Kluwer Arbitration Blog

Efficient Arbitration – Part 3: Winning an Efficient Arbitration

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Following up on Efficient Arbitration – Part 2: Launching an Efficient Arbitration, where we addressed efficiency tools available at the early stages, we now provide an overview of options to save time and costs up until the award. As we continue our efficiency series, we will zone in on a selection of efficiency tools and discuss our experience using them.

5. Focusing the Evidence

Gathering and presenting the right evidence is key.

This often requires close cooperation between counsel and the parties who have the best access to documentation and fact witnesses. Where documentation is kept by the opposing party, agreeing on a document production phase might be advisable. However, document production should be a focused exercise. To avoid fishing expeditions, discovery requests are best addressed at the CMC. This permits the tribunal to direct the parties to the evidence required to determine the case.

Expert witnesses play an important role. They should be carefully selected and thoroughly briefed. While in-house experts might be cheaper, parties should be mindful of their potential (at least perceived) partiality (IBA Compendium of Arbitration Practice 2017).

Preparing fact and expert witnesses for the hearing is a costly exercise; in particular, if mock hearings are held for counsel and the witnesses. However, witness and expert testimonies are valuable. The costs of preparing the witnesses will often prove worth it.

Other relevant tools may include expert conferencing, electronic filings (see also Leon Kopecký's A Case for Paperless Arbitration), splitting exhibits into "core" and "supplementary" categories (i.e. exhibits likely and unlikely to be referred to at the hearing), and pleading the applicable law rather than relying on legal experts.

6. Streamlining the Hearing

Hearing practicalities have the potential to save (or waste) significant resources. Efficiency considerations will include: selection of venue, adoption of a tight hearing schedule (chess-clock process), decisions on which witnesses to call (and cross-examine), agreement on paperless hearings (see also Leon Kopecký's A Case for Paperless Arbitration), and the use of video conferencing (ICC Guide on Effective Management of Arbitration).

Transcript services should also be borne in mind. Less complex, low value disputes may not justify the expense of live daily transcripts. Similarly, consecutive interpretation may be more accurate, but will certainly prolong the duration of the hearing (ICC Guide on Effective Management of Arbitration).

Finally, where issues have been fully covered in submissions, counsel should consider whether opening statements are really necessary, and if so, whether they could at least focus only on the key issues. Naturally, this will depend on the tribunal's familiarity with the submissions and supporting documentation.

7. Post-Hearing

Post-hearing briefs are popular among parties who wish to seize this last opportunity to (re-)present their case. In reality, however, the time to present evidence has passed. This limits the benefit of post-hearing submissions. At the same time, these submissions are costly, as preparing them requires a thorough review of the previous submissions, the evidence submitted and the hearing transcripts.

If at all necessary, post-hearing briefs should be limited in scope, length and timing (see ICC Guide on Effective Management of Arbitration). They should be drafted to assist the tribunal, and not restate the parties' submissions and closing statements.

While parties might be tempted to re-plead their strongest arguments, or to sneak in new ones, the cost/benefit analysis will often speak against post-hearing submissions.

In conclusion…

Designing an efficient arbitration is an important and daunting responsibility. Counsel has to determine in every case and at every stage whether resources are being invested or wasted. While utilizing the right efficiency tools will save time and costs, selecting the wrong ones might jeopardize the party's chances of success in the arbitration.

The quest for efficiency therefore remains a balancing act. But the goal is not more than just saving: it is achieving the best possible outcome with the least amount of resources. After all, there is one thing that is more important than saving.

Winning.

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