Managing the unexpected in international arbitration

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INTRODUCTION

It is rare that an international arbitration goes according to plan. To transpose to international arbitration Mrs Cheveley’s statement in Oscar Wilde's play “An Ideal Husband”, that “To expect the unexpected shows a thoroughly modern intellect” encapsulates the importance of anticipating the unexpected and the ability to deal with it is nonetheless an important attribute of a thoroughly modern arbitrator.

Unexpected events happen in a myriad of contexts in international arbitration, whether because of procedural issue including guerrilla tactics, or the impact of cultural issues, or events outside the parties’ and the Tribunal’s control. An ability to be ready for such events and deal with them efficiently and fairly without jeopardizing the arbitration is very important. Some of these unexpected events can be pre-empted by deft advance procedural orders, others require reactive decision making. Sometimes this can be quite tricky: on other occasions not so.

In this article I shall explore some of these unexpected situations, including some which I have myself faced, and shall offer some suggestions as to how to manage them.

This short article in no way seeks to emulate the erudition and vast experience of Rusty Park to whom this special issue of Arbitral International is dedicated, but I hope provides a canter through some ‘Tales of the Unexpected in International Arbitration’ and how to prepare for and confront them.

I shall deal with the issues in three contexts:

1. Procedural Issues.
2. Cultural Issues.
3. Issues outside everyone’s control.

PROCEDURAL ISSUES

Unexpected procedural issues can take many forms from nothing more than counsel’s underestimation as to the work and consequent time involved in meeting deadlines leading to requests

for extensions of time which, without careful management, can put the timetable out of kilter, engender a feeling of unfairness in the party resisting an extension of time and, more importantly, jeopardize the hearing date. Such matters occur so frequently that it might be a misnomer to describe them as unexpected. Too often, despite procedural orders to give advance warning, these extension requests come as a fait accompli often at midnight of the original intended day of service. However, in most cases, any deleterious consequence of such issues can be largely ameliorated by ensuring there is sufficient flexibility in the timetable at the start—not to encourage dilatoriness, but to ensure that if it occurs there is ‘wriggle room’.

More unexpected in the procedural context are the various forms of procedural issues such as a wholesale change of case half way through the arbitration, applications for adjournment of the hearing, change of counsel, and a variety of interlocutory applications including in relation to disclosure. Sometimes these arise unexpectedly, but quite genuinely, whether because of events or issues arising in relation to one party’s conduct of its case or because they are deployed as guerrilla tactics by parties to obstruct, delay, derail, or sabotage an arbitration. Sometimes there is only one such event: in other arbitrations there are repeated such ‘unexpected events’.

There is one golden rule however, whatever the motive allegedly behind the application: both sides must be given a fair opportunity to deal with the unexpected event. But a reasonable opportunity to put one’s case does not necessarily mean an endless opportunity and tribunals need to keep some control over the procedure and the number of rebuttals and replies that parties can make, so that if, for example, the application is a form of guerrilla tactic it is not self-perpetuating.

Change of counsel for one party or the addition of counsel are good examples of an unexpected event which can substantially affect the progress and potentially integrity of an arbitration. A party is of course entitled to have counsel of its choice, but a change of counsel mid-arbitration, involving new counsel reading into the case, may involve either a substantial change to the procedural timetable or an adjournment. A tribunal will need to weigh up the position carefully and achieve a result which causes the least prejudice to both parties and in particular the party who has not changed counsel.

But a change of counsel can also raise conflict-of-interest problems for arbitrators. The LCIA (Articles 18.3–18.4), for example, provides that the Tribunal’s approval is necessary before a change or addition of counsel.

Article 18.4 provides;

18.4 The Arbitral Tribunal may withhold approval of any intended change or addition to a party’s authorised representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict of interest or other like impediment). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including: the general principle that a party may be represented by an authorised representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition.

Where institutional rules do not cover or adequately cover the situation it is always wise to include in the First Procedural Order a paragraph notifying the parties of the risk that a late change of counsel may force the Tribunal to disallow it if the Tribunal considers that it could affect the integrity of the arbitration, so that the parties are on notice from the beginning.

But other unexpected events may occur, such as the last-minute inability to obtain visas or the illness of witnesses. Fortunately today such issues can usually be accommodated by the use of a video link, but in the past that was not always the case.
Then there are the more extreme unexpected events—whether one could class them as procedural is debatable. On one occasion many years ago as a sole arbitrator I was faced with the situation of a witness about to attack counsel physically, the prevention of potential violence in a hearing not being something most arbitrators are normally trained to do! Fortunately I was able to calm the situation, but I dread to think what would have happened otherwise, as no amount of due process would have resolved that particular issue.

Though at a less extreme level, parties and witnesses can become quite aggressive and arbitrators need to be able to control the situation if this occurs, such as by adjourning the hearing to let everyone calm down or exerting one’s arbitral authority and threatening possible orders.

CULTURAL ISSUES

I next turn to cultural issues. These too can take many forms and in particular tribunals may be met with local bar rules which prevent them making particular orders; for example, different jurisdictions have different professional rules relating to interviewing witnesses etc. This can often be difficult to resolve so as to give the parties an equal playing field without prejudicing either party or jeopardizing the professional reputation of one side’s counsel.

Today we have the advantage of Zoom/Teams and where difficult issues such as these arise, rather than endless rounds of submissions, it is often better practice to set up a virtual procedural hearing where it is much easier to find some sort of common ground, but if not, the stance of each side becomes clearer. Such procedural hearings are useful not just for unexpected events based on cultural difficulties, but for any tricky unexpected issue which cannot be easily determined on written submissions.

Reverting to cultural issues, other forms of unexpected events arise such as when witnesses give evidence. I recall vividly many years ago when asking a witness from an East European country a question and, in those days not knowing how to address a female arbitrator, the witness started each response with the words ‘my dear!’ Or there are situations where counsel takes a colloquial approach to a witness such as calling them by their first name.

Does a tribunal simply let it ride as I did in both cases, acknowledging that maybe the semi-formality normally associated with international arbitration could be ignored in the situations in question? In neither case were the words intended to be discourteous: just unusual and rather unexpected. The important point is that when such an unexpected event occurs because of a difference of cultures, or even genuine ignorance of the process, the Tribunal should take that fact into account.

On a more serious note, a few years ago I chaired an arbitration where one of the co-arbitrators said to me during our deliberations that he would do whatever I did as Chair until I explained to him that his role was to come to his own independent view. It was clear to me that this was because of his understanding of how the tribunal would have worked in his country and he was at the time very inexperienced. So the unexpected is not necessarily confined to the parties and sometimes the issues which have to be handled can be even more serious.

MATTERS BEYOND EVERYONE’S CONTROL

Finally, I turn to those situations which arise because they are outside of everyone’s control, the two most recent and obvious examples being Covid and the position with Russia and Russian sanctions. The former caused chaos: the latter still impacts on arbitrations today.

Covid arrived without much warning three years ago and potentially could have caused havoc to international arbitration. Some arbitrations were simply adjourned, but many went ahead virtually. This was not always welcome. Parties wanted to see the witness in the eye; counsel
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objected for a variety of reasons instinctively because it was something they were not used to. In fact virtual arbitrations worked well. At its extreme, I always thought the most disadvantaged were counsel who could not work as a team, for instance when cross-examining or looking for a reference. What’s App and separate e-mail lines had to be established. As counsel for many years myself, I understood how difficult this was, but as restrictions were eased, this became less difficult.

Another issue was ensuring that witnesses were not being fed answers by someone hiding surreptitiously in the room, but protocols were established relating to cameras and 360-degree views of rooms which averted this problem. From a tribunal’s perspective, tribunal rooms were set up virtually to enable confidential discourse between the members of the tribunal. As for assessment of witnesses, as a member of the tribunal one could look the witness in the eye in a way that was not possible in person. Nonetheless, as most agree, virtual hearings are not usually as good as in-person hearings which are now for the most part returning.

But what has been learned during Covid has had some beneficial consequences. Procedural hearings can now be carried out for the most part virtually instead of taking expensive trips for half a day to another jurisdiction or having less satisfactory telephone conferences. It has also engendered a willingness to entertain more use of virtual evidence to provide a hybrid form of hearing, whereas in the past there was always enormous resistance to hearing witnesses virtually. Covid is thus a good example of how arbitrators have used their ‘thoroughly modern intellect’ or, in this case, use of thoroughly modern technical equipment, to meet an expected event.

Finally, I turn to the ongoing impact of the Ukrainian War and Russian sanctions and the impact on Russian parties being able to make or defend a claim in arbitration. Where a party is sanctioned or controls a sanctioned party, the position, at one level, is clearer. Different countries have different procedures to address those situations. Initially after sanctions were imposed in England, for instance, only specific licences were available which would allow counsel to represent parties and be paid for their services, but these were complex, took a long time to obtain, and were not always available. Now, for example, in England, a general licence exists which enables legal representatives to represent clients and be paid for their services. Arbitral institutions such as the LCIA and ICC, have also obtained general licences to enable them to accept deposits.

There still remains the problem of banks, some of which remain nervous about receiving fees for legal work where the payment originates from a sanctioned party even where there is a general or specific licence for the work to which the fees relate. Having sanctioned parties in an arbitration can also throw up a host of other issues relating to ensuring that sanctions are not breached, some of which, for example, are going through the English courts at the moment.\footnote{PJSC National Bank Trust, PJSC Bank Otkritie Financial Corporation v Boris Mints, Dmitry Mints, Alexander Mints, Igor Mints, Vadim Belyaev, Evgeny Dankevich, Mikail Shishkhanov, Maplesfs Limited (in its capacity as former trustee of the MF Trust), MFT (PTC) Limited (in its capacity as the trustee of the MF Trust); [2023] EWHC 118 (Comm), 2023 WL 01106119.} This is not however the place to discuss these complex issues. The usual impact of a party becoming sanctioned is to suspend/adjourn the arbitration until the position is resolved.

The much more difficult question in the context of how to deal with unexpected events is where one of the parties is Russian, but not sanctioned. As a general rule parties are entitled to have their disputes resolved, yet from time to time parties are now being unexpectedly disadvantaged by experts or even legal representatives who decline to act or to continue to act for Russian clients. This is very controversial, but in the context of the unexpected can cause huge problems and potential prejudice and often the only solution involves an adjournment of the arbitration or even a delay to its start in a situation where neither actual party is at fault. Nor can tribunals really anticipate such events in any prior procedural order save for the general provision about change of counsel referred to above which is not principally designed for this situation.
CONCLUSION

Tribunals need to be prepared therefore for the unexpected. The First Procedural Order can anticipate some procedural problems, but not all events can be foreseen. The unexpected e-mail, so often late on a Friday afternoon!—can raise very difficult issues for tribunals to resolve. The ability to manage such unexpected events fairly and efficiently is an important skill of an arbitrator.

And finally, by way of postscript, for an unexpected twist, those yet to come up against the potential for unexpected issues arising from artificial intelligence (AI) might like to type the title of this short article into Chat GPT, which I did after I wrote it, whether the comparison is unexpected is a matter for the reader to judge! AI is clearly the harbinger of a whole new thoroughly modern arbitral world and likely to affect the management of many future unexpected events in international arbitration—as well as any future editorship of Arbitration International.