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Fast-Track Arbitration: The Procedural Tools Available

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Outline

- I. Introduction: Procedural Tools (definition/goal)
- II. Sources of Procedural Tools
- III. Check-list of Procedural Tools
- IV. Practical Illustrations

I. Introduction: Procedural Tools (definition/goal)

- **Definition:**

mechanisms and techniques related to the procedure/conduct of the proceedings in order to accelerate the arbitration.

- **Goal:**

to help the parties reduce the time taken to reach a solution to their arbitration dispute:

- Reduce the time between the Request for Arbitration and the Award
- Encourage settlement

II. Sources of Procedural Tools

Two main sources:

1. National laws and rules of arbitration institutions

- Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce (SCC)
- Rules for Expedited Procedures of the American Arbitration Association (AAA)
- Section V of the Swiss Rules of International Arbitration
- Chapter V of the Arbitration Rules of the Japan Commercial Arbitration Association Commercial (JCAA)
- Article 32 of the ICC Rules of Arbitration

II. Sources of Procedural Tools

2. Agreement of the parties – Preferred source of procedural tools

(a) General comments

- Distinctive feature of arbitration: the parties can define their own procedure
- Room for procedural creativity
- No fast-track arbitration without the agreement and cooperation of the parties

II. Sources of Procedural Tools

(b) How and when to agree on procedural tools?

- Arbitration Agreement: to provide for the intent/principle of an expedited arbitration
- In the course of the arbitration: to adjust the fast track procedure to the needs of the dispute/parties
 - Constitution of the Tribunal
 - Terms of Reference
 - Procedural Timetable
 - Other Procedural Agreements

III. Check-list of Procedural Tools

Procedural tools allow the parties to tailor the arbitration to their needs.

Non-exhaustive check-list could include:

1. **Select the right Arbitral Tribunal**
2. **Set time limits**
3. **Provide procedural rules to adjust/accelerate the conduct/steps of the proceedings**
4. **Baseball arbitration**
5. **Sealed Offer: a procedural tool for fast-track arbitration?**

III. Check-list of Procedural Tools

1. Select the right Arbitral Tribunal

- Cooperation of the Tribunal is essential
- Sole arbitrator or a three-member Tribunal?
- Experienced arbitrators with available time
- Arbitrators with strong case-management skills
- Arbitrators who will render their Award in a timely manner

III. Check-list of Procedural Tools

2. Set Time Limit(s)

(a) Recommendations

- Set up reasonable and realistic time limits
- Define milestones for the steps in the proceedings and the Award (responsibility of the arbitrators)
- Allow some flexibility if necessary (due process, validity of the Award)

III. Check-list of Procedural Tools

(b) Where? When?

- The arbitration clause

Example of an expedited arbitration clause:

“The Award shall be rendered within [nine] months of the commencement of the arbitration, unless the arbitral tribunal determines that the interest of justice requires that such limit be extended”

(P. Friedland, Arbitration clauses for international contracts, 2nd ed., Juris, 2007)

- The Terms of Reference and Provisional Timetable

III. Check-list of Procedural Tools

3. Provide procedural rules to adjust/accelerate the conduct/steps of the proceedings

Possible at each level/every step of the procedure:

- Length of submissions?
- Number of submissions?
- Need for a document production phase?
- Number of hearings/ No hearings?
- Number of witnesses/ No witness?
- Number of experts/ No expert?

III. Check-list of Procedural Tools

4. "Baseball" Arbitration

(a) Definition of "baseball" arbitration

In a final offer/"baseball" arbitration, the powers of the arbitrators concerning the award are narrowed down to a choice between two final offers submitted by the parties; after an exchange of written pleadings.

Example of a "baseball" arbitration clause:

"Each party shall submit to the arbitrator and exchange with each other, in accordance with a procedure to be established by the arbitrator, its best offer. The arbitrator shall be limited to awarding only one or the other of the two positions submitted."

(P. Friedland, Arbitration clauses for international contracts, 2nd ed., Juris, 2007)

III. Check-list of Procedural Tools

(b) Advantages of “baseball” arbitration

- Expedited resolution of disputes
- Encourages the settlement of disputes

III. Check-list of Procedural Tools

5. "Sealed Offer": a procedural tool for fast-track arbitration?

(a) What is a "Sealed Offer"?

- A "sealed offer" is a written offer to settle a dispute which has been referred to arbitration; made "without prejudice save as to costs".
- The offeree who does not accept the offer and fails subsequently to achieve a more favorable award by continuing the proceedings is liable for all the costs of the arbitration, as of the date of the submission of the offer.

(b) Advantages of a "Sealed Offer"

- Incentive to a settlement
- Reasonableness of the parties in assessing the claims
- Originally a UK dispute practice: not yet standard practice in international arbitration

IV. Practical Illustrations

Case No. 1: Price Readjustment in a Long-Term Contract For Sale and Purchase of Gas

(a) Background

Parties: US Buyer v Eastern Europe Seller

Nature of the Dispute: Contractual dispute over price redetermination

Seat of Arbitration: The Hague

IV. Practical Illustrations

Case No. 1: Price Readjustment in a Long-Term Contract For Sale and Purchase of Gas

(b) Procedural Tools Used

- Arbitration Clause: time limit set up in the clause, intermediate milestones
- Terms of Reference: one round of submission, no expert, expedited hearings
- Baseball Arbitration

IV. Practical Illustrations

Case No. 1: Price Readjustment in a Long-Term Contract For Sale and Purchase of Gas

(c) Timetable achieved

| | |
|-------------------------------------|--------------|
| Signature of the Terms of Reference | September 13 |
| Claimant's Submission | October 3 |
| Respondent's Submission | November 1 |
| One-day Hearing | November 12 |
| Award | December 1 |

Total length of the proceeding: two and a half months

IV. Practical Illustrations

Case No. 2: ICC “Fast-Track” Complex Construction Arbitration

(a) Background

Parties: Middle-Eastern Company v American Contractor

Nature of the Dispute: Construction Dispute

Seat of Arbitration: Paris

IV. Practical Illustrations

Case No. 2: ICC “Fast-Track” Complex Construction Arbitration

(b) Procedural Tools Used

- Other Procedural Agreement: MOU between the parties where they agreed on an expedited proceeding
- Procedural Timetable

IV. Practical Illustrations

Case No. 2: ICC “Fast-Track” Complex Construction Arbitration

(c) Timetable achieved

| | |
|---|----------------|
| Request for Arbitration | May 2003 |
| Answer and Counterclaims | June 2003 |
| Reply to Counterclaims | July 2003 |
| Document discovery begins | September 2003 |
| First exchange of witness statements and expert reports | October 2003 |
| Procedural hearing and second exchange of witness statement | November 2003 |
| Five-day hearing on merits | December 2003 |
| Post trial briefs exchanged | January 2004 |
| Award | July 2004 |

Total length of the proceeding: one year and two months

IV. Practical Illustrations

Case No. 3: ICC Construction Dispute

(a) Background

Parties: Japanese company v Dutch company

Nature of the Dispute: Contractual dispute over an EPC Agreement

Seat of Arbitration: New York

IV. Practical Illustrations

Case No. 3: ICC Construction Dispute

(b) Procedural Tools Used

- Arbitration clause: time limit set up in the clause
- Terms of Reference: Adaptation of time limits to the needs of the dispute
- Procedural Timetable: Limited time between the submissions

IV. Practical Illustrations

Case No. 3: ICC Construction Dispute

(c) Timetable achieved

| | |
|--------------------------------|---------------------|
| Request for Arbitration | March 14, year 1 |
| Claimant's Memorial | November 2, year 1 |
| Respondent's Memorial | December 14, year 1 |
| Document discovery begins | December 21, year 1 |
| Claimant's second Memorial | March 14, year 2 |
| Respondent's second Memorial | April 25, year 2 |
| Four-day hearing on merits | May 12-16, year 2 |
| Post –Hearing Briefs exchanged | June 13, year 2 |

Total length of the proceeding: one year and two months

Conclusion

- The techniques discussed in this presentation are not exhaustive.
- The appropriate procedural tools will depend on the specificities of each dispute.
- Both parties and arbitral tribunals can benefit from these practical tools to facilitate efficient procedures in which time and cost can be better controlled.

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