DISPUTE RESOLUTION BRIEFING

International arbitration: reducing costs and promoting efficiency

International arbitration has traditionally been seen as more efficient than litigation. In arbitration's formative years, civil law procedures dominated, with arbitrators investigating the parties' contentions of fact and law. Lately, as Anglo-American procedures have become prevalent, arbitrations have become more akin to common law litigation, with its interim applications, extensive disclosure, and aggressive witness examination.

While arbitrators should strive to adopt procedures that limit costs, they often agree to applications (for example, for additional disclosure) to reduce the likelihood that a losing party will challenge an adverse award because of a failure of due process. There are also additional expenses that do not apply in litigation, such as paying the arbitrators and arbitral institutions, and hiring a venue.

This has caused concern among many arbitration practitioners that arbitral costs can be excessive and risk discouraging commercial arbitration. The popularity of international arbitration is based on far more than its traditional cost-effectiveness, but if it is to ensure its pre-eminence for international disputes, issues of cost efficiency need to be addressed.

Arbitration agreements

Parties typically consent to arbitration by incorporating arbitration clauses in their contracts that specify: arbitration as the means of dispute resolution; the arbitral seat; the arbitral rules; the number of arbitrators; and the language of the arbitration.

Effective drafting is essential to reduce the likelihood of competing litigation proceedings or delays due to uncertainty over the form of an arbitration. When drafting arbitration clauses, practitioners should bear in mind the following:

- Tiered dispute resolution clauses provide an opportunity for settlement before arbitration, therefore reducing costs. Parties may specify negotiation or mediation as mandatory, or optional, steps before arbitration.
- Increasingly, arbitrations involve multiple contracts and parties, which heighten the risk of parallel proceedings. This can often be avoided by including provisions in an arbitration clause that address consolidating related arbitrations and joining parties to existing proceedings.
- While some parties may wish to select ad hoc arbitration, rather than incur the fees of arbitral institutions, this may be a false economy. Institutional support and supervision may, in the long run, outweigh the savings of ad hoc proceedings.
- Lengthy proceedings generate costs, so parties may wish to specify time limits for procedural steps, or a deadline for an award. However, an award that is not produced by the deadline may be challenged or refused enforcement under the New York Convention. Some arbitral institutions offer expedited, or fast-track, arbitration; for example, the Stockholm Chamber of Commerce and the Singapore International Arbitration Centre.
- Some jurisdictions enable parties to exclude certain types of challenge to an award, which would limit the scope for post-award proceedings. For example, in England, challenges on the basis of errors of law may be excluded.
- Parties are generally free to choose the substantive governing law of an arbitration. A tribunal will apply substantive law in the same way as a court. However, a tribunal may be empowered to decide a dispute in accordance with general merchant law or principles of equity or fairness. This may enable it to reach a decision in a simpler manner than if it was required to apply national law. So-called "baseball arbitration" involves each party specifying a damages figure, with the tribunal obliged to choose one or the other, therefore narrowing the tribunal's scope of inquiry.

Case evaluation

While the parties may agree any of the above measures when a dispute arises, the breakdown of relationships and trust that often occur at this point may make this difficult. The focus instead switches to case evaluation. Preparing a case strategy, and anticipating how an arbitration will evolve (to the extent possible), is the best way of managing cost expectations.

The client and its legal advisers must work closely together on case evaluation. The client must communicate clearly the facts of the dispute, the commercial drivers and the desired outcome. The lawyer must ensure that the client understands the nature of the arbitration process and the choices that exist to manage costs.

Careful evaluation at this stage may identify arguments that are unlikely to prevail. Rather than advancing them and developing them in submissions, disclosure and evidence, they may judiciously be dropped, reducing the scope of the dispute. A client may be satisfied with certain representative claims being decided by the arbitrators, rather than requiring the arbitrators to sift through all of the claims and evidence that may be relevant.

Appointing the tribunal

Having three arbitrators rather than one is more expensive and may delay proceedings; for example, finding time in three diaries for a hearing is harder than one. However, given the limited scope to challenge awards, parties often value the perceived rigour associated with multiple arbitrators.

Identifying arbitrator availability is key. If the preferred tribunal has limited availability, final resolution may be delayed. Institutions and arbitrators need to supply parties with reliable information so that informed choices can be made about which arbitrators to appoint.

The skill set of the arbitrators is also important. A suitably qualified arbitrator may add significant value by focusing the tribunal on key technical issues and directing the parties accordingly.

Fixing the arbitral procedure

Once constituted, the tribunal must fix the procedure. However, tribunals have

The evidential hearing

The evidential hearing is when the theatre of arbitration occurs. Evidential hearings are intense, demanding, sometimes emotional and invariably expensive. By this stage, the tribunal should be aware of the detail of the parties' cases. Efficiency can be promoted by:

- The tribunal circulating a checklist to the parties in advance of the hearing that enables procedural issues to be defined, and avoids wasted time at the hearing.
- The parties providing the tribunal with well-structured submissions, a list of issues, a chronology and a list of parties. This helps it to assimilate the wealth of information and encourages proactive case management; for example, hearings conducted in the sequence of specific issues, rather than chronologically.
- Ensuring that the hearing venue has ample space, good quality facilities, and internet availability, and is available at a reasonable price.
- Imposing a finite time period within which each party must present its submissions and examine witnesses.
- Using electronic bundles for document-heavy proceedings, which enable relevant documents to be called up almost instantaneously and projected on screens, and reduce copying costs.
- Using video conferencing so that minor witnesses do not need to travel and incur unnecessary costs.
- Conferencing, or "hot-tubbing", factual or expert witnesses so that evidence is presented side-by-side, reducing time spent on the examination of witnesses, and enabling the tribunal to take the initiative.
- The tribunal taking a proactive role in managing the witness examination process. This may involve identifying which witnesses address which issues, and policing the scope and nature of cross-examination.

limited visibility over the dispute at this stage and may find it difficult to suggest procedural innovations without knowing more about the contested issues. For this reason, tribunals often present the parties with a fairly generic procedural order for comments.

It is imperative that clients involve themselves in fixing the procedure and do not leave it to counsel and the tribunal. Measures to achieve efficiency include the following:

- Organising an early conference with the parties so that the dispute can be explained to the tribunal, both in writing and orally. Tribunals can then use lists of issues or terms of reference to make proactive suggestions with regard to case management. Tribunals, or the parties, may suggest that certain preliminary issues (such as liability or jurisdiction) are heard, which may resolve the dispute without the need to determine other issues (such as damages).
- Using a documents-only arbitration where the tribunal renders its award on the basis of written material only. This would reduce time and costs, but would only be suitable if there are few contested facts and the issues are straightforward.
- Asking the tribunal to make orders regarding future delays, such as prescribing the circumstances in which extensions of time may be sought, and costs sanctions for parties that fail to meet deadlines.
- There are typically many administrative tasks that fall to a tribunal during an arbitration. Some of these may be performed by an institution (if applicable). An administrative secretary may also be appointed who will perform low-level tasks at a reduced rate.

The pre-hearing phase

Written submissions, document production and evidence comprise the pre-hearing phase of the arbitration (*see box "The evidential hearing"*). Costs may be managed by the tribunal:

- Imposing page limits on written submissions, or requiring the parties to respond to specific points identified by the tribunal as being material to its determination.
- Controlling carefully the production of documents. The International Bar Association Guidelines on the Taking of Evidence in International Arbitration were intended as a synthesis of the limited disclosure civil law approach and the extensive disclosure common law approach. They require that requests are made for the production of documents that are relevant to the case and material to its outcome. A high degree of tribunal control ensures that this process operates efficiently.
- Defining the scope of witness and expert evidence. There is often a large amount of background, or even irrelevant, evidence submitted. The tribunal may define the issues on which it requires evidence and may require experts to meet in advance of preparation of reports so that the reports can be focused on the disputed issues. It may also determine that it does not require expertise on issues of foreign law, preferring to rely on party submissions.

After the hearing

After the hearing, the award must be produced. Tribunals should produce awards as quickly as possible. Some institutions impose deadlines for the production of awards, which can encourage tribunals to complete the process expeditiously (*see News brief "New LCIA arbitration rules: welcome modernisation", this issue*). An award may be challenged, or enforcement resisted. Parties should think carefully about whether tactical challenges, which have little merit, should be brought, or whether the decision of the arbitrators should be accepted.

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