

The tribunal's role: how pro-active should the tribunal be in ensuring the speedy resolution of the dispute?

Laurence Burger

October 10, 2008





In a fast-track arbitration, main reason for the tribunal to be pro-active is to ensure that the deadlines are respected.

But concern not to deprive the parties of their right to present the case.





# IS PRO-ACTIVE GOOD?

Two points of view:

- parties
- tribunal





# PARTIES

## **Advantages of a pro-active tribunal:**

- Expectations are clear
- Knowledge that procedural issues will be resolved quickly
- Cooperation between the tribunal and the parties

## **Disadvantages of a pro-active tribunal:**

- Possible inference in the parties' handling of the dispute
- (Presumably) imposition of short deadlines
- (Possibly) less leeway to ask for deadline extensions





# TRIBUNAL

## **Advantages of being pro-active:**

- Provide the parties with a clear roadmap
- Control of the proceedings
- Less surprises (in particular at the hearing)

## **Disadvantages of being pro-active:**

- Time-consuming
- Possibility to antagonize the parties
- Risk of claim of violation of due process





## ISSUES

1. Discovery?
2. Witness Statements
3. Reply/Rejoinder?
4. Hearing?
5. Post-Hearing Briefs?





## DISCOVERY

### ▪ Points to take into account:

- Extensive (US-type) discovery WILL delay the proceedings
- Timing of discovery will also determine how extensive the discovery will be:
  - ✓ Early on, open door to extensive requests
  - ✓ After first submissions (SoC, SoD), scope of requests can be limited to allegations in the submissions

### ▪ Therefore, pro-active tribunals should avoid ordering discovery or, if they do, limit its scope and schedule it after the first exchange of submissions.





## WITNESS STATEMENTS

- **Points to be taken into account:**
  - Witness statements make for larger submissions BUT less surprises at the hearing
  - A party could have difficulties to prove its case without witness statements
  
- **As a result, a pro-active tribunal should allow witness statements. Witness testimony can only be presented at hearing if the witness produced a statement.**







## REPLY/REJOINDER

- **Points to be taken into account:**
  - Second round of submissions means further delay
  - BUT depends on the complexity of the case
  - AND often difficult to determine how complex the case will be at the time of the first procedural order
  
- **If the case is not complex and the amount in dispute is low, Reply and Rejoinder can be avoided, if the parties agree.**





## HEARING

- **Points to be taken into account:**
  - Hearing particularly important when witnesses/experts are involved
  - Preparation is key (both for parties and tribunal)
    - ✓ Prior production of witness statements and expert reports allows to focus the scope of the hearing
    - ✓ Tribunal to prepare a list of both parties arguments and supporting evidence for use at the hearing
- **Depending on the time-frame, a pro-active tribunal could order a hearing and no reply/rejoinder or the opposite.**





## POST-HEARING BRIEFS

- **Points to be taken into account:**
  - Often parties use PHBs as a means of pleading once more their case in its entirety
  - Efficient PHBs briefly summarize the case and focus on the issues that have arisen at the hearing
  
- **A pro-active tribunal should limit the number of pages of the PHBs and ensure that they are a useful reference when drafting the award.**





## CONCLUSION

**In fast-track proceedings, the tribunal should be pro-active and the parties should wish for a pro-active tribunal.**

**Fast-track means important work-load for both parties and tribunal.**

**Consequences of having a pro-active tribunal for the parties :**

- **Raise issues early**
- **Do not request measures delaying the proceedings for ludicrous reasons**
- **Counsel must educate clients on the difficulties of fast-track proceedings**





THANK YOU FOR YOUR ATTENTION!

