MANNHEIMER SWARTLING

Procedural Management in Arbitration

Robin Oldenstam – Norwegian Arbitration Day 2020

The old ways worked fine…

- Mono-cultural participants → lighter version of domestic rules for litigation
- Social control in a small, local arbitration community
- Less procedural and substantial complexity and smaller value claims
- Less focus on efficiency as to time and cost

→ **Sufficient with informal procedural rules and light-touch case management**

…but are less well suited for the modern arbitration environment

- Multi-cultural participants
- Less social control in a larger and increasingly global arbitration industry
- Increasing procedural and substantive complexity and higher value claims
- Increasing focus on efficiency as to time an cost
- Increasing tendency to assert due process infringements and challenge awards

→ **More need for formal procedural rules and stricter case management**

A few principles for efficient procedural management of international arbitrations

- Take a polite, but firm, hands-on and pro-active approach
- Align expectations by providing clear rules on all anticipated matters of procedure
  - providing flexibility and discretionary powers for the Tribunal
- Adopt clear time-table for entire proceedings
  - resist deviations that may jeopardize the due date of the Final Award
- Solicit the parties' agreement to governing rules, time-table and other matters

Due process considerations

- Due process essentially entails
  i) an unbiased, rational and foreseeable procedure;
  ii) a reasonable opportunity for each party to present its case; and
  iii) equal treatment of the parties

- A procedural decision has to be “unjustifiable” for a challenge to be successful (Swedish Supreme Court case NJA 2019 s. 171 “Belgor”)

- However, within the limits of reason, Tribunal’s should endeavor to leave especially the losing party procedurally satisfied

Best practices in international arbitrations - PO 1

- Clear, practical and detailed rules on all anticipated matters of procedure

- Drafted by the Tribunal in consultation with the parties

- Caters for
  i) alignment of expectations
  ii) orderly conduct of proceedings
  iii) foreseeability
  iv) efficiency; and
  v) reduced risk for subsequent challenges on procedural grounds

Best practices in international arbitrations - Timetable

- Decided by the Tribunal in consultation with the parties
- Front loaded
- Only two rounds of substantive submissions;
  i) Statement of Claim and Statement of Defence
  ii) Statement of Reply and Statement of Rejoinder
- Document production between the first and second round of submissions

Best practices in international arbitrations - Rules precluding late submissions

- Rules requiring each Party to set out its full case, including all evidence, witness statements, expert reports and legal authorities in the first round of submissions
- Rules limiting the second round of submissions to addressing only new facts, arguments and evidence raised by the other party
- Rules allowing the Tribunal to reject any unsolicited submissions (including parts of submissions which fall outside the Tribunal's procedural directions)
- Cut-off date for submission of any new facts or evidence in advance of hearing

Best practices in international arbitrations - Hearings

- Short opening statements
- Written witness statements – focus on cross-examination
  - Direct examination allowed for experts
- Short oral closing arguments → Post Hearing Briefs (focusing on certain topics)
- Short overall time for hearings – “chess-clock” as a means to allocate time?

Practices from international arbitrations migrate into domestic arbitrations

- Best practices in international arbitration facilitate control, foreseeability and efficiency
- Equally useful in many domestic arbitrations
- Increasingly, features from international arbitrations are also being adopted in domestic arbitrations
- This trend is especially pronounced in expedited arbitrations where efficiency as to time and cost is of particular importance

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