Professional Perspective

Controlling Costs in International Arbitration

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Costs are a major consideration in virtually any arbitration, and international arbitration can be very expensive. Large arbitrations routinely result in party costs of millions, if not tens of millions of dollars. The costs of small arbitrations, where the amount in dispute is less than a few million dollars—and there are many, many such arbitrations—may themselves reach into the millions.

There will often be high stakes for a party in the result of an arbitration, but experience teaches that there will frequently be a very loose correlation between the amount spent and the result. There will almost always be many things that a party can do to avoid unnecessary expense in arbitration without impacting upon the chances of its success.

In international arbitration, the losing party is typically ordered to reimburse the winning party's costs. This is not an invariable rule, however, and any reimbursement is limited to a reasonable amount. Moreover, behavior during arbitration that wastes costs is often punished in the costs award. Controlling costs in arbitration is not just a matter of limiting the financing of the arbitration, it also relates to the amount of costs a party will ultimately bear, win or lose.

In controlling the costs of arbitration, one must distinguish between the period of settling the arbitration agreement and the period after. Much can be done in the arbitration agreement to ensure cost-efficiency. But even after the arbitration agreement has been set, a party retains a significant ability to control its costs.

Settling the Arbitration Agreement

The first choice is whether to opt for arbitration. Unless one actively opts for arbitration, disputes will end up being bindingly resolved in a court. There are many reasons other than costs to choose arbitration, like international enforceability of the result, choice of language, confidentiality, neutrality of the adjudicator, and the non-costs advantages of procedures tapered to the particular dispute.

It would be a bold claim that arbitration will invariably be meaningfully less expensive than court procedures, but the result of international arbitration—the award—is generally much more difficult to avoid than a first instance court judgment. So, if one includes the costs of appeals against court judgments, arbitration may well be the less expensive option.

Drafting the Arbitration Agreement

A lot can go wrong in arbitration agreements. Where they are incomplete, unclear, or even unusual, this foments costly side skirmishes which may even result in significant expenditure to determine if there is a workable submission to arbitration at all. To avoid these problems, it is highly advisable to avail oneself of specialized arbitration law advice on whether to choose arbitration and what to put in the arbitration agreement.

Most parties will not have significant experience with actual arbitrations since they will usually make significant efforts to settle their disputes and a number of those that are not settled will go to the regular courts. If this is the case, in-house counsel may wish to seek outside advice. It will not typically take a long time for the specialist to advise so there should be minimal cost, and it should be foreseeable in its amount thus allowing for the option of a negotiated flat fee. The time required to advise will usually fall within a pretty narrow range of around five to 15 hours. Parties should press for a good offer, since advising on arbitration clauses is a rare repeat business for arbitration practitioners. The specialist will need to know the parties and their relationship which should therefore be in focus before you approach them for advice.

Arbitration agreements are like constitutions in that they have far-reaching effect and are difficult to change once they are adopted. It is highly advisable to base the agreement on a recognized and familiar formulation. There are standard-form arbitration agreements for almost every major arbitration institution. For arbitration without an institution, use an UNCITRAL Model Arbitration Rules standard arbitration clause.

Choice of Arbitration Institution

A choice needs to be made as to whether to have the arbitration administered by an organization—usually called "arbitration institutions." It will almost always be more cost-effective to choose an administered arbitration. This is

principally because the arbitration institution will make decisions to get the arbitration running, and to support the arbitration while it is running, which otherwise a court would have to make. Going to court is a major source of extra costs.

On the other hand, one needs to pay for the arbitration institution. Some arbitration institutions are less expensive than others but their costs will generally be a comparatively minor component of overall costs. Moreover, the cost range of arbitration institutions is not extremely wide, and one generally gets what one pays for with arbitral institutions. So the relative cost of the individual arbitral institution should not weigh heavily in the choice of them.

The particular features of a certain arbitration institution may recommend it for a particular arbitration, which in turn may entail costs efficiencies, notably in regard to their acquaintance with particular locations in the world and the arbitration practitioners there, and particular subject matters–for example the Arbitration Center of the World Intellectual Property Organization has unique strengths in and familiarity with IP matters.

Arbitration institutions usually come with a set of arbitration rules. These rules are critical for the smooth operation of the arbitration, and therefore its costs. This is because arbitration removes many of the rules that apply to litigation and this void needs to be filled by party agreement or decisions of the arbitrator. These rules act as party agreement as to a host of essential aspects of the arbitration.

Rules of Arbitration

All major arbitral institutions have serviceable rules. In fact, there is on the whole not much difference between them, in particular as regards costs consequences. An arbitration expert can advise on subtle differences between institutions and their rules, and which is most appropriate for a case.

It is, however, important not to mix and match arbitration institutions and arbitration rules. An arbitration institution will have a practice in administering its own rules that allows for cost-efficient application to any current case, and some institutions will refuse to administer arbitrations under other rules, which will leave you with an unadministered arbitration or even none at all.

There is one choice in relation to arbitration rules that does have a sizeable impact on costs. Many arbitration institutions offer variants of their rules which entail simpler and quicker procedures, which will usually deliver significant costs savings. Under these rules, there will usually be fixed and modest fees of the arbitration institution and the arbitrator, and procedural features favoring reduced costs, such as a sole arbitrator rather than a panel of three, fewer written submission opportunities, shorter periods for written submissions–which should result in fewer lawyers' hours–and a less costly hearing, for example a virtual one, or no hearing at all.

These streamlined rules, usually called accelerated or expedited rules, will apply either by virtue of party choice or where the amount in dispute is below a certain figure. Unless the amount of the future dispute is known in advance, it will be necessary to stipulate for application of these streamlined rules in the arbitration agreement in order to achieve the costs savings.

The winnowed procedures under these streamlined rules may result in less accuracy of the result. Also, parties will generally have a reduced opportunity to participate, which relates not only to potential reduced accuracy of the result but also to the sense of having had "one's day in court." As mentioned above, arbitration is usually highly final, and, unlike in court systems, is a one-shot opportunity to obtain a result. Experience shows though that except in cases of particular technical or legal complexity and cases of high value, the costs savings of streamlined rules may be a decisive advantage.

Place of Arbitration

It is highly advisable to set the place of arbitration as part of the arbitration agreement. If the arbitration is proceeding under institutional rules, there will generally be a cost-efficient mechanism to set it if the parties fail to do so. But if there are no institutional rules it is much more costly and time-consuming to do so.

To save costs, it is important that the place of arbitration is a city in a country that is a signatory to the New York Convention of 1956 on the Recognition and Enforcement of Foreign Arbitral Awards. It is much less difficult to enforce an arbitration award around the world if it is from a New York Convention country.

Amongst New York Convention places of arbitration, one should choose a well-established place of arbitration. This is principally because the courts of the place of arbitration will generally have responsibility for supporting the arbitration

and ensuring its regularity and that of the award. They need to be empowered and to know how to navigate swiftly through any issues that may arise. In Switzerland, for instance, challenges to international arbitration awards, which may be submitted in the English language, go straight to the Supreme Court where they are generally dealt with in a papers-only proceeding in about six months.

Other Stipulations

Certain other stipulations in the arbitration agreement can also deliver costs savings:

- Stipulate the applicable language, one that is commonly used by all or the vast majority of those who may be involved in the contract and the arbitration, to cut down on the time and costs of translation. Most international arbitration is in English.

- Stipulate a costs rule, such as that the losing party pays all reasonable costs of the arbitration. This removes most of the unpredictability of the arbitrator's otherwise vast costs discretion.

- Stipulate that in the absence of extraordinary circumstances all hearings shall be held virtually.

- Stipulate that document discovery shall be "kept to a minimum" or shall be in accordance with the **2020 IBA Rules on the Taking of Evidence in International Arbitration**, or even review and request that your arbitration specialist advise on stipulating the application of the **Prague Rules on the Efficient Conduct of Proceedings in International Arbitration** or parts of them.

The Prague Rules give significant power to the arbitrator to limit costs and move the arbitration forward, and will generally deliver significant costs savings. But especially for those from the common law tradition, they may present unfamiliarity and a sense of loss of control over proceedings.

Make sure your stipulations do not overlap, like the Prague rules with the IBA Rules.

After Settling the Arbitration Agreement

The key to saving costs in arbitration is to maintain as much as possible of the work in-house. Arbitration proceedings are much more informal and flexible than court proceedings. There should be no barrier to the performance of much work in the arbitration by those without special experience and status.

Unfortunately, in the usual case when an arbitration appears on the horizon a party simply unloads it lock, stock, and barrel on outside counsel who launch a squadron of specialized lawyers to manage it, and make crucial procedural decisions in the absence of the party. Every one of those outside lawyers is going to be billing on the arbitration, and there will be much overlap as everyone will need to learn the case, follow developments in it, and senior lawyers' time will need to be spent just managing the team.

Keeping the work in-house has three cumulative costs savings effects. First, it will generally be decidedly less costly to use in-house resources. Secondly, significant involvement of in-house and senior business persons in the arbitration ensures that procedural decisions are adequately costed. Outside counsel will generally have a number of countervailing interests which tend to subdue the interest of costs savings. Thirdly, hiring a group of specialized outside lawyers to conduct the arbitration tends to erode the informality and flexibility that arbitration promises, which in itself generates unnecessary costs.

If a party has in-house specialized arbitration expertise then in principle *nothing* needs to be outsourced in running the arbitration, and nothing should be if saving costs is a high enough priority. Where, however, such in-house specialized experience is lacking it is the only resource that needs to be sought out. Crucially, it can generally be limited to strategizing, guidance on procedural specificities of arbitration, the making of judgement calls so frequent in arbitration where the proceedings are much less of a straightjacket than court proceedings, finalizing submissions, and leading the party's case at the hearing where experience of managing a team in this context is crucial and where there may be unexpected developments.

The remainder of the work can generally be performed in-house in particular the management of documents and databases. There is generally such expertise in-house, and a party's employees are best placed to know where to find

documents and what they mean. Where an external law firm performs this function it converts fee-earning lawyers into data managers, and charges for the software and other infrastructure that is readily available for no extra cost in-house.

The one limit on this in-house involvement is that arbitration often represents surges of activity and a party may not feel it has the resources to cover this. The key to maximizing in-house resources is to manage the work on the arbitration. Arbitration permits a party to influence the times for those surge events, such as written submission dates and hearings. A party should be sure to situate them at a time where there is a relative lull in other activities of the in-house personnel that will be involved. In an extreme case, the party itself should contract for the extra person-power for this specific purpose.

Moreover, the completion of the work should be carefully managed, with clear deadlines for intermediate stages. Outside specialist counsel and in-house counsel should set up a detailed plan at the outset of the arbitration, and assign specific tasks to specific persons. Also, it is important for a party to keep good, complete, and organized records on a running basis from the time of the contracting that can be called up in short order and efficiently drawn from in the creation of the database to be used in the arbitration.

The traditional resistance to allowing recovery of the cost of in-house resources in arbitration costs awards has today largely been overcome. But recovering such in-house costs requires careful timekeeping of the work dedicated to the arbitration by each employee or directly contracted person. The party should also be able to calculate and evidence the actual cost to it of each person's involvement by producing an accountancy statement about the global costs of that person, their total hours, and what proportion of that was dedicated to the arbitration.