FANTASTIC BEA(S)TS AND WHEN TO USE (OR NOT USE) THEM: PROCEDURAL ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION

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16 September 2019

REGULAR (MORE COMMON) STEPS
IN THE ARBITRAL PROCESS:

- Preliminary Meeting
- Pleadings Stage: SOC -> SODCC -> Reply and DTCC -> Rejoinder and Reply to DOCC
- Settling the Memorandum of Issues
- Discovery / Disclosure Process
- Exchange of Witness Statements and Expert Reports -> Responsive Statements
- Opening Statements - > Hearing on the Merits - > Closing Submissions
- Award Stage

A. PRELIMINARY MEETING

- Bifurcation – splitting / slicing the process
  - "general powers" of the arbitrator
  - Aim: save time and costs
  - Incentive to settle

  - Is it an effective tool?
    - ICC statistics: In 2017, 143 partial awards issued out of a total of 512 awards (no available statistics on time duration)
    - ICSID statistics: In 2011, 45 bifurcated cases took 3.62 years; non-bifurcated cases took 3.04 years
    - NAFTA case – Mobil Investments and Murphy Oil vs Canada – bifurcated to liability and damages phase; added 2 additional years to the timetable.

TWO MAIN TYPES OF BIFURCATION

I. Jurisdiction challenge (JC) as a preliminary matter vs. JC determined at the final award
II. Liability - > Damages phase

- When to request JC as a preliminary matter?
  - Statute of Limitations
  - Arbitrator has no jurisdiction – see New York Convention grounds (Art V)
  - Available early dismissal procedures – SIAC and ICC Rules

- When to request bifurcation for liability and damages?

  - High value disputes that require technical expertise on valuation of damages;

  - If "no liability" - not necessary to proceed to "damages" phase; reducing complexity;

  - If "with liability" – more incentive / pressure to settle;

  - BEAST: this could go both ways – speed up or delay the process

B. DOCUMENTARY PHASE

- Pleadings vs Memorials
  - When is “pleadings” style more appropriate over “memorials” style?
  - Check the case’s potential for settlement
  - May be a guerilla tactic from the opposing side

- Memorandum of Issues (MOI) (agreed by the parties)
  - Narrows the scope of issues
  - Provides a guide / map in the preparation of WS/ER
  - Arguments against the MOI

- <u>Discovery Process</u>

  - When appropriate?
  - Argument against discovery – commercial / technical confidentiality
    - disputes between competitors
    - gas price review disputes
  - Common convincing arguments against discovery:
    - Industrial significance
    - Might give competitive advantage to the opposing party
    - Data on development of a project
    - Proprietary technology

- Possible solutions or orders to be sought from the arbitrator:

    - Redaction of documents
    - Protective orders
    - Requiring return or destruction of document disclosed
    - Restricting access
    - Appointment of independent expert

C. SUBSTANTIVE HEARING

- Experts
  - ➢ When to have experts?
    - o Legal / Damages / Engineering / Oil and gas valuation experts
- Hot-tubbing (witness conferencing)
  - ➢ When to request:
    - o Saves time
    - o Immediate feedback and response
  - ➢ When to object:
    - o Cultural nuances
    - o Senior-junior experts; mentor-mentee experts
    - o Language of the arbitration – not the expert's first language
  - ➢ NOTE: Experts are not to be "cross-examined"
  - ➢ Pre-hearing meeting between experts could be helpful

D. COMMON ISSUES ON DEPOSITS, COST, AND INTEREST

- Deposits
  - Payment of arbitrator fees pre-constitution
  - Garnishment
  - Award for Unpaid Deposits
- Cost
  - Cost of arbitration vs legal costs
  - Hourly rate vs fixed fees
  - Ad hoc vs institutional
- Interest
  - Procedural vs substantive law

- End -

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