FANTASTIC BEA(S)TS AND WHEN TO USE (OR NOT USE) THEM:
PROCEDURAL ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION[1]

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"Navigating the arbitral process requires fluency in the potential iterations of each stage of the process. We examine the key stages in an arbitral process – a) preliminary meeting setting out the procedure, b) documentary phase – exchange of statements, disclosure of documentary evidence, exchange of witness statements and expert reports, and c) substantive hearing – and their potential (and more common) iterations such as whether to bifurcate the proceedings, whether to proceed with pleadings or memorials, whether to set out a memorandum of issues, whether to undergo a process of discovery (and the extent of it), whether to appoint experts and whether to allow witness conferencing (or popularly known as hot-tubbing). Further discussion shall include common issues arising from deposits, costs and interest."

Procedure is meant to reaffirm the twin original aims of arbitration – time-effective and cost-efficient proceedings. Of late, however, an increasing number of arbitrations involve higher claims reaching hundreds of millions or multi-billion dollar sums. The cases have also become more complicated, with issues crossing multiple jurisdictions, laws, cultural nuances resulting to higher costs and protracted proceedings. What tools of procedure are available such that we can maneuver the proceedings back to becoming time-effective and cost-efficient? We examine such "beats" in the arbitral process symphony that could – depending on the timing and manner how we use them – become "beasts" that could altogether wreak havoc and further delay (and make more costly) the proceedings. There are, however, good "beasts". If properly used, they could assist in the timeous resolution of the proceedings.

A) PRELIMINARY MEETING

a. Bifurcation – this is a more common technique of shortening the arbitral process by splitting the proceedings in distinct phases with a view of reaching decisions on discrete matters and could potentially shorten the arbitral process.

- This is allowed under the "general powers" of the tribunal or under specific institutional rules;

[1] Nothing in this outline or supplement or excerpts consists legal advice but are only references to best practices in international commercial arbitration.

- There is no rule for or against bifurcation and it is largely within the discretion of any party to request for bifurcation or not under the factual matrix of the case;
- When is it appropriate to request for bifurcation? If the determination of one issue will eliminate the need to resolve the remaining issues. The aim is efficiency, i.e. to save time and costs;
- If a major and discrete issue is resolved that eliminates the need to resolve the rest of the issues, this may provide an incentive for the party at the losing end to settle;
- Available data shows that:
    - For ICC matters: In 2017, there have been 143 partial awards out of 512 awards issued. There is no indication however how long it took for the bifurcated proceedings to end vis-à-vis the non-bifurcated proceedings.
    - For ICSID matters involving investor-state proceedings: In 2011, there had been 45 bifurcated cases which took 3.62 years to complete. Non-bifurcated cases took 3.04 years. Do note that these involved investor-state arbitrations, and not international commercial arbitrations.
    - In a NAFTA case – *Mobil Investment and Murphy Oil vs Canada* – the proceedings had been bifurcated into liability and damages phase. The damages phase added 2 additional years to the procedural timetable.

<u>Two main types of bifurcation</u>

i. Jurisdiction challenge as a preliminary matter vs jurisdiction challenge determined at the final award.

When is it appropriate to request for a jurisdictional challenge to be determined as a preliminary matter?

- If there is a clear "Statute of Limitation" defence;
- If it is clear that an arbitral tribunal has no jurisdiction, viz:
    a. Any of the grounds that could set aside an arbitral award under the New York Convention ([Art V (1)]:
        i. incapacity, invalid arbitration agreement;
        ii. no proper notice of appointment of arbitrator or the arbitral proceedings, unable to present one's case/defence;

iii. matter not falling within the scope of arbitration agreement;
iv. composition of arbitral tribunal / arbitral procedure not in accordance with agreement by the parties, not in accordance with the law of the country where it took place.

- Early dismissal procedures:
  a. SIAC Rules 2016 – Rule 29.1 – "*manifestly without legal merit*"; "*manifestly outside the jurisdiction of the tribunal*".
  b. ICC Practice Note 2017 – Note C – "*manifestly devoid of merit*"; "*manifestly outside the arbitral tribunal's jurisdiction*".

ii. Liability phase vs damages phase

- It may be appropriate for huge construction disputes or other disputes that may require technical expertise on quantification of damages;
- If the tribunal decides "no liability", it saves time and costs by avoiding quantum-related work. It reduces complexity as there is then no need to quantify damages. Parties save further legal costs and expert fees.
- It could work both ways: either speed up resolution of the case or needlessly delay the case. This needs careful assessment at pre-dispute stage – whether to request for bifurcation or not. If it's clear that there could be grounds for "no liability", then it may be prudent to request for bifurcation. If unclear at all, it may be prudent not to request for bifurcation and proceed with both liability and damages moving forward together.
- Again, if there is a finding on liability – either on the part of the claimant or respondent – then there is more pressure to settle on the part of the liable party without having to proceed to the damages phase.

B) DOCUMENTARY PHASE

a. Pleadings vs Memorials

i. Pleadings – when pleadings (substantiated with documentary evidence) are first filed followed by witness statements / expert reports
    - It may be appropriate if the parties are talking and are still willing to settle in the course of arbitral procedure; gives the parties time needed to talk further;
    - It may be appropriate if the source of a dispute is an ancient contract where potential witnesses may have left the employ of the disputing companies already or if there is difficulty gathering documentary evidence and expert reports on damages.

ii. Memorials – the pleadings (substantiated with documentary evidence) are filed together with witness statements and expert reports
    - It may not be appropriate if the parties are talking and could still settle in the course of the arbitral procedure.
    - It is a tedious and time-consuming process at the initial stages of the arbitral process. There may be claimants who will file a Notice of Arbitration / Statement Claim, memorials-style to perhaps overwhelm the respondent to also file Defence, memorials-style. This will be difficult if there is difficulty gathering documentary evidence and witnesses at such a limited period of time.

b. Memorandum of Issues – setting out the issues (as agreed by the parties or settled by the arbitrator) to be determined in the case; usually settled after submission of pleadings but before filing of witness statements and expert reports.
    i. It narrows the scope of issues for resolution by the arbitrator;
    ii. It provides a guide / map in the parties' preparation for witness statements and expert reports;
    iii. Arguments against the MOI include there may be more issues coming out in the preparation for witness statements and expert reports and having an MOI makes it inflexible
        - This could only mean that the pleadings filed at the initial stage had not been well-drafted at all to clearly set out claims and defence.

c. Discovery Process
    i. Where one party may have access to documents relevant to the issue of damages that are not in the possession of the other party, for instance, internal documents identifying whether a party has mitigated or contributed towards its losses, it may be appropriate for the proceedings to include a procedure for documentary disclosure;

ii. Common defence against disclosure: Commercial and technical confidentiality that's compelling (IBA Rules of Evidence)
    - If it involved disputes between competitors;
    - If it involved gas price review disputes or businesses that depend on securing confidential information.
iii. Convincing arguments required, e.g. industrial significance, disclosing to give competitive advantage to the other party, data relating to the development of a project, proprietary technology;
iv. Issue: What if a document is requested to be produced but the opposing side objected to the production on the ground of confidentiality or legal professional privilege and the tribunal determines it should not see the document? What are the potential order to be requested?
    - Redaction of documents;
    - Protective orders where only certain individuals could have access to the document such as the tribunal, experts and parties' counsel (but not the parties themselves);
    - After disclosure, requiring return or destruction of documents disclosed;
    - Restricting access such that only visual inspection is allowed. No circulation is allowed and no electronic or hard copies are be made;
    - Independent expert may be appointed to decide on the objection (IBA Rules on Evidence).

C) SUBSTANTIVE HEARING

a. Experts and hot-tubbing
    i. When to have experts:
        - Legal
        - Damages
        - Engineering / construction experts
        - Oil and gas valuation consultants
    ii. Witness conferencing / Hot-tubbing
        - When to request:
            a. If to do so would be more efficient and provides for immediate feedback from each of the experts vis-à-vis the questions proffered on them by counsel or arbitral tribunal
        - When to object:

a. Note the nuances of presenting experts from different cultures and legal traditions;
b. Senior / junior experts; Mentor/Mentee experts – the junior or mentee may not feel comfortable presenting and arguing in favor of his/ her own report that contradicts the opinion of the senior / mentor expert;
c. Language of the arbitration is not the first language of any of the experts.

- Experts are not to be "cross-examined", unlike factual witnesses. It may be best to stick to clarificatory questions on arguments raised in their expert reports. In case of legal experts, it may be best to raise issues arising from the legal experts report early on (i.e. when the written expert report had been first exchanged) so the tribunal could then make the appropriate orders for each party to submit on such issues raised. For example, if a legal expert failed to provide an opinion on the most recent case authority involving a major issue in the arbitration matter, then counsel ought to have raised that when the expert reports had been first exchanged so that each expert could then make responsive statements. If however the legal expert had been requested to make a responsive statement and still failed to make any submissions on the most recent case authority that may have been deliberately excluded in the first expert report, counsel could then request to clarify at the hearing why the legal expert had done (or not done) so without vigorously "cross-examining" the expert.
- Pre-hearing meeting of experts without counsel may prove to be more efficient in the presentation of agreed issues and disagreed issues at the hearing. It may not be appropriate if the experts are adversarial.

D) COMMON ISSUES ON DEPOSITS, COSTS AND INTEREST

a. Deposits
    i. Garnishment of deposits for the winning party – check if allowed in the seat of arbitration.
    ii. Payment of arbitrator fees even pre-constitution is allowed under the relevant institutional rules. If rules are silent, it may be allowed under the terms of engagement of the arbitrator and the nominating party unless the same is silent or expressly prohibits such payment.
b. Costs
    i. Hourly rates vs fixed fees
        - Hourly rates may provide an incentive to delay the case;
        - Fixed fees may sacrifice thoroughness and quality of output.

ii. Ad hoc arbitrations vs institutional
    - Biggest advantage for institutional arbitrations is the policing of arbitrator ethics and behavior.
    - Another advantage would be scrutiny process of awards.
    - Ad hoc arbitrations could go both ways – depending on the case management and costs management skills of the arbitrator. It could prove to be less costly (i.e. no payment of institution administration fees) only if the arbitrator has good case management skills. It could prove to be more costly if the it has been needlessly delayed by the arbitrator (and perhaps delaying tactics from any of the parties as well) without the policing eye (and ears) of arbitral institutions.

c. Interest
    i. Procedural or substantive law
        - To carefully examine whether interest is considered falling under procedural or substantive law as interest rates (or the non-imposition thereof) may vary in various jurisdictions.

Supplement I – Procedural Issues in International Commercial Arbitration

a) What are "pleadings" style and "memorials" style? The features of "pleadings" style and "memorials" style?

Pleadings-style consists of filing of the following in sequential order; it is more commonly used than Memorials-style filing:

1. Statement of Claim (with documentary evidence attached),
2. Statement of Defence and Counterclaim (with documentary evidence attached),
3. Reply and Defence to Counterclaim (with documentary evidence attached),
4. Rejoinder to Reply and Defence to Counterclaim (with documentary evidence attached),
5. *[Perhaps Discovery process could be had at this stage],*
6. Exchange of Witness Statements and Expert Reports, then
7. Exchange of Responsive Witness Statements and Expert Reports.

Memorials-style (or "all-in") filing consists usually of the following:

1. Memorial of Claim: Statement of Claim (with documentary evidence attached) filed together with Witness Statements and Expert Reports for the claimant;
2. Memorial of Defence: Statement of Defence and Counterclaim (with documentary evidence attached) filed together Witness Statements and Expert Reports for the respondent;
3. Statement of Defence to Counterclaim (with documentary evidence attached) filed together with Responsive Witness Statements and Expert Reports;
4. Statement of Reply to Defence to Counterclaim (with documentary evidence attached) filed together with Responsive Witness Statements and Expert Reports.

As can be gleaned above, Memorials-style filing will shorten the arbitral process by having all witness statements and expert reports filed together with the pleadings. It may take 7 steps in Pleadings-style filing before counsel will know of the total picture of a client's case or defence. In Memorial-style filing, it may take only 4 steps.

If the parties are communicating to each other and both remain open for settlement, then the time afforded by a Pleadings-style filing will be more appropriate.

A disadvantage for Memorials-style filing will be how tedious it would be for counsel to prepare both pleadings and the corresponding witness statements and expert reports at the same time. It will not be tedious if counsel has a large team, has had ample time to secure the documentary evidence and the witnesses and experts to be interviewed. If a dispute between the parties has been ongoing for a long period of time, most of the witnesses have been difficult to locate, and there may have been transfer or moving of documentary evidence, Memorials-style filing will not be appropriate in such cases. Counsel will need sufficient time to prepare all documents afforded by a Pleadings-style filing.

An advantage for Memorials-style filing is both parties will know the total picture of their respective cases at an early stage in the arbitral process. Both parties may already have a realistic assessment of their respective cases and the party with the weaker case may be more inclined to enter into settlement.

Memorials-style filing is more commonly used in construction and engineering arbitrations.

b) Why shouldn't (or Why can't) experts be cross-examined? Then, how are we supposed to question an expert? What are the questions that we can ask an expert?

This has provoked quite a number of questions and interestingly so.

A common definition "cross-examination" includes the examination of a witness in order "*to check or discredit the witness's testimony or credibility*" or "*in order to evaluate the truth of that person's testimony."*

Experts (legal or damages) are called to testify based on their expertise on a subject area – whether legal or damages. They are not called to testify on the <u>facts</u> of the case but on:

a) how the governing law or law of the seat of arbitration (and the relevant case authorities) apply to the facts of the case or the facts as relayed to them by the instructing party (for legal experts), or
b) how accounting (and forensic and damages valuation principles) apply based on the facts of the case or the facts as relayed to them by the instructing party (for damages experts).

On this basis, the line of questioning from counsel ought not to be in the form of "cross-examination", i.e. to discredit credibility or to evaluate the truth, which is largely more appropriate for factual witnesses. In my view and what I have observed in senior arbitrators I had worked with, it is encouraged that counsel puts forth questions to experts in the form of "clarificatory questioning".

It is important to note that while it may be prudent to refrain from vigorously cross-examining experts, it does not mean that there is no more opportunity to question the experts. There is such

an opportunity but in the form of "*clarificatory questioning*". It could be confusing as there is a thin line between cross-examination and clarificatory questioning.

One example discussed at the seminar was questioning a legal expert for potential bias by failing to include in the expert report a case authority that is more recent and more authoritative as applied to the facts of the case. I agree that the legal expert must be questioned on why she had missed that more authoritative case authority but not in the form of "cross-examining" the expert along the lines of insinuating that the expert may have lied or misled the tribunal.

A more ethical and appropriate strategy would be to put the case authority to the attention of the tribunal at the earliest opportunity, i.e. after the legal expert submitted her expert report, the opposing party's expert could submit on that missing authoritative case authority in the latter's responsive expert report. The potentially biased legal expert could then be asked clarificatory questions at the hearing on why she has not included the authoritative case authority in her expert report. That is a strategic move, but it should be nothing more that could suggest glaringly she is lying or trying to mislead the tribunal or is being biased. Counsel ought to focus on persuading the tribunal that the opinion of its own expert is the most applicable under the factual matrix of the case.

c) On "to check the law of the seat and the governing law to see whether such interest is characterized as procedural or substantive", does the governing law here refer to "procedural governing law" or "substantive governing law"? What are the respective legal impacts of treating interest as procedural or substantive?

This is an issue that could potentially arise in awarding interest in arbitral awards. There is yet no hard and fixed rule to answer the question: whether principles of interest fall under the characterization of substantive law or procedural law. If substantive, then the governing law of the contract applies on the award of interest. If procedural, then the law of the seat of arbitration applies to the award of interest. I highlighted this issue to simply make everyone aware of the existence of such an issue but I offer no solution for this as there is none available yet, to the best of my knowledge.

Anecdotally, this issue has not yet been rigorously debated in many international commercial arbitration cases. At least in the cases that I have been involved in, there had been no glaringly huge disparity between the principles of interest under the governing law of the contract and the principles of interest under the law of the seat.

What could be problematic is if one jurisdiction (of the governing law) allows interest to be imposed on the awarded sums, and the other jurisdiction (of the seat) expressly prohibits interest on awarded sums, i.e. Shariah law. This is an area that is yet to be thoroughly studied perhaps by researchers and is ripe for a doctoral dissertation.