

SCHELLENBERG WITTMER

ASA below 40 Spring Seminar (12 May 2017)

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I. Introduction

- ∅ No simple answer and no single model of strategy.
- ∅ Factors that are likely to have an influence on strategic / tactical choices:
 - q Claimant or Respondent
 - q Complexity of the case (legal / factual / both)
 - q Goal(s) your client wants to achieve (complicate or delay the proceedings / encourage quick and streamlined arbitration / length of proceedings does not matter)
 - q Strengths and weaknesses of the case
 - q Whether your client wants to maintain a business relationship with the other party
 - q *Last but not least:* the financial situation of the parties

II. Document production (1/2)

- Ø Document production can prove to be an effective strategic tool even at the outset of the arbitration
- Ø Party seeking the production of documents:
 - q Most obvious strategic interest is to obtain the production of the document(s) that will offer support to its case
 - q That phase is all the more important to succeed in its claim or with an early request for interim relief, that party really needs those documents on record
- Ø Document production can also be a useful tool at the outset of the arbitration to:
 - q delay the proceedings (numerous / excessive document requests)
 - q disrupt opposing party's preparation of the Answer to the Request for Arbitration
 - q gain psychological advantage / put pressure from the very outset of the arbitration:
 - § if documents requested are expected to be (very) detrimental to opponent's case
 - § if opposing party is in financial distress or is expected to have capped its lawyers' fees (for e.g. states in investor-state disputes) (numerous / excessive document requests)

II. Document Production (2/2)

- ∅ Party from which the production of documents is sought:
 - q A cooperative attitude from the outset of the proceedings may help defeat any allegations that that party would be obstructive
 - q The more a party resists producing a document, the more light is thrown on the fact that said document may be vital to the opponent's case, and, in turn, (very) detrimental to its own case
 - q Then, how best to “resist” to an early request for production of documents?

III. Advance on costs (1/2)

There is no such thing as a free lunch (American proverb)

- ∅ Advance payment in equal shares
- ∅ What are the tactical tools available to Respondent?
 - If Respondent has no counterclaims and main claims appear to be phoney or grossly overestimated:
 - § Request security for costs ?
 - ü arbitral tribunals are usually reluctant to grant security for costs
 - § Play hardball and refuse to pay its share of the advance?
 - Claimant then may seek to:
 - ü terminate the arbitration agreement
 - ü sue Respondent in state courts
 - ü pay Respondent's share and request (immediate) award for reimbursement of one half of the advance
 - § Possible sanction by the Arbitral Tribunal when apportioning the costs of the arbitration

III. Advance on costs (2/2)

- If Respondent articulates phoney or grossly overestimated counterclaims:
 - § Claimant can then seek the payment of separate advances on costs

- If Respondent articulates counterclaims but because of its financial situation (financial distress) cannot afford to pay advance on costs for its own counterclaims:
 - § Seek an order from the Arbitral Tribunal that Claimant should cover Respondent's share?

 - § Right of access to justice: Article 6 of the ECHR?

IV. Interim relief (1/2)

Ø First question: why seeking interim relief at the outset of the proceedings?

q **to ensure the effectiveness of the arbitral award**

§ order to refrain from disposing of or modifying the object of a proprietary claim

§ order to refrain from drawing on a letter of credit or guarantee

§ order to deposit the goods in dispute or goods to be delivered with a custodian

q **to regulate the relations between the parties during the arbitration**

§ order requiring a contractor to carry on with the construction works / or the owner to continue to make payments (possibly on escrow account)

§ order requiring a manufacturer to continue supplying a distributor

§ order requiring a distributor to continue selling a manufacturer's product

q **to preserve evidence**

§ order authorising the inspection of a construction site prior to impending change(s)

q **to enjoin an adverse party from commencing court proceedings abroad or before another arbitral tribunal**

§ anti-suit / anti-arbitration injunction

IV. Interim relief (2/2)

Ø Second question: which forum?

q State court or arbitral tribunal?

§ Arguments in favour of **arbitral tribunal**:

ü arbitrators might be already familiar with the facts of the dispute

ü arbitrators may have the specialised legal or technical knowledge required to decide the application

ü arbitrators know the language of the dispute

ü arbitrators provide a neutral alternative to potentially unfriendly courts

ü arbitrators are usually in a better position to ensure the privacy of the proceedings

§ Arguments in favour of **state courts**:

ü *imperium* of state courts (threat of criminal sanctions)

ü no jurisdiction of arbitral tribunals over third parties (e.g. order prohibiting payment by a bank under a refund guarantee or attachment of assets held by a third party)

V. Other procedural motions (illustrative)

- ∅ Other scenarios that would warrant the filing of procedural motions:
 - ∅ If your client has limited (financial) resources available:
 - q Request nomination of tribunal-appointed expert(s) to avoid costs of party-appointed expert(s)
 - ∅ If opposing party is expected to leak information on the case
 - q seek order providing, that all pleadings, motions, discovery responses, depositions, testimony, and documents exchanged or filed in relation to the arbitration be kept strictly confidential
 - ∅ In case of conflicts of interest concerning opposing counsel or opposing counsel's law firm?
 - q Procedural motion to preserve the integrity of the arbitration (Chinese walls)

Thank you for your attention !

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