IADC COMMITTEE NEWSLETTER

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IN THIS ISSUE

Parties are in control of the arbitral procedure and have therefore the ability to make arbitration proceedings more efficient, speedy, and less costly without harming the result. They can do that by (i) concentrating the briefs to the real factual and legal issues, (ii) by agreeing in the procedural order no. 1 that the party requesting document production will advance the cost to the other party subject to a final decision in the award, or waiving discovery, and (iii) by presenting witnesses only who have personal knowledge und whose knowledge is not tainted. The parties decide whether an arbitration is efficient, speedy, and less costly.

How to Make International Commercial Arbitration More Efficient, Speedy, and Less Costly

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ABOUT THE COMMITTEE

The International Arbitration Committee serves all members involved or interested in international arbitration as in-house and outside counsel and/or as arbitrators. This extends to actions for or against the enforcement of arbitral awards in their jurisdiction and actions aiming at setting aside arbitral awards. Members publish newsletters and journal articles and present educational seminars for the IADC membership-at-large, offering expertise on drafting arbitration provisions, choosing arbitral institutions and rules, and the do's and don'ts in international arbitration. The Committee presents significant opportunities for networking and business referrals. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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International commercial arbitration is often and accurately criticized for being too slow and expensive.[1] However, delays and exorbitant costs in these cases are not inevitable; they are the result of intentional but frequently mistaken choices by the parties and their counsels.

Flexibility is one of the key benefits of international arbitration.[2] The parties can, within applicable mandatory laws, structure the arbitral process by amending procedural rules and tailoring procedures to the needs of the dispute, while achieving an efficient, speedier, and cheaper resolution of their dispute.

Excessive costs in arbitration are incurred by three causes: the unnecessary length of the parties' submissions, overbroad discovery of documents, and the ineffective and abusive selection, preparation, and examination of fact witnesses. It is possible to reduce such costs without harming the quality or fairness of the proceedings or the result. Indeed, the costs of these activities are often disproportionate to the anticipated benefits.

Submissions Could Concentrate on Real Issues

Many parties file lengthy briefs covering every potential aspect of the case. Their submissions would be more effective if they were limited to the significant, relevant, and material issues of the factual and legal disputes. The briefing process could be improved if the arbitral tribunal could, after having studied the first round of briefs, with the permission of the parties, define the issues the tribunal regards as relevant to the case and material to its outcome. Such a practice is encouraged by Art. 2 para. 3 of the 2020 IBA Rules on Taking Evidence in International Commercial Arbitration (IBA Rules).[3] Thereafter, without limiting their right to argue other issues, the parties could concentrate their briefs on topics of interest to the tribunal.

Overbroad Document Discovery Requests are Seldom Worth Their High Cost

Article 3 of the IBA Rules allows the parties to submit a request to produce documents to the arbitral tribunal and to each other. Paragraph 3 of Article 3 requires the requests to specifically identify the desired documents or a narrow category of documents and explain why these documents are relevant to the case and material to its outcome. However, too often parties deliberately submit discovery requests for "any and all" broadly described categories of documents. Thereafter, each party will object that the requests are

[1] This complaint was raised in all Queen Mary studies from 2006 to 2021. *See* International arbitration: Corporate attitudes and practices 2006, at 19; 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, at 24; 2018 International Arbitration Survey: The Evolution of International Arbitration, at 8; 2021 International Arbitration Survey: Adapting arbitration to a changing world, at 2, 13 et seq.

[2] Gary B. Born, International Commercial Arbitration, 2nd Ed., at 84 seqq.

[3] These Rules are often applied to or used as guidance in international arbitrations by agreement of the parties.

neither narrow nor specific nor relevant or material to the outcome of the dispute. Then the arbitral tribunal will either permit or deny the contested requests, as it is not the tribunal's role to cure the parties' drafting errors. As a result, often the parties will not obtain the requested documents; instead, they spend a lot of time – and money – arguing without benefit.

Therefore, a lot of money could be saved if document discovery were targeted or not used at all. Most parties do not find the smoking gun that changes the case in their favor despite time and money arguing. From a civil law perspective, justice can be rendered without a discovery of document procedure. The parties in international commercial arbitration can choose to pursue ineffective discovery of documents procedures; but then they should not complain that arbitration is expensive.

Some Suggestions to Make Discovery Requests More Efficient and Cost-Effective

If the parties despite the high cost still prefer to request the discovery of documents, the parties or the arbitral tribunal could be inspired by the discovery related stipulations of the JAMS Recommended Arbitration Discovery Protocols for Domestic Arbitration[4] and amend the IBA rules. To increase the speed and cost-effectiveness, the tribunal should agree with the parties in the Procedural Ordner no. 1, that the party who requests a discovery of documents shall advance the reasonable cost of production, including attorneys' fees, of the other side subject to the allocation of costs in the final award. Thereby, the requesting party will consider whether it really needs such documents to prove her case. And costs should be reimbursed in the award only if the produced documents were filed and the tribunal considered these documents as relevant and material for the decision. Additionally, as suggested in the JAMS discovery protocol, electronic documents should be produced only from sources used in the ordinary course of business absent the showing of a compelling need to produce required documents from backup servers, tapes, or other media.

By these measures, each party will consider whether the requested documents are really needed to prove her case.

Fact Witnesses in Arbitration Often do not Influence the Decision

Fact witnesses in international commercial arbitration can be valuable if they have uncontaminated, direct knowledge of the relevant facts or can explain gaps in documents. A witness should give his or her own evidence uninfluenced by what anyone else has said. The parties are free to identify the witnesses on whose testimony they intend to rely. However, increasingly, the present form of preparing and presenting witness testimony in international commercial arbitration adopts the Anglo-US

[4] www.jamsadr.com

litigation model. Many practitioners question whether this model of presenting witnesses really helps the arbitral tribunal find the truth.

For example, Toby Landau, KC, opines that this practice of selecting, preparing, and presenting witness testimony may corrupt the very evidence that arbitral tribunals rely upon for the fair resolution of disputes.[5] The practice is also expensive, as a lot of time and money is spent – and possibly wasted - in the selection, preparation, presentation, and cross-examination of fact witnesses. Often the selection of a given witness does not allow the arbitral tribunal to find the "truth", if that witness is not really the person with the best personal knowledge. Instead, the selection of witnesses can be a highly strategic exercise aimed at selecting persons who are best able to present and express themselves, to give a favorable impression, support the official case, and effectively withstand cross-examination. Additionally, written witness statements have little to do with the actual words and recollections of witnesses and rarely contain their actual, unassisted recollections.

This practice raises the question of whether preparation of the witness statements and rehearsals in preparation for the cross examination constitute legitimate witness familiarization or distortion of the witness' memory. The ICC task force regarding Maximizing the Probative Value of Witness Evidence[6] concluded that the memory of an honest witness can easily become distorted by the interactions which commonly take place in the preparation and presentation of witness evidence and may therefore be less reliable. Thus, the testimony of a witness whose memory was refreshed or even trained in mock cross-examinations may not be the uncontaminated memory of the witness.

An arbitral tribunal may not know which testified facts correspond to the original memory of a witness and how much was learned and memorized by the witness during the witness preparation. Even worse for the offering party, the tribunal may recognize when witnesses don't have direct personal knowledge and discount their testimony accordingly. Thus, the time and effort devoted to proffering that evidence may have been wasted, as the tribunal makes its decision based on other proof or based on the burden of proof.

Parties Have the Option to Make an Arbitration Quicker and Less Expensive

Unnecessary lengthy briefings, unproductive efforts to discover documents, and the improper selection and presentation of fact witnesses are unlikely to significantly influence the decision of an arbitral tribunal in favor of the offending party. Concentrating on the material issues in dispute, avoiding or limiting discovery of

[5] Kaplan lecture 2010: Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration

[6] ICC Commission Report: The Accuracy of Fact Witness memory in International Arbitration, published in June 2020

documents requests, and eliminating fact witnesses with no or little personal knowledge can speed up the arbitral process and significantly reduce cost and expenses. Therefore, parties have the ability to save time and cost without damaging their cases.

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