Ashurst international arbitration group
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Anatomy of an arbitration Part III: Pre-dispute strategy considerations

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In the third instalment of our series providing practical insights into the arbitration process, we examine the key issues to consider once arbitration proceedings appear probable. It should be of particular interest to anyone facing imminent proceedings, whether initiating or defending an arbitration claim.

Effective dispute management is a challenge, and one which needs to be tackled early. A comprehensive and well-planned approach at the initial stages of a dispute is crucial to optimising your legal position and ensuring any proceedings run as efficiently as possible. Here we provide a checklist of the key issues to consider at the outset of a dispute.

Pre-dispute checklist

- ✓ Are there any statutory or contractual deadlines by which a claim must be brought?
- ✓ Does the contract require any steps to be taken before proceedings are commenced?
- ✓ Consider sending a letter before commencing proceedings.
- ✓ Have you circulated a document retention letter? Remember to preserve existing documents and avoid creating new ones.
- ✓ Who are your key employees/witnesses?
- ✓ Consider insurance coverage.
- ✓ Assess media interest and possibly prepare a press statement.
- ✓ Assess commerciality of the claim and develop a costs budget.
- ✓ Consider settlement opportunities.

Watch the clock

One of the first questions to consider is whether you are facing an imminent deadline to bring a claim. There are statutory, and sometimes contractual, limitation periods which dictate by when claims must be brought. If you are facing a potential claim, a limitation period can provide a complete defence if the other party is out of time. If you are the claimant, you should diarise the deadline early on so as not to get caught out.

Contractually required steps – to comply or not?

Some dispute resolution clauses require certain steps to be taken prior to commencing proceedings, for example, issuing a notice of dispute and attempting resolution through negotiation. If there are contractually required steps, you need to consider whether or not to take them. It may be that such steps are futile at this stage, and that further delay cannot be tolerated. It is important to consider the potential consequences of not complying with pre-action procedures. One of the risks is that the respondent will argue that the arbitration has been improperly commenced and should not be allowed to proceed. A challenge to the jurisdiction of the arbitrators may be brought. An award may be challenged or refused enforcement down the line.

Letter before action

If you are initiating the claim, you should consider whether you are legally required to notify the respondent that proceedings will be commenced, setting out a brief background of the facts and your complaint. This letter should be carefully drafted as it may subsequently be used as evidence. Such contemporary procedures are rare in arbitration, but a letter before commencing arbitration may focus your opponent on the shape of any arbitration proceedings, facilitating pre-arbitration settlement.

Documents – preserve existing and avoid creating

Documents are perhaps the most important source of information about the dispute. At the outset, you should prepare a documentary record. It is common in

international arbitration for the tribunal to order some document production, although the scale of the exercise varies. Once arbitration is imminent, you will need to ensure that existing documents are not destroyed, so you are able to comply with any future order. Destruction of documents may lead a Tribunal to draw adverse inferences if no explanations can be provided.

While you need to ensure that existing documents are not destroyed, it is also prudent to avoid creating new documents once the dispute has arisen. Privilege will protect some documents from disclosure, but it only arises in certain circumstances and can be lost or waived. Practically, this means sending a document retention letter or email to all relevant employees requesting that they do not destroy any existing documents and also avoid creating new ones that discuss the dispute.

Identify key employees

The input of key employees will be crucial in preparing your case, both in terms of providing facts for the initial submissions and possibly providing witness evidence in the arbitration. It is advisable to contact these employees and/or HR at the beginning of the dispute. You will need to gauge the extent of their knowledge, their willingness to co-operate and provide assurances as giving evidence can be a stressful and time-consuming process.

Insurance notification

Some losses, including through arbitration, may be covered by your insurance policy. You should notify your insurance provider as soon as possible about the potential dispute to ensure you do not forfeit the benefit of the coverage by failing to give timely notice.

Media

You should consider whether your dispute is likely to attract media attention. Often, disputes involving public concerns like natural resources or infrastructure projects attract significant interest. While arbitration is often confidential, this is not always the case, and there are a number of ways by which information about arbitral proceedings can slip into the public domain, for example, by a party having to make a mandatory regulatory announcement. In our experience it is surprising how often the media incorrectly reports disputes. Subject to compliance with any confidentiality obligations, it may be necessary to prepare a press statement and/or engage the services of a PR adviser to manage the media.

Costs management

At the outset of any dispute, it is important to assess the commerciality of any claims. Like any commercial project, a dispute should be subject to budget control and costs should be kept under constant review. A costs estimate can also inform the timing of any settlement negotiations.

Settlement

Arbitration is inherently uncertain and unpredictable. If a settlement opportunity arises, it deserves careful consideration and should be a part of your strategy at the outset of the dispute. Like costs, settlement opportunities should be at the forefront of your mind. A costs-benefit analysis of continuing with the arbitration should be undertaken at the outset of the dispute, and reviewed on a continual basis.

Any correspondence which is intended to resolve the dispute should be marked "without prejudice". The principle of the sanctity of bona fide settlement communications is upheld by most tribunals on the basis of either national or international legal principles. However, you should be very careful when proposing any settlement in pre-action correspondence, as lawyers from different jurisdictions may produce the settlement offer in subsequent proceedings on the grounds that the offer was an admission of liability.

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