January 14, 2016

Keys to Achieving Efficiency in International Arbitration

Practical Tips for In-House Counsel
Perceived Advantages of International Arbitration

- **Neutrality** (avoid potentially unfriendly foreign courts)
- **Enforceability** (New York and other Conventions)
- **Flexibility** (ability to tailor-make a procedure)
- The decision makers
- **Speed?**
- **Cost?**
Stakeholders in Arbitration Proceedings

- Counsel
- Parties
- Arbitrators
- National Courts
- Institutions
Breakdown of Costs in Arbitration

- Party costs: lawyers’ fees; witness and expert evidence; travel; etc. (82%)
- Arbitrators’ fees/expenses (16%)
- Institutional costs (2%)

Step 1: The Arbitration Agreement
Key Elements of an Enforceable Arbitration Agreement

- Clear and unconditional agreement
- Specify which disputes are covered by the clause
- Check for inconsistencies in complex contractual instruments
- Select reputable institution and version of applicable arbitral rules
- Select pro-arbitration seat
Check-list for an Enforceable Arbitration Agreement

- Review institution’s methods to appoint arbitrator and consider specifying own method

- Check for mandatory formal requirements under law of jurisdiction where parties come from, law of seat of arbitration, law of jurisdiction where contractual relationship is based, law of jurisdiction where enforcement of award may be sought

- Keep in mind requirements for challenge, recognition and enforcement of arbitral award
Step 2: Case Preparation
Define dispute resolution objectives

- Evaluate strengths and weaknesses of case
- Definition of success
- Consider overall business interests
- Budget – win at all costs?
Project Planning

- Define business goals and objectives.
- Establish the scope of work, key deliverables, timelines and expected results.
- Identify the core legal team and the additional resources required.
- Plan and document the team dynamic for the project (roles, responsibilities, scheduled meetings, etc.).
- Identify the available tools and resources that can assist with managing the case.
Project Planning – Tools & Resources

Project Planning
- Gantt charts
- Budget templates
- Statement of work
- Risk register
- Communication plan
- Contact directory

Internal Resources
- Online legal research applications
- Standardized forms
- Process maps
- Translation resources

Information/Document Sharing
- Internal team sites
- Desktop sharing tools
- External client sites

Monitoring
- Time entry by task code
- Reporting/Dashboards
- Alert system
Budgeting and Forecasting

- Aligns price with case strategy and assumptions.
- Allows in-house counsel and outside counsel to manage spend and effort.
- Develop budget that includes hours and fees grouped by resource, location, phase/task/subtask and month/year.
- Negotiate fee arrangement once the budget has been approved by both parties.
# Budgeting and Forecasting - Sample Budget

January 14, 2016

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## CLIENT NAME

<table>
<thead>
<tr>
<th>Phases</th>
<th>Tasks</th>
<th>Attorneys</th>
<th>Title</th>
<th>Hourly Rates</th>
<th>Estimated Hours</th>
<th>Estimated Fees</th>
<th>Assumptions/Notes</th>
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<td>Initial analysis &amp; drafting notice of dispute</td>
<td>Steven Reed</td>
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Alternative Fee Arrangements

- **Fixed Fee Arrangement** – Installment based billing for a phase of a matter, an entire matter or a grouping of similar matters on a periodic basis.

- **Flat Fee Arrangement** - A single fee charged for a phase of a matter, an entire matter or a grouping of similar matters.

- **Capped Fee Arrangement** – A pre-agreed maximum “do not exceed total” for legal fees.

- **Blended Hourly Rate Arrangement** – An agreed upon single hourly rate that applies to all timekeepers or a class of timekeepers working on a matter regardless of their seniority.

- **Collar Fee Arrangement** – A predetermined minimum and maximum amount of legal fees that can be charged for a matter.

- **Contingency Fee Arrangement** – A fee that is paid only in the event of the satisfactory outcome of a matter.
Dear Client:

We agreed to act on your behalf in relation to the following matters: Task 1, Task 2 and Task 3.

Partner 1 will be the partner responsible for the supervision of this matter. He will be assisted by the following Partners and Associates: Partner 2, Senior Associate 1 and Junior Associate 1.

The current hourly rates of our proposed team members are listed below:

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<th>Timekeeper</th>
<th>Hourly Rate</th>
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<td>Senior Associate 1</td>
<td>$Y</td>
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<td>Junior Associate 1</td>
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Case Management –
Measuring Plan Progress

Fosters communication through regular reporting and project updates to understand where the legal team stands against the project plan and provides in-house counsel with up to date information to facilitate strategic, data driven decisions.

<table>
<thead>
<tr>
<th>Title</th>
<th>Timekeeper</th>
<th>Current Month</th>
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<td></td>
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<td></td>
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**Current Month Hours per Title**

**Budget vs. Actual**

- **Partner**
- **Counsel**
- **Associates**
- **Legal Asst**

**May Budget**

**May Actual**
Selecting Arbitrators

- Identify candidates
  - Review prior awards and publications
  - Seek advice from prior appointing parties
  - Consider nationality (including common law / civil law background) and language ability
  - Consider standing, reputation, and influence
Selecting Arbitrators

- Interview candidates
  - Availability
  - Flexibility on procedural issues. Ask for past procedural orders?
  - Length and timing of proceedings
  - Familiarity with substantive law
  - Familiarity with industry practices
Step 3: Running the Case
Develop a Dispute-Appropriate Procedural Framework

- Case management conference
  - Draft a tailored roadmap for the proceedings.
  - A party representative should attend

- Identify key issues
  - Minimize disputes over collateral issues and focus tribunal deliberations.

- Broad statement of agreed facts
  - Avoid time and expense associated with litigating collateral facts that can be jointly agreed.
Develop a Dispute-Appropriate Procedural Framework

- **Bifurcation**
  - A partial award on jurisdiction or liability may facilitate settlement.
  - Where claimant has a high likelihood of prevailing on these issues, bifurcation may delay the proceedings by adding unnecessary procedural steps.

- **Dispositive motions**
  - Early resolution of a controlling question can mean resolving a dispute without the cost of litigating ancillary issues.
Develop a Dispute-Appropriate Procedural Framework

- How many rounds of pleadings?
  - Consider the complexity of the issues.
    - Additional submissions will add to cost and length of proceedings but may be necessary for complex disputes.
  - Limit the scope of subsequent submissions
    - Consider allowing the tribunal to indicate issues on which it wishes the parties to focus.
    - Consider implementing page limits for pleadings.
  - Post-Hearing Briefs
    - Consider whether genuinely useful. Consider simultaneous, rather than sequential, submission.
Develop a Dispute-Appropriate Procedural Framework

- Limits on document production
  - Conduct a cost/benefit analysis to decide whether, and to what extent, to conduct document production
    - Never, one round, or more than one? Timing in relation to pleadings?
    - If one of the parties has sole possession of documents, production may be essential
  - Establish reasonable time limits for document production
  - Take translation costs into account
    - Reducing the need for certified translations can help to reduce costs
Embrace Technology (Where Appropriate)

- Use of modern software and vendors to manage documents
- Videoconferencing
  - Case management conference
  - Procedural hearings
  - Witness Testimony?
    - Consider the stakes – witness credibility assessment
Strategies to Engage Opposing Counsel and Arbitrators in an Efficient Procedural Framework

- Do the parties work together to achieve a result which is fair and sensible in commercial terms, or do they not rather seek out every procedural advantage to ensure that they win, regardless of the merits?

  – Lord Mustill (1989)
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