Breaking Arbitration’s 5-Minute Barrier: from the Archives

Kluwer Arbitration Blog
August 26, 2015

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Please refer to this post as: Michael McIlwrath, ‘Breaking Arbitration’s 5-Minute Barrier: from the Archives’, Kluwer Arbitration Blog, August 26 2015, http://arbitrationblog.kluwerarbitration.com/2015/08/26/breaking-the-5-minute-barrier-in-arbitration-from-the-archives/

Dear Readers,

you may have noticed the dearth of recent posts, for which we make no excuses.

It is late summer for the northern hemisphere contributors. At this point, most of us are lingering poolside at the Kluwer International Arbitration Resort and Amusement Park, sipping procedural cocktails in the waning light as the children take turns riding the garyborn-a-coaster (but only when they are not fighting over who gets to calculate the VAT on arbitrator fees).

It’s not that we’re lazy. It’s just that we don’t feel like doing any work.

So here’s a reprint from the Kluwer archives. In other professions, this would be considered regurgitating one’s former writings. In international arbitration, it’s called “best practice.”

Enjoy,

Mike

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BREAKING THE FIVE MINUTE BARRIER IN INTERNATIONAL ARBITRATION

The goal had seemed an impossible one for many years. And then, recently, a tribunal in Berlin came close to breaking the famed barrier. Their noble effort was thwarted only by the Teutonic lapse of the chair who, on the verge of declaring the proceedings closed at 4 minutes and 43 seconds, spontaneously suggested terms of a settlement which he gave the parties “a minute” to consider.

Of course, there is also the unconfirmed account of the dispute allegedly arbitrated on the deck of the Titanic during the ship’s final moments. It is said the tribunal’s careful grappling with the proposed seating arrangements at the hearing gave birth to a colloquilism that is still used to refer to many arbitrations today. Sadly, however, neither the parties nor the arbitrators survived to tell of the experience. All that remains is the tribunal’s hastily-issued order of a deposit against fees, proudly displayed today in the entrance-hall to the London Museum of International Arbitration.

So imagine my surprise to have participated in the arbitration that finally (and officially) broke the elusive barrier.

It can only have been immense good fortune that I was at my desk when the institution’s case manager called to say she had opposing counsel on the line. It was also fortunate that our agreement called for a sole arbitrator, prompting the case manager to immediately propose names from the institution’s database.

After 30 seconds, it was already clear we would never agree on a candidate. Thus, the case manager reached out to the first on the list, who confirmed his availability literally within nanoseconds. But we then lost substantial time – the better part of a minute – awaiting a ruling on whether it is an unwaivable conflict for arbitrator and one of the counsel to share a common interest in Broadway theater.

At one minute and 30 seconds, it was deemed sufficient for this to have been disclosed as long as it did not involve musicals.

With a firm hand, our arbitrator swiftly dispensed with disclosure objections, ordered the production of key documents from each side, and declared all disclosure completed at two minutes and 15 seconds. We exchanged expert reports at two minutes, 45 seconds. At three minutes precisely, the parties submitted highly skeletal arguments for the evidentiary hearing, for which it was agreed that witness statements should serve in lieu of direct examination.

As the parties could not agree on the use of a chess clock, the arbitrator granted a full 30 seconds for each side to present and defend our cases. Following searing cross-examinations of the claimant's key witnesses and expert, and only modest points given up in testimony from our side, the hearing concluded at four minutes and 20 seconds, leaving only a single, simultaneous exchange of post-hearing submissions. This was done at four minutes and 40 seconds.

At this stage we were close to trumping even the much-touted German arbitration. As often happens, however, an urgent call had to be taken by the arbitrator on another case in which he was sitting. When he turned back to our dispute, the clock had reached four minutes and 58 seconds, just enough time to quickly utter that the proceedings were now closed.

We rejoiced at our accomplishment despite being fully aware of its transient nature. Already the possibility of breaking the four-minute barrier is on the lips of institutions and leading arbitrators everywhere, and experts rightly point out that we still do not know the limit of human achievement, i.e., just how fast an arbitration can ultimately be conducted.

Naturally, as many have pointed out, the tools already exist to make proceedings ever more efficient, such as accelerated, expedited, and fast-track rules of different institutions, stronger case management, or appointing arbitrators not saddled with scheduling conflicts. Just as important, I would say, is to keep yourself and the tribunal well-hydrated at all times.

And there is also a dark side to speed that is now coming to light. One rumor is that certain arbitrators have begun taking procedure-enhancing drugs, and that the ICC will soon move its operations to Geneva to administer anti-doping tests before each hearing. I sincerely hope this will not be needed. The profession must not be tarnished by the scandal of arbitrators on steroids.

A question I am frequently asked is whether being on the "winning" side may have colored my perception of the process: would I still be celebrating this pinnacle of procedural efficiency had we lost? The answer is easy: while I have never doubted that our side had the better arguments and evidence, I cannot say with complete confidence that we won. That is because, some 18 months after the close of the

proceedings, we are still waiting to receive the award….