PERKINS COIE
COUNSEL TO GREAT COMPANIES

ARBITRATION 2.0:

A Manifesto for Efficiency in International Dispute Resolution

INTERNATIONAL ARBITRATION HAS LOST ITS LUSTER.

For more than half a century, arbitration has offered the promise of quick, fair, and enforceable dispute resolution across borders. But the process has increasingly become cumbersome, bloated, and inefficient. Users of international arbitration bemoan expensive proceedings, intrusive discovery, and excessive waits for awards. Far from being the dispute resolution mode of choice, arbitration is now often seen as the least bad option for parties unwilling to litigate in each other's court system.

It need not be so. At Perkins Coie we recognize that our duties to our clients include facilitating an efficient and effective dispute resolution process as well as zealously representing their interests. We do not consider these responsibilities to be mutually exclusive. And we are not alone in that conclusion.

Accordingly, we have propounded the following principles for the efficient conduct of international arbitration. We call these principles Arbitration 2.0, in acknowledgement of the significant role that technology plays in them.

GENERAL PRINCIPLES

FLEXIBILITY

One of arbitration's virtues is its flexibility. We therefore decline to propose hard-and-fast rules to fit each and every arbitration. Where feasible, however, and as specified below, we will try to narrow the scope of arbitral procedures to maximize speed and efficiency.

CONFIDENTIALITY

Not every arbitration can be confidential. Investor-state disputes in particular are subject to requirements of transparency and publication. Nonetheless, where possible, we will press for the confidentiality of proceedings, subject to the terms and applicable laws of the agreement at issue, the reporting requirements of parties involved, the law of the seat, and the rules of any applicable arbitral institution. We will not report or discuss the course and results of arbitrations, on or off the record, without explicit consent from our clients.

COURTESY

Arbitrations are adversarial proceedings. This does not mean that they need to be mean-spirited or antagonistic. Arbitration is first and foremost a means of resolving commercial and investment disputes; it is not— and should not be—a no-holds-barred mud fight between parties and their lawyers. Accordingly, we commit to treating opposing counsel and witnesses with the respect they deserve. Again, we do not view that commitment as being in conflict with our duty to represent our clients' interest to the utmost of our ability.

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SPECIFIC UNDERTAKINGS

ARBITRATION CLAUSES

Arbitration begins with the clause. Arbitration practitioners are increasingly being called on by their transactional partners to advise on and draft dispute resolution provisions for international business contracts. This is a positive trend that presents an opportunity for clients and their counsel to address arbitration's shortcomings.

We will encourage our clients to propose and accept Arbitration Clauses with terms designed to streamline the process, making it more efficient and less costly.

REQUESTS FOR ARBITRATION

In cases where our client is a Claimant, we will strive to provide a Request for Arbitration that is clear and concise. Where circumstances permit, we will not file a Request for Arbitration longer than 30 pages, double-spaced.

To the extent that it is compatible with the requirements of a case, we will also explore filing papers in multimedia format. This may include links to video presentations of preliminary evidence and argument, supplemented by documentary references and PowerPoint slides. Any such presentation, where possible, would be limited to 30 minutes in length.

Modern technology readily permits arbitrators and other viewers of such materials to "flag" portions of such presentations that they find noteworthy, and return to them at a later point. We would ensure that arbitrators and counsel have ready access to such technology.

We believe that arbitrators and arbitral institutions ought to welcome alternative means and media whereby a party can present its case.

STATEMENTS OF CLAIM AND DEFENSE

A Statement of Claim should provide a comprehensive recitation of a Claimant's grievance. A Statement of Defense ought to respond fully and comprehensively to a Statement of Claim. That said, they should not take a week each to read.

We will strive, except in the most complex of cases, to limit any Statement of Claim to 100 pages, double-spaced, in length. We will likewise strive to limit Statements of Defense to 100 pages, double-spaced, excluding any counterclaim.

As with Requests for Arbitration, we believe that the interests of clients, arbitrators, and the arbitral process might be well served by alternative means of presenting a case. Accordingly, we will consider, where permissible, filing hyperlinked multimedia presentations as part—or in lieu—of an old-fashioned, written Statement of Claim or Defense. Such presentations, where possible, would not exceed 120 minutes in length and would be customized for simple "flagging" for future reference.

A Claimant ought to be prepared to submit a Statement of Claim promptly after constitution of a tribunal. We commit, wherever possible, to doing so within 45 days of a first procedural meeting or conference. We likewise commit, where possible, to submitting a Statement of Defense within 60 days of a Statement of Claim.

WITNESS STATEMENTS

Because Witness Statements typically serve as the direct testimonial evidence in arbitrations, they are essential to the process. As with Statements of Claim and Defense, however, there has been a tendency in recent years to conclude that more is better.

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We disagree. In our view, the interests of clients are best served by focusing on the few witnesses with knowledge of the facts inherent in the claims and defenses. In all but the longest-running disputes, those witnesses will not exceed a handful in number. Subject to the circumstances of the case and our clients' needs, we therefore will endeavor to present no more than five witnesses of fact in a particular proceeding.

We believe that Witness Statements, of all the documents in arbitrations, would benefit most from alternative media, particularly video. We therefore would propose to record and transcribe all such statements.

POST-STATEMENT HEARINGS

We endorse the recent proposal of distinguished arbitrator Neil Kaplan QC that the parties make an oral presentation to the arbitrator(s) following the exchange of Statements of Claim and Defense. We believe in particular that such a presentation might serve to help the parties and the tribunal focus on specific aspects of the dispute in any future briefing.

We further believe that a "Kaplan Opening" might serve to do away with the need for rejoinder and rebuttal briefing. Moreover, where one or more aspects of a claim might be dealt with summarily, early intervention on the part of the tribunal might facilitate a quicker dispositive result.

We believe that a preliminary presentation need not occur in person. High-quality video conferencing ought to facilitate a hearing between arbitrators and counsel in different locations. Time zone differences may complicate finding a suitable hour, but that inconvenience is minor compared with the logistical difficulty of finding common dates for travel and a hearing in one location.

The video conference capability would further assist clients to be present at any preliminary hearing. They could have a significant say in whether and how to proceed further down the course of arbitration. The Post-Statement Hearing would thus present an ideal opportunity for the parties to discuss whether settlement might be feasible before further time and expenses accrue.

DISCOVERY

One of the areas in which arbitration has most disappointed users is in its approach to disclosure and discovery of documents. The disappointment may have been inevitable in light of the radically different approaches to discovery taken by arbitral practitioners from their representative jurisdictions.

The IBA Rules on the Taking of Evidence in International Arbitration, now in their third iteration, form a valiant attempt at a global compromise. Nonetheless, their formulation that tribunals should order production of requested documents that are "relevant to the case and material to its outcome" is inevitably interpreted differently by counsel and arbitrators from different cultural backgrounds. Common law practitioners tend to view that phrase as endorsing a broader approach to discovery; civil law practitioners take the opposite view.

As a component of the arbitral process that often generates procedural disagreement, discovery deserves attention at the outset. Accordingly, we will propose in all arbitrations in which we represent a party and in which the relevant agreement(s) and rules do not provide firm guidance that the parties and the tribunal select an approach to discovery from the options below:

(i) No discovery: the parties would not seek any documents from each other. The documentary record would consist exclusively of materials advanced by each party in support of their own position.

(ii) Narrow discovery: the parties would limit themselves to a maximum of 20 document requests each, with no subparts. Each request would be crafted so as reasonably to expect that it would elicit no more than five responsive documents.

(iii) Broader discovery: the parties would limit themselves to 50 document requests each, with no subparts. Each request would be crafted so as reasonably to expect that it would elicit no more than five responsive documents.

(iv) Open discovery: the parties would not limit the number of document requests or the anticipated scope of responsive documents.

Disclosure of Existence of Responsive Documents

In categories (ii) through (iv) above, responding parties will as soon as practicable, and before any objections are made, identify any and all requests for which no responsive documents exist.

Electronic Backups

If a requesting party reasonably believes that responsive documents may have existed but have been deleted from files and servers, it may petition the tribunal to search for such documents. Any such search would be conducted by a third-party discovery firm, under the supervision of the requested party and/or its counsel. The requesting party would bear the costs of the search.

Redfern Schedules

We believe that Redfern Schedules in their current form are no longer a useful means for tracking discovery requests and responses. It should go without saying (and we will propose that it be the rule in any arbitration) that a requesting party not possess any document it is requesting. It should furthermore be apparent from the context of any request why a document sought is relevant and material.

Accordingly, we propose to replace or update Redfern Schedules with an electronic format for document requests. Under that format, each request would carry a link to the parts of the Claimant's or Respondent's submissions that give rise to the request. For example, if a witness wrote in a statement that he made a note of a meeting, a request for that meeting note would link to the relevant portion of the Witness Statement. A party opposing a request could likewise link to relevant parts of submissions for evidence and argument that the request was irrelevant or otherwise ought to be denied.

Legal Privilege

Different legal cultures have different approaches to legal privilege. We appreciate that lawyers in international arbitrations remain bound by the ethical canons of their local jurisdictions. Accordingly, in any arbitration in which documents are requested, we will explore the parameters of each party's and counsels' understandings of legal privilege at the outset of the document production process.

MERITS HEARINGS

We understand the importance that most lawyers continue to attach to physical presence and interaction in hearings. We nonetheless believe that arbitration's goal of efficiency is ill served by an insistence that all participants be in one place at the same time, all the time. Twenty-first century technology permits people across the world to interact as if they were across the room.

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This is not to argue that Merits Hearings in arbitrations ought to take place entirely remotely; it is to suggest that the absence of some participants not be seen as an absolute impediment to proceeding. There is no reason, for example, why some counsel could not participate in an arbitration from New York while their colleagues, opposing counsel, and the tribunal were assembled in London, or vice versa.

Remote participation might be particularly appropriate for certain witnesses. Provided that they are not inconvenienced in their time zone, and that counsel and the tribunal are satisfied that they can clearly see and be seen, hear and be heard, we commit to exploring the possibility of video conferencing for witnesses who cannot travel or who would be substantially inconvenienced by attending in person.

Arbitrations often involve complex facts and legal theories. We nonetheless believe that a properly prepared tribunal ought to be able to hold Merits Hearings in most arbitrations that last no longer than three weeks. Remote participation may hold the key to making such hearings feasible without having to schedule them years in advance. Where expeditious, oral openings might be prerecorded and sent to the tribunal in advance, with each side reserving a short period at the outset to respond to points made in opening.

POST-HEARING BRIEFS

Rather than serving as a sparingly used procedure for clarifying discrete issues, Post-Hearing Briefs are becoming de rigueur in arbitration. This adds substantial time and expense to the process. We do not believe that comprehensive Post-Hearing Briefs are necessary or useful for a diligent and attentive tribunal.

We believe, rather, that tribunals should reserve time at the end of the Merits Hearing to put forward any issues on which they seek clarification. Within 30 days of that time, the parties could then submit briefings or, if preferred, multimedia presentations on these specific issues. In most proceedings, we would expect that such submissions should be no longer than 30 pages, double-spaced, or 30 minutes.

AWARDS

We aspire to work in an environment in which arbitrators routinely issue awards within one year of the filing of a Request for Arbitration. The commitments and suggestions above are consistent with that aspiration. Where feasible, we will consider and explore with clients the possibility of structuring payments to arbitrators in a way that incentivizes rapid issuance of awards.

CONCLUSION

International arbitration occupies a privileged and unique position in dispute resolution. Arbitrations are not bound by the strictures of local court proceedings. They should be laboratories of innovation for methods of securing just and efficient results.

If all the stakeholders in arbitration undertake to make the process quicker and more agile, consistent with the parallel and paramount goal of giving the parties a fair hearing, then arbitration can reclaim its lost luster.

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