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ICCA 2014. What Do Users Really Think About Document Exchanges And Interim Measures?

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How can arbitrators ensure the fair exchange of documents, and what role should arbitrators play in calling expert witnesses? When and how, if at all, should interim measures be used in international arbitration proceedings? These questions were tackled during a breakout session titled *Arbitral Legitimacy: The User's and Judge's Perspectives* at the ICCA Miami 2014 Congress, on Tuesday, 8 April. The panelists included in-house attorneys, Karl K. Hennessee, Vice-President of Public Law & Technology with Halliburton Energy Services, Clyde W. Lea, Deputy General Counsel of Litigation and Arbitration with ConocoPhillips, and Judge Vance E. Salter of the Third District Court of Appeal of Florida. The chair of the panel was José I. Astigarraga of Astigarraga Davis in Miami, Florida.

Like with most things in life, there were no clear answers to the questions posited during the debate. Mr. Lea opined that document production is a strength of arbitration given the abuse that sometimes occurs in litigation. The challenge he claimed, however, was the ability and willingness of arbitrators to ensure compliance.

This led Mr. Hennessee to discuss the "myth of the courageous arbitrator." He explained that unlike judges, arbitrators do not have to worry about appellate review of their decisions, yet often times, it seems as if judges are more willing to flex their muscles by, among other ways, sanctioning parties. Mr. Astigarraga inquired as to whether perhaps arbitrators are less bold because they depend on a consuming public and have a market reputation to protect.

This inquiry led the panel to discuss the selection of arbitrators, and specifically, if there is a preference for the selection of civil law arbitrators versus common law arbitrators. Messrs. Lea and Hennessee appeared to agree that each case is different and requires different arbitrator skills, though Mr. Lea did explain that as corporate counsel, he is reluctant to use an American trial lawyer as an arbitrator.

Mr. Hennessee followed up that what users want is "certainty." Rules need to be set so that the parties can know what to expect. The question that followed is at what stage should an arbitrator decide the scope of document exchange that will be permitted. Judge Salter explained that Florida courts often require document production management discussions at the outset of a case. Mr. Lea also explained that in arbitrations, document production requests are often made at an early stage of the dispute and that arbitrators are therefore forced to resolve a document production dispute before they have full knowledge of what the case is about. He stressed that arbitrators need to be

able to adapt to the case because one process does not fit all cases.

The panel then turned to the question of interim measures. The corporate counsel panelists did not appear to be fans of such measures in international arbitration disputes though recognized that they are sometimes necessary. The question was asked about the use of strategic requests for interim measures wherein one party requests such measures for the purpose of planting the seed of an idea to help shape the arbitrator's thinking for the future. Judge Salter stated that in his opinion, such a tactic —often referred to as a "rolling start"— is not very effective.

Finally, the panel discussed the question as to who decides on witnesses, and specifically, should arbitrators call upon fact witnesses to testify or appoint expert witnesses. Mr. Hennessee acknowledged that there is sometimes a role for tribunal-appointed experts, but that the need is usually obviated if the parties engage experts early enough in the dispute to allow the experts to help guide the proceedings. Moreover, Mr. Hennessee explained that parties should be careful to select arbitrators with sufficient expertise regarding the subject matter of the dispute, which in turn, could also lessen the need for an expert.

With respect to arbitrators calling witnesses, Mr. Hennessee opined that an arbitrator should be strong and engaged, but there is a line that should not be crossed. Where that line lies is not clear. Somewhere between a laissez-faire and activist arbitrator "is just right", he joked.

So what was the take-away? There is no one-size-fits-all solution for dealing with document production, the calling of witnesses or requests for interim measures. Each dispute is it own story with its own facts and characters. In order to ensure the just and efficient resolution of a dispute, arbitrators should be flexible and should analyze the case at hand to anticipate the particular challenges that may arise in the particular dispute. Taking these steps, arbitrators can help ensure that the process is fair and provide the much needed certainty that users seek when choosing to arbitrate a dispute.

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