TECHNIQUES OF SAVING TIME AND COSTS IN COMMERCIAL ARBITRATION PROCEEDINGS

MARUBE C GETANDA, LLM; LLB: CPS (K), CPM (MTI)

Lecturer, Faculty of Law, Egerton University,
Nakuru Town Campus College, Nakuru , Kenya
Email: cmcmgetanda@yahoo.com

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Abstract

The common way of resolving a commercial dispute is litigating the matter before a court of law. However, business people have overtime found that this method has a number problems associated with it. They include the fact that the process is slow, expensive and has technical procedures that are not easily understandable by parties. Business people have resorted to alternative methods of resolving business disputes which are faster, convenient, confidential and and even cheaper. One such method is arbitration. Though arbitration satisfies the aforementioned advantages, it has turned out to be one of the most expensive and complicated system of Alternative Dispute Resolution (ADR). Although in this paper the key features, advantages and disadvantages of arbitration have been outlined, the paper mainly focuses on ways of minimizing time and costs in order to make arbitration a more cost effective method of resolving commercial disputes not only at the domestic but also at the international level.

Key Words: Arbitration, arbitrator, award, time, costs.

Introduction

Arbitration may be defined as the submission of a disputed matter to an impartial third party for decision-making. The third party is known as the arbitrator and his decision is known as an award. Arbitration is an out of court method for resolving a dispute. The arbitrator controls the entire process and like a trial, he listens to both sides and then makes a decision. Unlike a trial, there are limited chances of appeal. The main features of arbitration are as follows: -

i) The process may be voluntary although it may also be mandatory if provided for in the contract.
ii) It is also private and confidential unless an appeal is made to court.
iii) Arbitration is less formal and structured than litigation depending on the arbitration rules.
iv) The process is usually quicker as compared to court proceedings but some proceeding may take long depending on the number issues and parties involved.
v) It is less expensive as compared to litigation though this is debatable.
vi) Each party has an opportunity to present his evidence and make arguments in favour of his case.
vii) Parties have a right to choose an arbitrator with specialized knowledge related to the dispute.
viii) A decision made by the arbitrator may resolve the dispute and can be final.
ix) The award of the arbitrator can be enforced in court.
x) The decision of the arbitrator may be non-binding and in that event the party has a right to go for trial.

The process of arbitration has the following benefits to the parties as compared to litigation;

i) Parties to the dispute have the right to choose the arbitrator.
ii) Judges do not necessary have the required expertise in commercial disputes.
iii) Arbitration is generally expected to be faster.
iv) There is flexibility in schedule.
v) Parties may have greater control.
vi) Rules of arbitration can be tailored to fit the nature of the dispute.
vii) It is confidential.
viii) There is less likelihood of bias.
ix) It can be less costly.
x) There are limited chances of appeal.
xi) Parties can choose the law of arbitration applicable.
xii) They can also choose the place of arbitration.

Despite the above benefits arbitration has the following setbacks;

a) There may be no right of appeal even where the arbitrator has made a mistake.
b) The process may not be faster after all.
c) Limitations on discovery may occasion a disadvantage to a party.
d) Flexibility of the rules of evidence may not be ideal to the facts of the case.
e) The arbitrator may be biased.
f) Exorbitant costs may be incurred more than contemplated by the parties.

As stated earlier, arbitration is one of the acceptable methods of resolving commercial disputes because it is faster and cheaper than ligation. However, if not managed properly, arbitration may end up taking too long and become expensive in terms of expenses like arbitrator's and lawyer's

fees among others. How then can parties and their attorneys save time and costs in arbitration process?

The following are the possible ways of saving time and costs in arbitration;

1. **Keeping the Arbitration Clause as Simple as Possible.**

Sometimes the language used in the arbitration clause may be a cause of contention. Parties to the arbitration dispute may spend time arguing as to the meaning of a particular clause used in the arbitration agreement. The language used in arbitration clauses should be made as simple as possible. A simple arbitration clause will avoid uncertainty and ambiguity in its meaning and effect. This means that the use of technical terms should be avoided. If technical terms are used it may require an expert to be brought to explain the meaning of these terms. This will translate to time wasting and incurred costs. If the language is simple, then the meaning of the terms used is easily understood by parties and the arbitral tribunal. This in turn will reduce the time and cost that may be spent in interpreting the meaning of technical terms or clauses in the arbitration agreement. It is therefore advisable for the parties to the arbitration agreement to consider using a simple language in arbitration clauses. The arbitration clause should also conform to the laws applicable in arbitration. The clause should be specific on the place of arbitration, language of arbitration, and the rules governing the contract.

A carefully drafted arbitration clause will go a step in limiting the scope of discovery of documents, establishing timelines and also creating other boundaries.

2. **Limiting the Number of Arbitrators**

It is a common and good practice to appoint at least three arbitrators. However, if the three arbitrators are to be appointed, each will have to be paid his or her fees. This will make the arbitral proceedings expensive as compared to having a single arbitrator. For example, data collected by American Arbitration Association (AAA) on medical cases decided by way of arbitration in 2012 showed that when a panel of three arbitrators is used, the cost of the case was five times as high as the cost where there was a single arbitrator deciding the case.[1] If the three arbitrators are travelling from distant places then more money will need to be spent by parties to the dispute to transport them to the location of arbitration. More so for the three arbitrators to agree on the time to be available for arbitration may take considerable time as their dairies may be different. It may take the three arbitrators a long time to conclude the arbitration proceedings as they may not be moving at the same speed. In the event that one arbitrator is absent for one reason or another, other arbitrators may have to adjourn the arbitral proceedings and wait for the other arbitrator. These problems can be avoided by the use of a single arbitrator. Parties to the arbitration should keep the number of arbitrators to the minimum. However three arbitrators can be used when it is absolutely necessary.[2] On this point Kenyan law is very clear on the number of arbitrator. If parties do not agree on the number of arbitrators then number of arbitrators should be one.[3]

[1] How to save time and Cost in Healthcare Arbitration: Can it Really be less Expensive than Litigation? Dispute Resolution Journal Vol. 69 No 3 Page 2; By Katherine Benesch.

[2] Controlling Time and Cost in Arbitration: Page 92, The Leading Arbitrators' Guide to International Arbitration 2nd Ed (Newman &Hill, Eds) Pg 81-96@92)

[3] The Arbitration Act Cap 49 (Laws Of Kenya)(Revised Ed.2010) Section 11(2)

3. Selecting the Right Arbitrator

Who is the right arbitrator? In the event of having a single arbitrator, it is ideal to appoint an arbitrator with experience, case management skills and who is familiar with the subject matter of the dispute. Experienced arbitrators recognize that they have a duty to ensure the dispute is settled not only expeditiously but also economically. The aim is to ensure that there is minimum delay in dispute settlement and avoid excessive costs. This will result in cost saving and time in conducting the arbitral proceedings. Due diligence should be conducted in obtaining the background of the arbitrators, experience and the way they handle arbitrations. Parties can review the awards by arbitrators in order to gain an insight on the experience of the arbitrator and whether such arbitrator tends to lean towards the claimant or respondent in particular types of disputes. Parties can go a step further to investigate the reputation, knowledge, experience and the effectiveness of the potential arbitrator. This information can be obtained from advocates who have handled matters before the said arbitrators.

4. Costs and Lawyers Fees

Litigation costs are very high but arbitration can be used to minimize costs and time in arbitration proceedings. The arbitrator should allocate costs for purposes of discouraging bad behaviour and encouraging good behavior on the part of the parties during arbitration proceedings. Bad behaviour may include delay in submitting documents by a party to the arbitral proceedings. The arbitrator should fix a timeframe within which a party should file his documents with the arbitration tribunal and the period which parties should exchange the documents. If a party does not comply the arbitrator should award costs payable by the party at fault. A party can also delay arbitral proceedings by making unnecessary arguments or requests, a practice which is very common in normal court litigation. If the arbitrator has powers to award costs in such case, the parties will conduct themselves well and arbitral proceedings will move fast hence reducing costs and time.[4] It is also good practice for a party and his or her lawyer to agree on the costs of arbitration during representation.

5. Advance Procedural Hearings

It is necessary for arbitrators and parties to a dispute to conduct an early procedural hearing. This is possible during this hearing that parties can identify and narrow down the main issues in dispute for determination. If this is done it will make the work of the arbitrator easier and move fast because issues for determination have been agreed by the parties. In many occasions a lot of time is spent in determining issues in dispute as parties to the dispute may not easily agree. The parties can also agree on the rules and adopt the procedure to be followed during the conduct of the arbitral proceedings and the time frame within which the proceedings can be done. If the parties do not agree, the arbitrator(s) can have the power to make such orders. If all these is done, time wastage and costs can be avoided by arbitrators and lawyers in arguing about the issues in dispute and the procedure to be adopted during the arbitral proceedings.

[4] Appendix 4.3: ICC Techniques for Controlling Time and Costs in Arbitration- Rule 85

6. Use of Experts

Some cases may require an expert witness to testify. Parties should determine whether the use of experts is really necessary. Though experts have vital evidence which can help in resolving the dispute, parties should have it in mind that fees for experts is very high. It is possible for fees of experts to be more than the value of the subject matter. If parties find that the use of experts is necessary, they should arrange for experts to have an early meeting to assist in identifying and narrowing down the issues and exchanging reports. Parties to the dispute should also consider limiting the number of expert witnesses each requires. Parties can save time and costs by having experts present a record of issues agreeable to the parties and the ones not agreed. Parties should not only look for qualified and experienced experts but those who are cost-effective. Parties can also consider whether there is a possibility of using a single tribunal appointed expert.[5] If the use of an expert is not necessary then parties should consider not using them. By so doing they will reduce the time spent by experts to give evidence and costs.

7. Language of Arbitration

It is possible for different languages to be used if the arbitrator, witnesses and parties to a dispute in arbitration speak different languages. It is advisable that a single common language is used by the parties. If more than one language is used, a lot of time will be spent in translation and interpreters will have to be availed. This in turn will require more time spent in translation. At the same time interpreters will have to be engaged and paid for the services they render. Parties should agree on the use of a single language to help in reducing the time spent in translation of proceedings to a language acceptable to all parties. More so, no extra costs will be incurred as no translation services are required. However, parties may use more than one language if it is absolutely necessary and if it is intended to reduce money and time in arbitral proceedings.

8. Location of the Hearing

Arbitral proceedings have to be held at some place. Parties should choose a location of hearing which is convenient to both them. They should consider a location which is not costly in terms of expenses. They should have in mind that some cities are more expensive than others. The location should not be an expensive place to transport witness and arbitrator(s). If parties choose a far distant place more time will be spent in travelling to the same place. It is also possible that travelling expenses to the same place are likely to be high. If a central place or a place nearer to the location of the parties is considered, witnesses and arbitrators time spent in travelling to the place of arbitration will be reduced. At the same time travelling expenses to such location will be reduced. In the long run arbitration will be cheaper in terms of costs and time spent to determine the dispute. However, if parties do not agree on the place of arbitration then the arbitral tribunal should determine the location but the arbitral tribunal must consider the convenience of the parties.[6]

9. Settlement of Dispute

As stated earlier, arbitration is one of the methods of resolving commercial disputes. However, commencement of arbitral proceedings does not prevent parties to a dispute from pursuing a consensus settlement on the dispute. For example, mediation can be used to resolve the dispute.

[5] The Arbitration Act Cap 49 (Laws of Kenya) Revised Ed. 2010 Section 27(1) (a)
[6] The Arbitration Act Cap 49 (Laws Of Kenya) (Revised Ed. 2010) Section 21(2)

Serving a claim on a party and filing a defense does not mean arbitration has to continue till the award is made. This has been explained as follows;

> *"Serving a claim or filing a defence does not mean that the arbitration must be fought all the way to the award. A settlement can be reached at any time if both sides are willing, and often a third party mediator can help bring this about. Usually, the key question is when in a process can a mediation be attempted: too early, and the parties may not properly know their own positions; too late, and positions may have become entrenched"*[7]

Even if the arbitral proceedings are on-going parties should be encouraged to settle the dispute. The arbitral tribunal has also the obligation of encouraging parties to exercise their freedom to discuss, mediate, negotiate and agree on the terms of settlement. If parties reach an agreement, this surely will reduce costs and time drastically. If this happens, it means that arbitral costs which include fees for the arbitrator, counsel and expert witness, if available, will not be paid by parties to the dispute. The Arbitral tribunal should record a settlement award in the terms agreed by the parties and then adopt the same.

10. Conduct of the Arbitration Hearing

Once the arbitration hearing commences it is important to avoid unnecessary repetition of what has been said by a party. Parties should stick to the issues in dispute and always have their theme in mind. This will help in streamlining the arbitration process. Courtroom formalities like objections and too much of cross-examination should be minimized. This requires parties to properly prepare for their cases. Communication skills of summarizing will help a great deal in saving time and costs.

11. Length of Written and Oral Submissions

Parties may present written submissions in support of their case which are intended to persuade the arbitrator to make an award in their favour. The written submissions by disputants can cover many pages. This will require the arbitrators to take a lot time reading, analyzing and understanding the written submissions. Parties to a dispute in arbitration may also make oral submissions which may take long hours. It is possible that both the oral and written submissions may address the same issues. To minimize costs and time, parties should reduce the quantum of pages of written submissions and the time taken to make oral submissions. Alternatively, oral submissions can be avoided if issues to be covered by oral submissions are contained in written submissions. So far as it is possible, parties should avoid repetition of issues in either oral or written submissions.

12. Limitation Period of the Award

Parties should agree on the time within which the award should be made by the arbitrator. This will make the arbitrator to work extra hard to avail the award on time hence save time and costs. One of the advantages of arbitration as a method of resolving commercial disputes is that is fast. If the arbitrator takes a long time to make the award this advantage will not be realized. Delay in making the award will mean more time will be lost in waiting for the award and occasion losses and costs

[7] Ashurst Singapore ;July 2014 Page 2(9)

to the disputants. When the award is made early expenses of the arbitrators are reduced. The Kenyan Arbitration Act Cap 49 (Revised 2010) does not state a period within which the award is to be made. If parties do not agree on the period, then the award should be made within a reasonable time.

13. Use of Technology

Technology can also be used to save time and costs. Parties should consider sending and exchanging documents electronically as between them and the arbitral tribunal. This may work faster as compared to sending hard copies by post. Some evidence can be taken by way of a video instead of transporting witnesses to the arbitral venue. Power point presentations can also be used to explain and demonstrate the case of either party. Computer assisted mechanisms can be used to explain some data presented by a part to the proceedings. All this should be aimed at reducing time and costs. However, technology has also its own challenges that should be borne in mind by the parties.

Conclusion

Litigation has been the traditional way of resolving disputes. However, it has become very expensive as compared to other ways of resolving disputes. Business people have resorted to cheaper methods. Arbitration is one of such methods. Arbitration is informal, private and cheap. But because it is controlled by the parties, costs are likely to be much higher than litigation. Parties and their attoneys have to learn new techniques on how they can manage time and costs in arbitration. By maximizing the above discussed techniques arbitration is likely to work faster and become a less expensive method of resolving commercial disputes as compared to litigation. These techniques can increase the efficiency, minimize expenses and ensure a fast resolution at every step of the arbitral process.