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COMMERCIAL ARBITRATION FOR BUSINESS: Making it work

By Andrew Jeffries

As an arbitration counsel for some 22 years, plus now 13 years as an arbitrator, I confirm that going to arbitration, or to court for that matter, is better avoided whenever possible. No case is cast-iron and if you win there is still a drain on business resources, delay in resolving the issue and irrecoverable costs. If you lose it is plainly much worse. However, on those occasions when taking proceedings is necessary, here are some thoughts on some of ways the process can be made to work better and involve less pain.

Pre-arbitral procedures

Does your arbitration agreement contain a tiered escalation of steps to be taken before arbitration can be commenced? This might involve negotiations, senior management meetings, mediation. In many cases these pre-arbitral procedures are worded as compulsory. The effect is likely that if the procedures are not strictly complied with, the jurisdiction to arbitrate does not arise, and any arbitration which is commenced is liable to be dismissed. That wastes time and money while the claimant goes away and starts again, or worse still defeats the claim altogether if the limitation period has in the meantime expired.

The other problem is that these clauses are too often loosely worded, giving a recalcitrant respondent easy pickings to stall the process: A phrase such as "the parties will mediate before arbitration" is full of holes about when to mediate, for how long, in what place, before what body and under what rules. In a case before me, the pre-arbitral procedures provided that the dispute must first be considered by a board meeting of the parties' joint venture company. The inventive respondent resigned from the board of the joint venture company, meaning no quorate meeting could be held. Make sure pre-arbitral procedures are complied with.

My advice at the drafting stage is generally to avoid these procedures. They are difficult to draft and, in my experience, achieve little. If there is enough goodwill between the parties for negotiations or mediation to work, the parties will generally negotiate or mediate anyway even without pre-arbitral procedures. On the other hand, if there is no such goodwill, pre-arbitral procedures are likely to fail and just waste time and money.

Selection of arbitrator(s)

There are no universal rules as to what sort of arbitrator to select, and the amount of say the parties get in the process varies depending on the arbitration clause and any institutional rules adopted. There are, however, certain key things to bear in mind. Typical considerations will include the candidate's home jurisdiction, native language, qualifications and experience both as an arbitrator and in the industry. There is often pressure to select a very well-known, experienced and respected arbitrator, and the larger the dispute the more so. This is seen as a "safe option" – and it can be. However, be aware of the danger that the most renowned arbitrators can – sometimes – be very expensive, very busy, more set in their ways, and less driven to impress by working hard and doing a thorough and effective job.

Also, avoid the natural temptation to appoint a "good friend". A party-appointed arbitrator, or even a presiding arbitrator, who is patently predisposed towards one side will often be sidelined and ignored by the other two arbitrators (in a three-arbitrator case) and otherwise lay themselves open to challenge on independence.

It is not uncommon for the arbitration clause to specify qualifications for the arbitrators. This is also something which is hard to draft and usually best avoided in the arbitration clause. Phrases such as "experienced in oil and gas" begs the question as to what 'experienced' means. On the other hand, "qualified as a chartered surveyor by RICS, with 10 years practical experience in xyz field" is likely to leave you with too few qualifying candidates. Either way, make sure your chosen arbitrator meets whatever the required qualifications are.

As for the selection of a presiding arbitrator, most of the general principles apply, but keep in mind that, regardless of any institutional rules, the parties should be involved and have input on the selection of the presider. When

first sitting as a party-appointed arbitrator, I was surprised to find fellow party-appointees opposed to the idea of the parties themselves having any say in the selection of the presider. This should be resisted.

Also, be conscious of the dynamic amongst a three-member tribunal. Will your nominee fit in with the status, style and culture of the other two, or will your nominee be marginalised by two arbitrators from the same background who have sat together numerous times?

Do consider the adoption of some sort of list procedure, primarily in a sole-arbitrator case, but also in the selection of a presiding arbitrator. The theory is if you nominate Prof Jones, the other side will automatically reject this choice and nominate Prof Smith. Under the list system, each side proposes a list of candidates whom they could accept, in the hope of coming up with a common name that each side can live with. The process can be repeated if no common names are found at the first attempt. There are many permutations of this.

Procedural structure

Confidentiality, time and cost are the usually cited advantages of arbitration. Whether this is correct is an issue for another day. However, a critical advantage of the arbitration process is also its flexibility, and this needs to be used to your advantage. In contrast to court proceedings which are often locked into a relatively fixed and well-worn path, the arbitration process has very few compulsory steps or other limitations.

Proactive consideration should be given at the outset, in conjunction with the arbitrators and opposing counsel, as to what is really needed to get this dispute resolved quickly and cost effectively, in a manner which each side can accept and get on with their business. Can expedited rules or an expedited timetable be used? Is disclosure of documents really needed, and if so on what basis? Are witness statements needed? Is a hearing needed at all? The process of expert evidence, in particular, is ripe for streamlining and efficiencies. Make full use of getting the experts to work together to agree on what they are going to talk about, what the differences between them are, how these arise, and which of them can be resolved. Approach the process not from the point of view of whether the rules in play need to be adapted, but from the point of view of what procedural steps are needed at all.

Although these thoughts are largely drafted from the claimant's point of view, most of them also apply to a sensible respondent trying to get a dispute resolved and out of the way, one way or another. Be cautious of the respondent strategy to stall and take every small point and delaying tactic possible. In my experience, it is very rare for a claimant which has got to the stage of starting proceedings to be ground down to the point that they give up and go away. Keep that in mind.

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