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Revisiting the arbitration agreement after a dispute arises – the role of arbitration counsel

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Arbitration counsel should meet with their counterparts early in a dispute, and ideally before the appointment of arbitrators, to consider whether the arbitration agreement is well suited to the actual dispute that has arisen between the parties. Early discussions between counsel, with a willingness to give and take, can often lead to a more appropriate and tailored arbitration process.

As arbitration counsel know, pre-dispute arbitration agreements range from very bad to very good, with some being sparse, others highly prescriptive, and some being simply inappropriate for the dispute at hand. What most such agreements have in common is that they were drafted by their parties or their counsel before they have any real idea about the subject or nature of the actual dispute that has subsequently arisen between the parties.

Much has been written about the importance of drafting in arbitration agreements, and the need to specify a seat, the governing law, the procedural rules, and whether the arbitration will be administered or *ad hoc*.

It is indeed important for drafters to consider these and other matters, and to outline a fair and economical procedure for the parties to follow if a dispute arises.

The challenge, not surprisingly, is that the dispute which actually arises, usually much later, is often quite different from anything that the parties had in mind when the arbitration agreement was drafted.

The arbitrator(s) will often have some ability, once appointed, to tailor a fair and economical process for the parties. However, that will, of necessity, be within the confines of the agreed governing law and rules, and within the confines of the arbitration agreement itself. The ability of the arbitrator to have a real impact on the process is limited by what they are given in the arbitration agreement, and the willingness of the parties to amend that agreement once the arbitration is underway. By that time, positions may be entrenched, and tactical considerations may undermine efforts to improve the process.

It is therefore critical for the parties themselves, through their counsel, and once a dispute arises, to re-visit these matters themselves in detail. This should normally take place prior to the appointment of the arbitrators.

Specifically, given the nature of the dispute that has actually arisen between the parties, counsel should consider whether the arbitration agreement is well suited to the task at hand. A few things to consider are:

- Whether arbitration remains the most economical and effective dispute resolution choice. In most cases the answer is most likely yes, but in some cases (for example if the parties wish to establish a public precedent), Court may be more appropriate.
- What is the most appropriate number of arbitrators given the size and complexity of the actual dispute at hand? Is the actual dispute relatively small? Perhaps one arbitrator would be more appropriate.

- Is the selection process for the panel the most appropriate? For example, perhaps the parties can agree on a Chair, rather than leaving this to the party nominees on a three person panel.
- Perhaps the qualifications specified for arbitral panel members are too restrictive, or do not match the actual dispute that has arisen. Once a dispute has been defined, the parties have a unique opportunity to select the most appropriate arbitrator, and that may be a different person from the one they had in mind when the arbitration agreement was first drafted.
- Is a pre-arbitration mediation appropriate, assuming that is not mandated in the arbitration agreement? If it is mandated as part of a stepped arbitration agreement, should it be dispensed with, or moved to a point later in the process? This will involve a consideration of what the barriers to settlement are, and whether taking some steps in the arbitral process will help get past those barriers.
- Are there any timelines in the arbitration agreement that need to be re-visited, or that could be shortened, considering the actual dispute between the parties.
- What arbitration rules are best suited to the dispute? Even where rules have been selected, this can be revisited if other rules are more appropriate for the actual dispute.
- What is contemplated by way of documentary discovery in the mandated arbitration rules? It sometimes makes sense to separately consider exactly what kind of documentary discovery is appropriate for the specific dispute, and to deal with this separately once the dispute is known. What standard will be employed for documentary discovery (relevant, relevant and material, a document that the party intends to rely on, or something else). The parties might agree, for example, to adopt the documents provisions of the *IBA Rules on the Taking of Evidence in International Arbitration* as a streamlined approach for dealing with documents, whether the arbitration is international or not.

An early discussion between counsel can sometimes lead to process changes that benefit both parties. In order to give that kind of discussion a chance of success, counsel need to be prepared to give and take. With that approach, the parties can often end up with a more appropriate process, well-tailored to the actual dispute between the parties.

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