Kluwer Arbitration Blog

Tribunal Logisitics: Before, During and After the Hearing

Nicolas Ulmer (Budin & Associés Avocats) · Monday, August 12th, 2013

Introduction

Unable to make this year's ASA Conference I accepted the invitation to submit a brief paper which I entitled: "Six Modest Proposals Before You Get to the Award". A principal theme was Tribunal logistics and attention.

I was happy to receive some positive feedback and have given this theme more thought. Arguably I have become yet more modest as I now cutback to three chapters and a few anecdotes:

1. Before Trial

Often the first meeting of Tribunal and parties is exclusively devoted to procedure and scheduling; this is a waste. When possible counsel should be told to be prepared at the first procedural meeting or conference call with a "no prejudice", brief but intelligent view of the substance of their case/defence and how they expect to submit it. Counsel are sometimes uncomfortable with this – and want to keep options open – but it is still worthwhile. The arbitrator(s) also need to be prepared to give intelligent – if sometimes tentative – instructions and repartee (e.g. "well if that is going to be your position we will need detailed information and pleading on the mandatory corporate law provisions of X" or "we will likely need considerable background on the customs and practices of widget trading in Y"). This focuses matters on what needs to be proved/proffered rather than who is "right". In my experience it also sometimes smokes out potential issues such as one party's desire for a Tribunal ordered expertise or an arbitrator whose views may be formed faster than the evidence allows…

2. Hearing: Before, During and After

a) Pre-Hearing Solidarity

The cohesiveness and thoroughness of the Tribunal is enhanced if time is taken to have a proper pre-hearing meeting to discuss the evidence and issues, and what the arbitrators are expecting from the hearing (the scheduling of such a formal meeting also heightens the likelihood that the arbitrators will usefully read the file in order to be prepared for the discussion). All too often one or more arbitrator flies in the morning of the arbitration itself, or late the previous night. I recently had an experience as chairman where, appointed by an arbitral institution, for a relatively small case, I knew neither of the co-arbitrators. I arranged to have a several hour meeting and **then** dinner and drinks, the day before the hearing. It was also agreed that one of the arbitrators, who had particular expertise in a pertinent issue of law would provide a neutral memo to the Tribunal

with the latest cases and doctrine. By agreement, I ended up drafting the Award and circulating it and our “deliberations” were efficiently carried out by conference call and email. I do not believe it would have gone as smoothly if the prior efforts at exchanging ideas had not been undertaken.

b) Paying Attention At Hearing

That arbitrators should pay attention at hearing would seem obvious, but they often don’t. I was counsel in an ICC arbitration where all three of the arbitrators were (almost constantly) sending and receiving messages on their Blackberries **during** witness testimony (they sought to conceal this by holding the devices under the table – but it was still visible, and from where my paralegal sat he had a good view of all three texters, which he reported to me). Since that hearing I have also been in a case where an expert witness sent at least one email from his IPad during his testimony. The aforementioned ICC case was a model for two other problems that should be of concern. First, most of the Chairman’s comments concerned speeding up the proceedings, cutting-off areas of testimony, dispensing with the last afternoon of the hearing, so he could set up earlier plane, no translation of the testimony, etc.; in short, the Chairman could not have made more obvious that his priority was to get out of town (Geneva) to return to his office (elsewhere in Europe) and that he had larger cases (this case involved about Euro 20 million in dispute). I should mention that this Chairman is a **very** well-known arbitrator who runs an “arbitration shop”. I would never agree to this appointment again, although he is a “big name”, and I am on good terms with him personally (and served with him on a panel – but the case settled early). Another attention problem in that case was language; one of the arbitrators, it developed, spoke but was not fully at home in the language of the arbitration (French). He was selected (by me alas) in large part because he was a prominent lawyer in the country whose substantive law applied to the dispute, and because he spoke perfectly serviceable French when I contacted him.. At hearing he should have concentrated very hard to compensate for his language disability, but I think he switched off; not surprisingly, he never asked a question (but I did notice the difference in his level of attention when a witness testified in his native language). There are many other anecdotes that most experienced arbitration counsel could contribute (the elegant Belgian Chairman who constantly had his secretary come into the hearing room with unrelated letters and documents for him to sign comes to mind), but the point is the same: some arbitrators do not give the hearings their best attention, including many of the “big” busy ones. Bad form, bad practice.

Furthermore, no sooner is a break called in a hearing than the arbitrators are on their phones to their offices, or are sending emails. Some of this is inevitable, but it should not be **every** break. Well-run arbitral tribunals should seize mid-hearing occasions to discuss the evidence they have just heard while it is fresh in their minds. Often not all arbitrators understood the witness the same way – raising issues for possible follow-up in the hearing or on the transcript. It can also be important to use the breaks to discuss what is expected of upcoming witnesses and interrogations the tribunal may have, i.e. to “take the temperature of the hearing”. I remember several arbitrations where one arbitrator was **never** present during the breaks and often had to be located when hearings recommenced. When I am a sole arbitrator, I try to use the break to reread the witness statements and my notes as to the next witness.

c) Discussion After Hearing

In a fairly large arbitration venued in Miami the Chairman immediately after the hearings caught a plane home. My co-arbitrator and I lived much further away (South-America and Europe) and had to wait until the evening of the next day to get our flights. We tried to make progress on the case, but it was difficult without the Chairman. Moreover, although my co-arbitrator and I got along well we did not agree on one – quite difficult – issue of interpretation (in fact I ended up being a part of

the majority and the South-American arbitrator dissented – albeit on that point only not on the other parts of the Award, but we couldn't sort that at the time). In another South American case I made a point of staying an extra day in a Latin American capital after the hearing so we could deliberate – as after that all communications would be by email and phone. Unfortunately, despite the Chairman's best efforts, the discussion was unfocussed and my co-arbitrator was far more interested in topping off the hearings with a pleasant lunch (we were able to put that off until 14:00) than in systematic review of the evidence. This same co-arbitrator – although he agreed at the time that the Chairman should circulate a draft – professed to be shocked when he got it. After many long and painful email and phone exchanges this co-arbitrator issued a detailed dissent (whose provenance I would question). While I doubt that any amount of deliberations would have caused this particular arbitrator to see the contract and the evidence the way the Chairman and I did (and we two had very similar views of the evidence) a longer and more disciplined deliberation would have helped "flush out" the arbitrator's viewpoint (or bias) earlier and reduced this arbitrator's subsequent complaints that his views were not taken into account. If all the arbitrators live in the same area, then this post-hearing deliberation may be put-off – but that is most often not the case, and I have sat on several Tribunals where the three arbitrators lived on different continents many thousands of kilometers and many times zones, apart. In such circumstances it is irresponsible to leave the hearing without seeking a disciplined meeting to discuss evidence and award. The time used for this purpose will almost always result in a better and faster award.

3. Do Not Delay Writing the Award

All too often an arbitral tribunal, or a sole arbitrator, has blocked out time for the hearing, but is then immediately occupied with other cases or matters that have been put off by the hearing. The result is that it takes weeks, or even months, before the arbitrator turns to the details of the case – which he or she then has to "relearn". In particular (and I know from frustrating personal experience) the arbitrator has lost intimate familiarity with the documents and where to find specific documentary passages. Obviously the process of writing an arbitral award takes time and reflection (and for the conscientious arbitrator is usually stressful). But there is little or no question that Awards are more faithful to and correctly cite evidence if the process is begun promptly after the close of the evidentiary hearing. If possible it is highly useful for the arbitrator to organize and review the file **before** receiving the Post-Hearing Briefs, and not just wait on those briefs before doing any work. All too often, however, arbitrators are immersed in a wholly different matter once the hearings terminate. This is in turn linked to what I have dubbed the "Arbitration Industry", one phenomenon of which is that many full-time arbitrators are more concerned with scheduling as many hearing and cases as possible, than in promptly and personally bringing each one to a proper resolution.

Nicolas Ulmer (nicolas.ulmer@budin.ch)

This entry was posted on Monday, August 12th, 2013 at 7:20 pm and is filed under Arbitral Tribunal, Arbitration, Arbitration Proceedings, Arbitrators
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.