

Western Canada Arbitration Society

May 14, 2013

Hot Topics

1. Pre-Appointment Communications and Interviews

- (a) What are current practices on interviewing prospective arbitrators? Are clients insisting upon a more detailed interview, even attending interviews?
- (b) How are arbitrators reacting to requests for interviews? Are the Guidelines of the Chartered Institute honoured in fact or in their breach, particularly regarding a written record of discussions about the factual circumstances of the dispute and the positions of the parties?
- (c) How frequently are arbitrators making a disclosure of the fact or content of a pre-appointment interview when signing a declaration of impartiality and independence?

2. Third Party Funding: A Curse or a Cure

- (a) Is the continued growth of Third Party Funding evidence of the failure to reasonably contain the costs of international arbitration (and litigation generally)?
- (b) Does TPF fulfill a legitimate need or will it make the arbitration process more complex and therefore more expensive?
- (c) Will Respondents start to use TPF more frequently?

3. Procedural Issues and Third Party Funding

- (a) The existence of TPF in international arbitration raises a variety of difficult legal and evidentiary issues, some of which can directly affect the conduct of an arbitration, such as privilege claims in respect of communications between a party and a funder and also disclosure of a funding agreement.
- (b) Does an arbitral tribunal have jurisdiction to order the disclosure of the existence of a Third Party Funding agreement? To order the disclosure of the actual funding agreement, to both the opposing party and the tribunal? If yes, does the same rationale extend to any alternative fee arrangement such as contingent fee?
- (c) Are such issues better referred to a supervising court rather than determined by a tribunal in order that a court may bind a third party funder which is not formally a party to the arbitration?

4. Procedural Orders, Times Limits and Tactical Delay

- (a) Is there a growing trend for a party to intentionally delay compliance with certain time limits to gain a tactical advantage? Is this happening with the delivery of expert reports which may be delivered late after the ordered date, significantly reducing the amount of time for the other party to properly respond?

- (b) Can time limits in a procedural order be effectively enforced? How often are orders or directions enforced in court for domestic arbitrations? In any event is court enforcement realistic? Note, under the Model Law, there is no similar mechanism. However, in the Ontario ICAA, an order in respect of “interim measures” may be enforced as if it was an award. The Alberta ICAA does not contain this provision.
- (c) Do tribunals refuse to allow the submission of evidence after a deadline has elapsed, and, if not, should they do so more frequently when asked by an opposing party claiming prejudice?

5. Issue Conflict

- (a) To what extent would prior involvement as arbitrator, counsel or expert witness be relevant when considering whether a conflict exists and there is a reasonable apprehension of bias?

6. Cancellation/Postponement Fees

- (a) Are they becoming more common in Canada? Why? What approaches are customarily taken?

7. Unrepresented Parties (or Parties represented by Counsel with little or no experience)

- (a) How common is this?
- (b) What problems does it present for the Tribunal?
- (c) What measures can be taken to overcome the problem?

8. Confidentiality

- (a) Is confidentiality the rule in Canada? Should it be? Should it depend on contract? How long should it last? How is it to be squared with public interest disclosure? Public corporation disclosure?

9. Squaring Expectations: the Civil/Common Law divide

- (a) When both Civilian and Common Law lawyers and parties are involved, how does the Tribunal come up with a fair process that will not offend basic arbitration concepts under both systems?

10. Costs – what is the appropriate approach to awarding costs in a commercial arbitration practice?

- (a) Is the general rule that the winner gets full indemnity for actual reasonable legal fees and expenses, or should that be reserved for special circumstances?
- (b) Claims for full indemnity costs can be very large – what “evidence” or other material should arbitrators have before making a costs award?

- (c) Is there a reason why different approaches should apply in international and non-international cases?
- (d) Is there a reason why a different approach should be or must be taken in Alberta as opposed to other Canadian jurisdictions?

11. Withdrawal of claims – what should arbitrators do if a claimant or counterclaimant advises that it wants to withdraw certain claims?

- (a) Does a party have a right to withdraw claims without leave of the tribunal?
- (b) Does it matter if the withdrawal is announced at the hearing versus 4 months before the hearing?
- (c) Should the withdrawal be recorded in an award or a procedural order?
- (d) If a claim is withdrawn without being dismissed by an award, does the tribunal still have jurisdiction to award costs?

12. Arbitration Chambers

- (a) Does the mere fact that (i) two arbitrators or (ii) an arbitrator and counsel come from the same "arbitration chambers" give rise to justifiable doubts as to independence or impartiality?