necessary in arbitrations. Indeed, in international arbitrations it is the exception. In any event, limits both on the number of persons to be examined, and time limits for any

such examinations, need to be considered. The extent of the need for oral discovery all depends upon the nature of the dispute.

A similar observation can be made with respect to the production of documents. The more voluminous the production is often the least helpful. With the production of hundreds and even thousands of documents in many court cases, it is often like looking for a needle in a haystack to identify documents actually material to the issues in dispute. In most instances, an exchange of documents intended to be relied upon by the parties in the arbitration provides adequate information for purposes of adjudicating the dispute. The ADRIC Arbitration Rules with respect to producing documents provide a reasonable balance and guard against excessive production.

Perhaps the most significant practical difference from court litigation is the accessibility of the arbitrator, or in the case of a panel, the chair person who is often delegated management of procedural issues. In the court system, an appointment to attend upon the case management judge often needs to be booked a number of weeks in advance, and then the judge must work through a system loaded with cases and dependent upon finding available judges to hear motions and trials.

While arbitrators are usually busy persons, in my experience they are prepared to take a telephone call from counsel on very short notice and their flexibility in scheduling applications and hearings is much greater than the civil system allows, often accommodating counsel on evenings or weekends. This is particularly the case in international arbitrations where the parties and their counsel may be in very different time zones.

In short, it is useful following the appointment of the tribunal to work out an agreement with its assistance with respect to the procedures to be followed in the particular arbitration, which agreement can form the basis of a Procedural Order. A two-fold purpose can be achieved. First, counsel addresses at an early stage the procedures applicable to adjudicate the issues(s) in dispute. Second, a schedule of the steps leading to a hearing can be settled at the same time.

It must be recognized, of course, that very often in disputes, one party is interested in moving the case forward in an expeditious manner while the other party finds it to their advantage to stall or, at minimum, to proceed at a very relaxed pace. In arbitration, it is not possible, as it were, to play off one judge against another. Rather, the arbitrator has knowledge of all steps and the positions of the parties from the time of appointment. In these circumstances, an arbitral tribunal is in a superior position in providing procedural directions and scheduling. Counsel appearing in arbitrations should not hesitate to approach the tribunal to ensure that the advantages of arbitration are achieved.

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