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An Arbitration Gone Bad – *Not* Arbitration Gone Bad

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Periodically, a litigator or a corporate counsel will complain about a bad experience in arbitration, and go on to say that as a result he or she will no longer agree to arbitration. In effect, that person has concluded that the entire process of arbitration is flawed – that it has "gone bad."

When we hear someone react that way, we question whether the person should be concluding that arbitration as a process is flawed. Rather, it may be that the particular arbitration was flawed.

And if that is a reasonable possibility, it seems to us that the litigator or corporate counsel should be trying to determine why that arbitration went badly.

We ask – or are at least tempted to ask – two questions:

Question 1: Have you ever a bad experience with court litigation?

Anyone who has been involved periodically in litigation has almost certainly had at least one bad experience and we would venture, probably more than one bad experience.

So we wonder why one (and it is often just one) bad experience with arbitration should cause anyone to decide to avoid a very effective means of resolving disputes and, in some situations, perhaps the only viable means. This is particularly difficult to understand because it often seems that the decision to avoid arbitration is taken with very limited analysis of what went wrong in the particular arbitration, and why it went wrong.

Question 2: Did you do an autopsy on the arbitration to determine what went wrong and why it went wrong?

It is unlikely, we would wager, that the complaining counsel did a comprehensive autopsy on the arbitration, analyzing it from the process of negotiating the clause through the provisions agreed to in the clause, assessing each major choice that was made or agreed to.

To provide some assistance to those who might wish to perform an autopsy on an arbitration that has gone bad, we offer this Arbitration Autopsy Checklist.

Arbitration Autopsy Checklist

This Arbitration Autopsy Checklist will help litigators and corporate counsel determine what went wrong with an arbitration, and why.

While focusing on international arbitration, this checklist is – with limited modification – suitable for use in debriefing on a domestic commercial arbitration.

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Before the Dispute Arose

✓ ***Did you have a reasonable understanding, in advance, of what arbitration is?***

A slide down a slippery slope will begin if the person instructing on or negotiating the dispute resolution provisions in a contract does not appreciate what arbitration is, its main features and how it differs from court litigation, domestically and internationally. A general understanding of arbitration should be acquired *before* a person becomes involved in the negotiation, not by learning on the job.

Before you became involved in the negotiation of the dispute resolution provisions, did you have reasonable familiarity with

- the benefits and disadvantages of arbitration generally?
- the benefits and disadvantages of arbitration in the relevant/available jurisdiction(s)?
- the benefits and disadvantages of comparable court litigation in the relevant/available jurisdiction(s)?

✓ ***Was consideration of appropriate dispute resolution provisions for the transaction left until the 11th hour (or later)?***

It is legendary that those negotiating dispute resolution provisions for a transaction leave it until almost the very end of the negotiation. To get the best outcome, allocating some time earlier to consider potential disputes and appropriate dispute resolution provisions is advantageous.

Before negotiating the dispute resolution provisions, did you consider

- the types of disputes that would be most likely to arise?
- whether your client would be likely to claim or defend in those types of disputes?
- which dispute resolution process(es) would most likely fit your client's interests and objectives?

And if arbitration was selected, did you consider

- the appropriate seat of arbitration (also known as the "place" of the arbitration, which is the legal location of the arbitration)?
- the appropriate number of arbitrators (one or three) for the arbitral tribunal?
- specifying or not specifying particular qualifications for the arbitral tribunal?
- the advantages and disadvantages of administered and ad hoc arbitration in the particular circumstances?
- whether well-intentioned provisions to ensure speed or a specific process are suitable for all types of disputes that might arise?
- whether the arbitration clause might not be workable or not work well (referred to as a pathological or dysfunctional arbitration clause), and the resulting consequences?

✓ ***During the negotiation of the arbitration clause, did you get experienced advice on what the clause should contain?***

There is no substitute for experience and knowledgeable advice on arbitration and arbitration clauses. Because arbitration's key feature is "party autonomy," a party has the opportunity to get the opposite party to agree to almost every aspect of what goes into the arbitration clause.

Therefore, it is important that those not experienced in arbitration involve counsel who has extensive knowledge and experience in arbitration. Although the use of arbitration is growing in most jurisdictions, there are a relatively limited number of lawyers in most law firms and corporate law departments who are reasonably familiar with domestic and international commercial arbitration.

For the negotiation of the arbitration clause, did you

- involve counsel with knowledge of and experience in arbitration in the applicable jurisdiction(s)?

✓ ***Did you agree to an arbitration clause that is pathological?***

The negotiator may agree to aspects of the arbitration clause that will result in problems down the road. Parties will often use a boilerplate clause or a clause that is a compromise between their positions, without considering the workability of the clause for all reasonably possible disputes.

Did the arbitration clause negotiated in your agreement

- clearly state that disputes "shall be" referred to arbitration?
- clearly describe the types of disputes to be covered (and/or not covered) by the arbitration clause?
- correctly identify the specific arbitral institution to administer the arbitration?
- identify an arbitral institution with the competence and neutrality to administer the arbitration?
- identify an arbitral institution with a fee structure that was acceptable to your client and suitable for all reasonably possible disputes?
- provide efficient procedures to be used for the arbitration?
- permit appropriate discretion and flexibility for the arbitral tribunal to conduct the arbitration effectively and efficiently in light of the actual dispute and circumstances that might arise?
- have regard for "proportionality" – i.e., the complexity of the arbitration procedures compared with the size and complexity of all reasonably possible disputes?
- specify a set of arbitration rules that were existing, effective and appropriate for the circumstances?
- identify a seat of the arbitration that was neutral and in all other respects appropriate?
- specify the number of arbitrators?
- adopt an arbitrator-appointment procedure that was not overly complex?
- specify arbitrator qualifications that were truly important for the circumstances and not so specific as to unduly limit the available pool of arbitrators?
- specify the language of the arbitration?

After the Dispute Arose

✓ ***Did you choose your arbitration counsel wisely?***

If the chosen arbitration counsel does not understand arbitration, it is less likely that the potential benefits of arbitration will be attained or the party's case advanced effectively.

The chosen counsel need not necessarily be from the seat of arbitration but should be well-suited for international arbitration through training, experience and advocacy style.

Was the chosen arbitration counsel

- experienced in international commercial arbitration?
- open to working with processes that differ from that counsel's domestic court system?
- able to examine witnesses and make submissions in a style that fits with the expectations of international arbitration?
- not unnecessarily expensive?
- willing to work with corporate counsel and the corporation in an effective, efficient and coordinated way?

✓ ***Did corporate counsel stay involved?***

Arbitration counsel needs the involvement of corporate counsel – for direction; for insight into the corporation's objectives, concerns, priorities, and so forth; and to ensure the appropriate involvement and availability of senior management and others in the business.

Did corporate counsel responsible for the management of the case

- stay appropriately involved with the case throughout?
- provide the appropriate direction and insight to arbitration counsel?
- ensure the availability of the necessary people from the corporation?
- not inappropriately interfere with arbitration counsel's role as advocate in the case?

✓ ***Was arbitration counsel adequately informed?***

When arbitration counsel is retained, it is necessary that he or she be adequately informed about the corporation and the dispute.

Was arbitration counsel required or at least encouraged to

- become familiar with the corporation and its business?
- pursue the arbitration in a manner consistent with the corporation's objectives and an agreed strategy?

And was arbitration counsel given sufficient access to corporate information to adequately prepare for the arbitration and present the case at the hearing?

✓ ***Was there coordination between corporate counsel and arbitration counsel?***

To maximize the benefits of arbitration, corporate counsel and arbitration counsel need to coordinate their efforts to maximize efficiency and minimize costs.

Was arbitration counsel required to or at least encouraged to

- work effectively, efficiently and in a coordinated way with corporate counsel and the corporation?

✓ ***Did you choose your arbitral tribunal wisely?***

It is important that the decision maker be knowledgeable about arbitration, have case-management skills and the ability to conduct a fair and efficient hearing, and have at least basic familiarity with the subject matter/business that is at issue and/or the area of law.

Too often the choice of arbitrator is based on a lack of due diligence, a failure to consider some important factors, undeserved reputations, or inappropriate or wrongly weighted considerations. For example, undue weight may be given to the arbitrator's nationality and legal culture (civil law or common law), with unjustified speculation on how the arbitrator will handle particular legal or procedural issues in the arbitration.

In some cases, the arbitrator chosen will be well-known and perhaps very good but too busy with other cases to be able to deal with the arbitration expeditiously. Parties may also have chosen a retired judge who has never transitioned from being a judge to being an arbitrator[1] or a lawyer unfamiliar with arbitration, both of whom are inclined to establish procedures that mirror local procedures for court litigation.

[1] Some former judges have become good arbitrators but others have had a difficult time transitioning from being a judge to being an arbitrator.

Was the arbitrator you chose

- familiar/experienced with arbitration?
- sufficiently knowledgeable about the subject matter/business and/or legal issues involved in the dispute?
- skilled in case management, particularly if the chair of a three-member tribunal or the sole arbitrator?
- skilled in conducting a fair and efficient hearing?
- as good an arbitrator as his or her reputation suggested?
- sufficiently available so that the arbitration was not delayed by his or her unreasonable unavailability?
- willing to intervene when parties could not agree on procedural issues and issue procedural orders when needed?
- fair and of sound judgment?
- impartial and independent of the parties?
- compatible with other members of a three-member tribunal?
- chosen with sufficient "due diligence" – e.g., was information obtained about the arbitrator from persons with experience with that arbitrator and from reading the arbitrator's published decisions, articles and other public documents?
- fluent in the language of the arbitration?
- not unnecessarily expensive?

✓ ***Did you seek or agree to the appropriate arbitration procedures?***

The party autonomy and flexibility offered by arbitration mean that wise decisions need to be made on procedure so that the arbitration proceeds efficiently while allowing adequate time for counsel and the tribunal to do things with appropriate thoroughness. Many pitfalls can be encountered by those who lack reasonable knowledge and experience regarding the options or are unwilling to agree to sensible procedures.

Did the procedures agreed to in the arbitration clause and/or at the beginning of the arbitration (with or without involvement of the arbitral tribunal)

- set time limits that were unrealistic, and thus unworkable?
- set out procedures that were too expedited?
- grant the arbitral tribunal enough flexibility to create or adapt procedures in a manner appropriate for the specific case?
- provide for mediation prior to or in the course of the arbitration?
- provide incentives to encourage settlement such as sealed settlement offers (and in appropriate cases, "baseball" [final offer selection] arbitration)?
- account for differences in geography, time zones and/or languages of the parties?
- adopt the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*?[2]
- provide for appropriate and proportional pre-hearing proceedings (pleadings; document discovery/disclosure/production; examinations for discovery/depositions)?
- include appropriate innovative hearing procedures such as panels of experts, written evidence-in-chief (direct evidence), time limits and/or page limits, and equal sharing of available hearing time?

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[2] Online: International Bar Association <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

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✓ ***Did you pursue inefficient and ineffective tactics?***

Sometimes a party and its counsel will pursue tactics that are unlikely to succeed and/or will not serve the party's main interest in the arbitration or frustrate the arbitration process.

Did you pursue inefficient or ineffective tactics such as unreasonably

- challenging an arbitrator (or two arbitrators)?
- challenging the arbitrability of the subject matter in court?
- challenging the jurisdiction of the arbitral tribunal in court?
- failing to trust the arbitral tribunal on case management and procedural matters?
- acting aggressively with the opposite side or before the arbitral tribunal?
- refusing or failing to cooperate on procedural matters?

Or did you pursue inefficient or ineffective tactics such as

- failing to listen to express and implicit signals from the arbitral tribunal?
- forgetting that the "hearing" starts with the first contact with the arbitral tribunal and continues with each subsequent letter, submission and other interaction?
- failing to treat the arbitrators with respect?

Conclusion

By undertaking a comprehensive autopsy on an arbitration that has not been a happy experience, litigators and corporate counsel will gain a good understanding of the reasons for the outcome and what to do differently when drafting arbitration clauses and managing or conducting arbitrations in the future.

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