

Kluwer Arbitration Blog

Arbitral Institutions and Party Expectations, Part I: We Need the Eggs

Michael McIlwrath (MDisputes) · Tuesday, November 20th, 2012

Arbitral institutions must feel at times like the psychiatrist in the joke from *Annie Hall*:



A man goes to a psychiatrist and says, “my brother has a real problem. He thinks he’s a chicken.” The psychiatrist raises an eyebrow and says, “I see. Have you tried telling him that he isn’t a chicken?” The man answers, “I would... but we need the eggs.”

Parties to arbitration are part of our own problem. Naturally so, that’s why we’re in arbitration. We may view the other side as unreasonable or even crazy, and they may think the same about our side. So, given the choice between *ad hoc* or institutional proceedings, many of us prefer to have an institution manage the details of our disputes.

The question is, can arbitral institutions meet party expectations under these conditions of potentially competing, conflicting, and even self-contradictory demands?

Turns out that often they can, or at least they can try, if the parties give them the opportunity.

I learned this, with some embarrassment, following one of the first international arbitrations I experienced in my position as in-house counsel. It had been a particularly acrimonious ICC proceeding with sizeable claims and counterclaims among four distinct parties. After two years of arbitration, however, we were still at least two more years away from an evidentiary hearing. The parties’ animosity towards each other gave way to frustration with the arbitral process, and this frustration provoked a settlement.

The tribunal, after being informed of our agreement, claimed the entire advance against fees that we had deposited. This was well over half a million dollars. In a rare moment of accord, all four parties decided to protest the arbitrators’ request to the institution’s secretary general, Anne-Marie Whitesell. She agreed to review our complaint and to meet. The other parties delegated this last part to me.

I remember animatedly recounting how we had settled in spite of the arbitral tribunal, not because of it, and that after two years we were still closer to the beginning than to the end.

Whitesell had spent considerable time reviewing the case file, and patiently pointed out three things. First, none of the arbitrators had been chosen by the institution; all were confirmed after having been nominated by the parties. Second, our progress (or lack of it) appeared to be due to the tribunal's deference to the parties' requests to make additional, voluminous submissions.

Third, and perhaps most importantly, none of the parties had ever expressed dissatisfaction during the course of the proceedings. At least to the institution, the procedure appeared to have been what the parties genuinely wanted.

I wish I could say that I was prepared for her observations and had a ready answer. But I wasn't and didn't. I said only that the parties wished the institution had been more proactive in saving us from our own worst tendencies. I might as well have said, "yes, but... we need the eggs."

Whitesell politely listened and graciously offered to look into how the institution could have played a more active role in supervising our case. As to the purpose of my visit, she indicated the ICC Court would decide the amount of the advance to be paid to the arbitrators based on how far the proceedings had progressed at the time of our settlement. (I do not recall the result, except that the parties felt we could live with the amount that was eventually refunded.)

More importantly, the meeting with Whitesell was the source of a lesson I've since shared with colleagues: not to play a passive role when dealing with an institution. By informing the case manager, director, or secretary general of dissatisfaction with the procedure, a party can rightly expect the institution to at least look into the concerns and potentially take steps to address them. This includes those situations where the parties themselves are responsible for derailing the process.

If any of the parties feels intimidated by the possibility that the tribunal may hear of their complaint, they can request the institution not to disclose that the issue was raised by a party.

What could an institution have done in our case, had we involved them earlier?

The case manager might have sent the tribunal an inquiry regarding the lack of progress in the case file as a gentle means of drawing attention to the lack of progress; less gently, the institution might have urged the tribunal to adopt a quicker pace despite the parties' acquiescence to longer proceedings, or refused to grant extensions of time to render an award; or they might have used other means of persuasion in the dialogue that takes place between case manager and tribunals. Some institutions might even have invited the parties to use their mediation services to end the arbitration sooner through settlement.

In other words, they could have given us some eggs.

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Arbitral Institutions and Party Expectations, Part 2: the Rules of Arbitration of the Finnish Chamber of Commerce

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