Negotiation in the Context of Arbitration

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Mediation and arbitration are often categorized as separate and distinct fields for good reason. Arbitration is an adjudicative process; mediation, on the other hand, is more accommodating, dependent on negotiation among parties. There is a formality attached to arbitration that one usually does not find in mediation. While the arbitration process is prescribed by rules, the mediation experience is created by the parties and the mediator to fit the needs of a particular dispute.

Although these two dispute resolution mechanisms surely have their distinctions, parties, advocates and arbitrators would do well to take lessons from the mediation forum in the preparation for, practice and perhaps resolution of arbitrated disputes. At the core of mediation is negotiation, a skill that can also encourage greater efficiency and economy in arbitration.

Therefore, this post includes practical considerations for parties and arbitrators to leverage negotiation and mediation skills in the arbitration process, particularly where cross-cultural considerations come into play. The post concludes with a short checklist to consider when preparing for negotiation.

Crafting the Clause

Arbitration clauses seem to get lengthier each day. From considerations over the extent of hearing, arbitrator qualifications, information exchange protocols, appellate processes and carefully crafted nuances to established institutional rules…. Parties' appetite to create bespoke arbitrations is a growing trend.

The problem here is that many clauses are nearly impossible to act on when the dispute finally arises. The requirements are so specific or, at times in conflict, that they are often nearly impossible to adhere to. Moreover, many of the provisions inserted into contracts are already addressed in institutional rules.

Making time at contract initiation to understand a business partner's interest in tailoring the dispute resolution clause will save future colleagues the time and expense in subsequently re-negotiating for terms that are workable. Concerns over varied approaches to arbitration are especially understandable where parties hail from different jurisdictions.

Addressing the potential for concerns over the arrangement of arbitral proceedings should be addressed upfront with candor. This may be accomplished by simply listening to the concerns of business partners relating to arbitration, asking clarifying questions to better understand their

perspective and holding open dialogues to craft arbitration processes that meet both parties' goals.

Arbitrator and Chair Selection

Negotiation is also critical once a dispute arises and arbitrators must be selected. This is of particular importance where the matter will be heard by a sole arbitrator and also in the selection of a tribunal chair.

One of the great benefits of an arbitral process is the ability to choose a decision-maker qualified to hear the dispute. However, where parties are unable to agree on an arbitrator, the choice often falls to the institution instead. This is an opportunity that should not be abandoned due to an inability to forge agreement.

In the selection process, vetting should not only take into consideration your own preferences, but your opponent's likely preferences as well. And while strike lists are often exchanged, parties may still meet and review the attributes they agree upon in an arbitrator – before any names are exchanged. Here, the importance of process expertise, subject matter knowledge, availability, cultural background, diverse characteristics and level of experience can be weighed and prioritized together. Thereafter, consideration of preferred candidates may be shared.

While the cross-cultural aspects of these considerations should not be minimized, there is a danger in attributing cultural expectations on an individual person. While researching cross-cultural candidates is a necessary part of the process, it should be done thoughtfully and based on individuals, simultaneously cognizant of the possibility for any implicit biases.

The Tribunal that Negotiates Together, Stays Together

Open and collaborative communications amongst the tribunal are a necessity for a seamless process. While each member of the panel holds this responsibility, it is ultimately the chair who is best positioned to foster a collegial environment with her co-panelists. In some respects, the chair almost assumes the role of quasi-mediator, listening to the concerns and opinions of the panel on the structure of the process and the manner in which party requests are granted or denied. This is perhaps most critical at the award drafting stage, when panelists' views of the solution may differ.

Parties Should not Lose Sight of Continuing Opportunities for Negotiation Throughout the Process

Opportunities to streamline or dissolve the arbitration process exist throughout. Although a formal process has been initiated and invested in, it is often sensible to explore opportunities for settlement outside the arbitration process.

Arbitration does not foreclose the opportunity for mediation. Whether the jurisdiction or local practice permits traditional arb-med, or parties initiate a mediation that is separate from the arbitration process, mediation may be leveraged to secure a resolution crafted by parties instead of arbitrators.

Negotiation Takes Planning

In each of the examples listed above, it is much easier to conduct the negotiation if some effort has gone into planning for the bargaining and presentation beforehand. With preparations done in advance, you are in a better position to attend the negotiation conversation with the focus required to actively listen and to be open to the path your negotiation takes.

At a high level, a negotiation plan may take the following considerations into account:

1. Clarify your goals for the conversation, prioritized and with an understanding of the reasons why each goal is important.
2. Assess your counterpart's likely views on these goals, along with any goals you anticipate they will seek in the conversation and their reasons for seeking those goals.
3. Understand the relative strengths and weaknesses in your position, along with those of your counterpart.
4. Identify the areas of overlap between your respective positions, along with those issues where you are furthest apart.
5. Develop a plan for the conversation, knowing it will likely evolve in real time. Where do you need to start the discussion? How can you build a collaborative environment that is conducive to forging agreements?
6. Propose the best forum for the discussion – in-person dialogues are hard to come by where parties or arbitrators are dispersed across continents. Thus, preference for conference calls, video calls, or e-mail exchange should be weighed in advance to evaluate the best venue for your discussion.

Taking time to understand your counterpart's perspective (what are their priorities and where are there opportunities for shared interests to be explored, etc.) is an important step in the process.

And though it may seem an unreasonable request, cultivating empathy here can go a long way towards a productive conversation. Demonstrating that you have made the time to consider positions other than your own is not only a showing of good faith, but also an ideal way to foster trust and open dialogues.

Conclusion

From crafting an efficient and enforceable arbitration clause, to tribunal dynamics and the opportunity for exploring mutually agreeable settlement terms…. The opportunities to leverage creative negotiation in order to encourage arbitration efficiency abound. This post has provided some examples for parties to consider as they proceed through the arbitration process.