Kluwer Arbitration Blog

Anti-Arbitration: 10 Things To Do Before The Arbitration Gets Underway

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Even when I think I know what I'm doing (be it self-confidence or self-deception), I still find checklists can be useful. Sometimes they can help validate or compare processes with others, but mostly they are good at making sure I haven't forgotten some critical step.

Below is a checklist for when someone – a business client, my boss, or a legal department colleague – has informed me that an arbitration is possible, likely, or has just been filed.

1. Check for any pre-arbitration procedures and assess whether to comply with them

Of course, the first thing any litigator will do when presented with a contractual dispute is to check the contract's dispute resolution and governing law clauses (assuming they were included). But what if the contract requires certain procedures before a claimant may initiate arbitration? For example, there may be a cooling-off period to negotiate, mediate, or escalate disputes to senior management; or the contract may provide that issues are deemed to be waived unless raised within a certain time period. In addition to investigating how best to comply with these procedures, a party may ask whether to comply. A claimant concerned about the clock (and time bars) may prefer to proceed directly to arbitration if doing so will not have unduly adverse consequences.

2. Consider sending letters before action

In his negotiation best-seller, *Getting Past No*, William Ury describes the value of keeping an objective distance in negotiations over hotly contested issues. He quotes American humorist Ambrose Bierce, "Speak when you are angry and you will make the best speech you will ever regret."

This is also true of letters, especially those exchanged by parties just before their dispute reaches an arbitration. It can be useful to try to calm the waters with a balanced and well-reasoned letter that summarizes the dispute, avoids any inflammatory language or characterizations, and makes clear exactly what you are requesting and whether you are open to resolving the dispute through negotiation or mediation before arbitration.

Consideration should also be given to sending the letter under the signature of the party rather than counsel, absent a "without prejudice" disclaimer. Even if it does not unblock negotiations, the letter will still make a better exhibit in the arbitration than the nasty correspondence that may have preceded it.

3. Mitigating risks of internal and external communications on the issues in dispute

When a dispute arises, it is natural for the people involved to speculate about the possible causes and potential consequences, often via e-mail. They should be warned that their informal internal communications may be produced in an arbitration (even if they would not have been subject to production in litigation in the party's own country). Directing communications to the attention of counsel, or at least keeping counsel informed, may help preserve arguments of privilege, where such documents may be subject to production.

While it may not be feasible to cease corresponding with the opposing side, relevant people in the party's organization should be advised of the importance of conferring in advance with counsel. This may seem common sense, yet often witnesses will be surprised when see their e-mails or faxes produced by the other side in the arbitration. This does not necessarily mean counsel must take over the drafting process, although sometimes they must do so. Even with minimal involvement, counsel can help avoid having letters sent MS Word file that contain meta data with the identity of each person who contributed to the draft.

4. Document retention notices

Although some jurisdictions (mainly the USA) require lawyers to take positive steps to avoid the deletion of relevant documents (spoilation), it generally makes sense to advise all involved in a dispute to preserve their documents. In an international arbitration, documents will often be more important than any witnesses. Once employees have been advised to retain their documents, they can be gathered and reviewed at a future date.

For small and large organizations, a Document Retention Notice (DRN) can be a simple e-mail to employees believed to have documents ("custodians") explaining the existence of the dispute, the nature of the documents that should be preserved, and how to preserve them. Some companies use software programs that will automatically send DRNs, update them periodically, and flag for human resources any custodians who may be about to exit the company.

5. Identifying and notifying key employees and witnesses

A good reason for preferring the civil-law style of arbitration over the common law is the preference for contemporaneous documents over witness testimony as evidence. This makes obvious sense for most business disputes, where there will generally be a written record of the parties' course of dealings. (Given recent research on the unreliability of witness testimony, the preference for documentary evidence probably makes sense for most or all forms of dispute resolution, but that's beyond the scope of this post….)

Where witness testimony is anticipated, it would be wrong to assume that employee-witnesses will be readily available by the time of an arbitration hearing. They may no longer be with the company (or even alive), and those do remain may feel overburdened or reluctant. Thus, it is important to reach out not only to potential witnesses to help set their expectations, but also to human resources and supervising managers who can take steps to ensure they will be available at the time an arbitration hearing takes place.

6. Notifying insurers or prior owners

This may seem obvious to others, but I include this step on my list because it is too easy to

overlook despite its importance. Even when there is doubt over insurance coverage, there is no downside to preserving the right to claim coverage later. Many insurance policies require notification within a short time period after the party becomes aware of a covered event, giving the insurer the opportunity to assume the defense and appoint counsel. Notice can usually be short and skeletal, with just enough detail to explain why coverage may exist.

The same is generally true of a seller's indemnity. Because business acquisition agreements tend to be more restrictive than insurance policies in the scope and timing of what may be claimed, it is advisable to review and carefully follow any contractual requirements for notifying claims.

7. Preparing for any media inquiries

Despite what one may read about concerns over confidentiality in international commercial arbitration, the truth is that only the parties themselves will have any interest in most contract disputes. Investment arbitration, where broader public interests will often be at stake, is an entirely different matter. For cases that generate public attention and interest, parties should be careful about litigating in the media.

First, they should disabuse themselves of any notion that the media will tell the story as they believe it should be told. Good journalists will always want to have the arguments of the other side to present (no matter how ridiculous they may sound to you), and less qualified journalists will just want to present the dispute, ignoring reality. Second, asserting an aggressive position in the media may constrain the other party to escalate in kind, forcing each side to adopt rigid and extreme positions in public that will undermine any settlement efforts.

Where media inquiries are expected, it usually makes sense to have ready a short, general statement (sometimes called a "holding statement"). This can summarize the party's position, or simply acknowledge the existence of dispute and the parties' intention not to comment on it.

8. Briefing management (or the client)

When a dispute is about to reach the point of arbitration, counsel cannot over-communicate about its consequences to the party, including to a company CEO or division president. Counsel should be prepared to field questions of what the arbitration will be about, why the parties have been unable to resolve their dispute, how long the arbitration will take, what it is expected to cost, and what the outcomes could be.

9. Conducting an Early Case Assessment (ECA)

Many companies, my own included, consider an ECA to be an essential tool at the onset of a significant dispute, to be completed within a reasonably short time period and updated periodically as the arbitration progresses. The ECA, which is typically (but not always) performed by external counsel, should include a review of relevant documentation, interviews with witnesses, and discussions with potential experts. It should give a party an early sense of probable outcomes and costs of the arbitration, which may also force more realistic and informed negotiations to take place.

In the words of a wise general counsel for whom I used to work, "what the business leader wants to know is whether the deal I can get today is better than the result that I'll end up with in arbitration." A good ECA will do exactly this. Many lawyers lose respect and even client

relationships because they limit themselves to saying “it depends”. If you have the courage and competency to translate the uncertainty of an arbitration into terms that a business leader can use, you will have a friend for life.

10. Exploring informal resolution options (negotiation and mediation)

The best resolution of a dispute, at least from a party’s perspective, will usually be no dispute at all. There are often multiple paths to attempting a settlement before reaching the arbitration with the usual default being another round of negotiations between the parties. This may be effective at times, but it may also waste an opportunity to engage in mediation at a critical moment.

If mediation is an option, counsel will want to begin preparing the foundation for it almost immediately. The party itself (its employees and management) will need to understand the process, the reasons for proposing mediation, and have reasonable expectations for an outcome.

A frequently asked question is, when is the right time to propose mediation to the other side? In most cases, the answer is the sooner the better. There is a common misperception among some litigators that mediation is effective only after the case has been sufficiently developed. From an in-house counsel’s perspective, this just sounds like a request to spend more of the client’s money before settling.

As with most checklists, it is likely that important items have been omitted, and hopefully these will be pointed out here so the list can be improved. I should note that my checklist purposely does not include appointing external counsel. The issue merits a separate checklist of its own, which should be for another post….
Note: a version of this checklist appears in *International Arbitration and Mediation: A Practice Guide* (Kluwer 2010), where it is enhanced and improved by my co-author, John Savage.

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