Participant’s Report on the Workshop

STRATEGY CONSIDERATIONS IN INTERNATIONAL ARBITRATION

By Ghada Qaisi Audi

A. Introduction

The workshop pulled together a highly motivated and prepared group of speakers and moderators, namely Professor Karl-Heinz Böckstiegel, Boris Kasolowsky (Freshfields Bruckhaus Deringer), Alexandra Schluep (Schutte Schluep & Heide-Jorgensen), Alexander Steinbrecher (Bombardier Transportation), Ruth Mosch (DIS), Ndanga Kamau (King & Spalding), Melanie van Leeuwen (Derains & Gharavi) and Philipp Wagner (Weitnauer Rechtsanwälte). It was held on 24th October 2012 at the offices of Freshfields Bruckhaus Deringer at Potsdamer Platz and was attended by 20 Young ICCA members and 10 young DIS40 members. The workshop was preceded by a dinner the evening before, and followed by the DIS40 Colloquium “Documentary and Witness Evidence in International Arbitration” later that afternoon. It was timed to coincide with the German Institution of Arbitration’s (DIS) Autumn Conference being held in Berlin.

B. Strategy Considerations Prior to the Hearing

The first session of the workshop was dedicated to pre-hearing strategy considerations and was divided into three sub-topics: interim measures applications, contract interpretation and the use of witnesses in support of interpretation of ambiguous provisions and client handling issues, such as budgeting, advising on likely costs and understanding client’s objectives.

1) Interim measures- how and when to seek them?

Interim measures for security of costs can be applied for and awarded on a summary basis. Often, the award against one side for interim costs can end the matter at that stage without going into the merits. Alexandra Schluep noted that in relation to proceedings in The Netherlands, one advantage of interim cost orders being awarded *ex parte* is that it can be very effective when the other side gets notified of the award against them.

Interim measures are awarded rather frequently. As confirmed by Professor Böckstiegel, in about 25% of cases in which he has acted as an arbitrator, interim measures have been sought and/or awarded.

So called “strategic requests” for interim measures, i.e., requests which a requesting party may not seriously consider that they will be granted, may make a strong impression, especially early in the proceedings. However, Ms. Schluep noted caution must be exercised,

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as the tribunal can see through flimsy requests and it may backfire against the requesting party.

What is in it for the client? On the one hand, often, interim orders serve to wake up the other party and can be used to ensure enforceability of an award, as there are often dramatic consequences for non-compliance with the award. On the other, counsel must make sure that the request will actually persuade the tribunal. Furthermore, considerations need to be taken into account that the requesting party will often have to provide a security for the interim order it seeks.

2) Contract Interpretation

Mr. Kasolowsky explained that counsel have a number of choices available to convince the tribunal that one side’s interpretation is the one to be adopted for rendering of the award in your favor. In this context, it was generally agreed among the panelists that the best evidence should be put forth in this order:

(1) Plain language of the contract itself;
(2) Contemporaneous evidence to signing the contract to consider the ‘matrix of the contract’;
(3) Witness testimony (i.e., parties who participated in the contract negotiations); and
(4) Expert witnesses.

The panelists also agreed that relying on who participated in the negotiations can be the least successful method because witnesses may often be unreliable for a variety of reasons: the person does not really recall the details, or there is a fear of one losing his/her job if an error is admitted. Furthermore, in the nature of drafting contracts, an ambiguous clause may be the only way to get the deal done. Professor Böckstiegel expressed his favor for document production to prove contemporaneous issues and suggested not to rely too much on witnesses if they are still with the organization, as they could fail to remember or their memory could be selective. However, if a witness is put forward, it is advisable to encourage the witness to link the statements to the documents that are on the record instead of making opinions about the legal interpretation of the contract. Professor Böckstiegel further suggested that hearing legal experts orally in the way of expert conferencing (hot tubbing), where both experts are heard at the same time, can be of assistance to the tribunal.

A spirited discussion ensued on the issue of putting forward no witness statements at all when the other side has submitted witness statements. Professor Böckstiegel commented that it is probably better to be on the safe side to have some testimony put forth for the avoidance of doubt and to counter-balance the other side’s statements. A common strategy noted was that counsel often calls a less important witness of the other side for cross-examination.

Alexander Steinbrecher, speaking from the client’s perspective, mentioned that with regards to the role of in-house counsel in the context of contract interpretation, they may have been present in the negotiations and/or drafting of the contract. Furthermore, frequently in-house counsel will have taken minutes and records of negotiations or have sent the counterpart emails summarizing key points as ‘joint views.’

3) Client Handling
Since the client is not in the business of arbitration, the most important objective for in-house counsel is, according to Mr. Steinbrecher, what can be achieved by an arbitral proceeding. In his opinion, the best time to stand before the tribunal is never. In general, clients would look for experienced legal teams having the time needed to devote to a case and having practice experience in ADR. In this regard, Mr. Steinbrecher noted that his preference would be to meet the entire external counsel team, from partner to junior associate before he would retain the team of lawyers. He is in favor of resolving disputes as early as possible and wants to assess the strengths and weaknesses of the case early on. His company makes use of litigation risk analysis to make a business case as to what needs to be invested to obtain as much as possible above the expected value. He mentioned he would like to see more lawyers and clients rely on the IBA guidelines for attorney-client relationships as a starting point of the relationship and joint strategy. He said that he has never seen any counsel who applied all 10 of the Golden Rules. As for budgeting, Mr. Steinbrecher expressed his preference for ‘smart remuneration schemes’ such as incentives to settle as early as possible and suggested the days of the ‘billable hours’ may be over. He stated that as an in-house counsel he would look for legal representation provided on a lump sum basis and breakdowns per stages, as this is useful for strategy assessment and setting the objectives for the client of what is to be achieved. Mr. Steinbrecher explained that the CEO sets a target based upon input from the in-house counsel’s assessment prior to speaking to external counsel. Then, the in-house counsel has to achieve that target; therefore early case assessment is critical.

Mr. Steinbrecher suggested that counsel should be creative in how to assess fees. Mr. Kasolowsky cautioned that incentivizing the outcome of the dispute may not always be in the best interest of the client.

Mr. Steinbrecher explained his organization’s approach to dispute resolution was to employ multi-tiered ADR clauses. In-house counsel in his company are being trained in mediation in order to enhance negotiation ability and to apply a mediation-centered approach to negotiation.

In connection with the issue of arbitration costs, Professor Böckstiegel noted that arbitration has become too expensive and noted a recent study in which 90% of costs in a claim are costs by parties, i.e., lawyers, experts, witnesses, etc. He suggested that it is best to keep the arbitration documents as user-friendly as possible and emphasized the difficulties arising when too many documents are being presented.

Mr. Steinbrecher noted that in arbitration it is the joined responsibility of the client to make sure external counsel can do their job efficiently. He noted the ICC Guidelines on Time and Cost as helpful in that regard.

C. Strategy Considerations at the Hearing

The second session centered on three topics: the audience, the file and the last impression at the hearing.

1) The Audience: Practical Tips for Interacting with the Tribunal
Mrs. Melanie van Leeuwen outlined three important phases of the hearing:

1. Oral opening statements,
2. Examination of fact and expert witnesses, and
3. Oral closing statements and/or post-hearing briefs.

She stressed that it is never too late or too early to develop professional skills for direct and cross-examination and urged counsel to seek specific training if needed. She also explained that the choice of arbitrators is the single most important decision in one’s case as they are the ‘people’ who will decide the case, and their experiences, frame of reference, jurisdiction, and roots in the legal system will all be brought to bear in making particular perceptions on the case and their view of the arguments brought before them. She noted that the facts, legal theories and the sort of relief someone is seeking, if brought before two separate tribunals could yield two completely different outcomes.

It was noted that flexibility is key, and counsel should be mindful when extra breaks might be needed or other changes and adjustments made to assist the Tribunal.

Ms. Ndanga Kamau pointed out that Counsel should never underestimate what questions may arise and should be prepared accordingly. Counsel must not expect to repeat their positions, they should rather be prepared to take into account different positions and evidence and show the tribunal why their respective side should prevail. She also noted that counsel should be aware how they are coming across to the arbitrators and stressed that they should strive to express trustworthiness and calmness. She also noted that knowing your audience is key, and that one ought to have clear themes and be mindful of time constraints.

Professor Böckstiegel, speaking from the view of the arbitral tribunal, emphasized that counsel often speak too fast in their opening statements, which can result in a lost opportunity. He noted that power point presentations might be helpful.

Furthermore, Professor Böckstiegel added that arbitrators tend to prefer post-hearing briefs and finds them almost indispensable, as counsel can often get their point across better. In his view, oral closing statements are not as important as post-hearing briefs.

Discussion pursued on avoiding ambushes at the hearing. As a general rule it was established that no new documents should be introduced which the other side has not seen yet. It was also discussed that common law and civil law backgrounds become apparent at the hearings. Professor Böckstiegel stressed that preparation is key and cross-examination skills are essential. The message he seemed to want to get across was that lawyers coming from a non-common law tradition should make an effort to learn cross-examination techniques as an essential skill.

From the client’s perspective, Mr. Steinbrecher said that clients typically want to be actively involved in the process of appointing an arbitrator and are looking for a persuasive and strong character in a party-appointed arbitrator, someone who can use and apply influencing skills. Additionally, he pointed out that strong case management skills are something to look for in
an arbitrator. He noted that it may be helpful for counsel to work with a communication specialist to not sound so “lawyerly” and to keep briefs and presentations in a simple language.

2) The File: Acquainting the Tribunal with Relevant Issues and Evidence

The typical file consists of the four basic stages of submissions: statement of claim, defence, reply and rejoinder, together with factual exhibits, written witness statements and expert reports. In connection with document production, it was stressed that counsel should exercise restraint and be as economical as possible. This concerns also the documents which should be part of the “core bundle” of the arbitration. Moreover, counsel should seize the opportunity at the hearing to give an overview of the most pertinent documents and to integrate those documents in order to grab the arbitrator’s attention.

Professor Böckstiegel added that e-briefs, providing an efficient way to hyperlink footnotes, citations, etc., are very useful tools which can be especially helpful in complex cases. He pointed out that the file should be as user-friendly as possible, and advocated for a common bundle for the hearing as well as a separate hearing bundle for every witness. From the client’s perspective, Mr. Steinbrecher called the audience’s attention to counsel’s role in arbitration which is to “simplify, simplify, simplify.” He suggested that counsel should first be able to convince him before they can convince the tribunal. If the client is attending the hearing, he stresses that it is very important to stay “on game” and not adapt to the other side’s style.

As to the presentation of opening statements, Professor Böckstiegel suggested that at least one or two hours of introduction would be helpful to set the stage, even in a condensed two-day hearing. He mentioned the “Böckstiegel Method” for setting time limits for witness examination: rather than calculating the same amount of time for each witness, the arbitral tribunal calculates the hours available, subtracts the time for breaks and then divides by two. This provides each side with the same amount of time to present their witnesses in the manner counsel sees fit.

3) Last Impressions: Leading the Tribunal to the Desired Resolution of the Dispute

It was said that “one never has a second chance to make a last impression,” and that counsel should thus use the opportunity wisely. Counsel can glean many things from the types of questions being asked, the expressions of the arbitrators, and body language. These are hints to focus on in the final stage of the arbitration. It was suggested that it is appropriate to ask the arbitrators whether there are specific topics they wish to have addressed in the post-hearing briefs, for example.

In closing arguments, counsel should cover all factual steps and legal foundations and provide the tribunal with the roadmap and sign postings of how to get to the result by giving precise references to witness evidence, factual evidence and placing it in the larger context.
The speakers highlighted the review of transcripts after each hearing day in order to keep track of what has been covered and to catch any issues that may have been missed.

What to do when your counsel has a weak argument?
The question sparked much debate. One suggestion was that if a client is already using a tree of arguments, placing a weak argument still enhances the chances of success as it sometimes is better to put forth 24 arguments and hope one sticks. Another view was to start with presenting all the plausible arguments in the pleadings and subsequently narrowing it down

D. Conclusion

Speaking on behalf of a number of participants who commented on how much they derived from the workshop, suffice it to say that it was highly worthwhile and full of tips and techniques that have been used by experienced counsel and imparted to the participants who were all keen to learn from the experiences of their arbitration-practitioner peers. The level of candid responses and open remarks about what has worked and what has not made the workshop extremely ‘hands-on’ and practical. For those who could not attend, luckily, the workshop has been filmed and will be posted on the Young ICCA website.

I take this opportunity to thank all the speakers, participants and the organizers for all of their efforts as it really was a fruitful half-day and it showed! Many of the participants along with myself went on to the DIS40 Autumn Colloquium, for a second-half day round of presentations and discussions on the topic “Documentary and Witness Evidence in International Arbitration: The Young Generation’s Perspective.” From there, on to the DIS dinner and conference being held on 24-25 October 2012.