

BRIEFING NOTE

Dispute Management – How Long Will it Take and How Much Will it Cost?

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Introduction

Good counsel will advise a client on three key issues before recommending and embarking on any arbitration or dispute resolution procedure: (1) How long will it take? (2) How much will it cost? (3) Will the client succeed? That is because these three issues enable the client to take an informed decision as to whether, and if so how, to prosecute or defend the proceedings.

Poor counsel will not provide that advice or provide advice that is vague or so heavily caveated that it is of no practical or commercial use. Proceeding in the arbitration, poor counsel will then fail to provide an arbitration strategy or provide a strategy that fails to take account of the client's commercial objectives, leading to protracted proceedings and spiralling costs.

In this briefing note, we set out a number of points that clients should consider with their counsel to minimise the time and cost, and optimise the outcome, of arbitration proceedings.

How long will it take?

The length of arbitral proceedings is usually determined by the amount at stake and the number and complexity of the issues between the parties. The amount is important because many international arbitration institution rules now allow for an expedited arbitral procedure for references in which the amount in dispute is less than say US\$5 million.

That is because the institutions recognise that for arbitrations in which the dispute is for a smaller amount, the legal costs can become disproportional to the amounts awarded. Hence the expedited procedures cut out, or reduce, the more extensive stages of the procedure, such as the disclosure of documents and the oral hearing, leading to a determination of the issues on factual and expert statements, and legal submissions, only without an oral hearing.

The number and complexity of the issues is important because the greater and more complex those issues, the more time is incurred in resolving them. For that reason, good counsel will weed out those issues that are of marginal relevance and focus on those that are central, conceding certain points if such concessions are economically sensible. The "fight every point" approach is usually the signature of counsel intellectually unable to identify the key issues on which the determination of the dispute rests or focused on annual billing targets.

How much will it cost?

The cost of arbitral proceedings has, for too long, been driven by the time incurred, which time incurred has, for too long, been driven by fighting every point, for the reasons set out above or through fear of incurring the client's wrath if not every stone is left unturned.

The short answer is a fixed cost agreed between counsel and client at an amount that is proportional to the amount in dispute and reflects the complexities of the dispute. This is a two-way street. Counsel has to recognise that the legal services market is saturated with competition that forces law firms off hourly rates and drives down the fixed rate that can succeed in any competitive tender. Clients have to recognise that if a fixed rate is agreed, it cannot expect every point to be taken and to have an army of legal minds dedicated to its file.

It is of course a balance. A dedicated legal team that provides extensive industry or matter experience, focused advice to identify the key issues, competent supervision of the running of the file and a senior lawyer to advocate the matter at trial or advise on settlement.

Will the client succeed?

A successful outcome turns on the definition of success, from making a full recovery to mitigating, or at least postponing, the full recovery that was inevitable from the outset. Achieving a successful outcome depends on probabilities. Good counsel will improve the probabilities in favour of their client. Poor counsel will ignore such probabilities, at best.

How can probabilities of success be improved? For example, by focusing the arbitration on the issues on which the client's evidence is strongest, selecting experts that have extensive and relevant expertise on the key issues in dispute, selecting arbitrators with technical, not necessarily legal, expertise or who are known to favour the client's side of the industry and by making an early settlement offer that exerts costs pressure on the counter party.

How We May Assist

As arbitration specialists, we act in domestic and international arbitration proceedings. We pride a detailed opinion at the outset of every matter, which opinion includes a factual, legal and technical analysis, a case strategy, a costs budget and an outcome assessment.

We firmly believe that mediation and other settlement procedures can provide commercially sensible outcomes for clients and their counterparties. Where appropriate, we work with our clients in pursuing those procedures to manage the time, cost and outcome of the dispute.

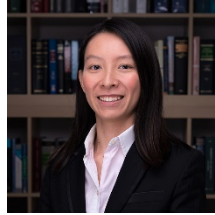
If you would like to speak to us as to how we may help, please feel free to reach out to any member of our team. We are aligned and the advice you receive will be consistent.

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