Procedural Management in Arbitration

Norwegian Arbitration Day 2020

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Principles for efficient procedural management of international arbitration

- Firm proactive approach
- Clear rules
- Efficiency
- Clear timetable
- Solicitation of parties in governing rules, time, etc.

- Suggestions for best practices
    - In P.O.
    - Timetable
    - Preclusion of pleadings, etc.
    - Hearings

Can we disagree?

Principles for efficient procedural management of international arbitration

- Why are these principles and recommendations not always followed by parties and arbitrators?

- Why are the parties/counsels challenging the tribunals by not adhering to these principles and a smooth proces?

- Has that become worse?

The arbitrators often see:

- Extensive correspondence about appointment of a ”clean”, non-biased arbitrator and chairman
- Discussions about the P.O.
- Difficulties in agreeing on timetable
- Untimely filings of submissions and evidence
- Postponements of hearing
- Procedural objections, obstructions
- Reservations for setting aside proceedings
- Parties not holding back on threatening the arbitrators

Found during research:

“Fifteen Ways to Annoy in Arbitral Proceedings

- do not pay any advances, except those for the counterclaim
- do not offer any help in appointing the tribunal
- choose an obstructing arbitrator and challenge the other arbitrators for whatsoever insignificant reasons; if your challenge is unsuccessful, try to bribe the chairman
- change lawyers in mid-stream or do not pay your lawyers, so that they refuse to do work
- frustrate the service of documents; act as if you were insolvent/dissolved/in coma/dead
- do not sign the Terms of Reference
- submit an unsolicited 20-page telefax with 5 procedural motions every Friday
- do not adhere to any procedural orders
- ask for extensions on a regular basis
- file your submissions late
- refuse to produce documents
- present documents/witnesses at the very last moment
- try to postpone hearings (if necessary, by injunctions); do not appear for a hearing; walk out from a hearing
- sue the arbitrators/arbitral institutions”

The result is frustration amongst arbitrators who wish to be efficient and are keen on parties being treated equally and given the right to present their case

- Fear of having their awards
  - being challenged or
  - set aside or
  - refused recognition under the N.Y. Convention

- Reluctancy in making decisions

- Increased time and cost consumption

- Slow proces

But are national courts increasingly interfering with tribunals' procedural decisions?

- No statistics or studies show that
- No judgments
- Is the fear exaggerated?
- Have the arbitrators become due proces paranoid?

The risk of criticism is sufficient for the arbitrators

- Conflict with one of the parties
- Might incur further work and costs
- The defending party will be incurring further costs
- Embarrasing in the arbitration environment
- Fewer appointments

The way to effectively balance fairness against efficiency

- Adopt the best practices
- Act boldly without excessively worrying about due proces
- Be cautious, try to avoid challenges
- Be robust and proactive
- Make sure that the losing party has no reasons at all to be dissatisfied with the procedural rules

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