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WINNING AN ARBITRATION DISPUTE

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Abstract— Indian Contract system has become a complex system mainly plagued by legal discrepancies. This has resulted in companies/organization spending their valuable time and monetary resources in fighting and hence proving their respective arguments in arbitrational councils or court of law. Many ways can be adopted so that organization conducting business transactions do not have to opt to arbitration. However, despite severe measures taken by organization there may be situation arising where both parties have to opt for arbitrational procedure. This paper underlines the key aspects that are needed to win an arbitrational procedure with proper planning, presentation and approach

Keywords— arbitration, dispute, success, clause, cost, description, specification, presentation

I. INTRODUCTION

To succeed at arbitration, three factors are most important: planning; preparation; and presentation. There is simply no substitute for a well-organized, logical presentation. This can only be achieved with hard work. This paper is designed to be a guide for anyone (with or without any legal help) who is preparing to arbitrate a contract (Engineering Department or Construction Organization contract) dispute. It is intended to help the reader better focus his/her efforts on the most crucial elements of an arbitration proceeding. The filing of a notice of intent to arbitrate with an arbitral Tribunal triggers a number of events culminating in the actual arbitration hearings. Each event is important and must be addressed with due diligence.

II. SELECTION OF ARBITRATORS

The selection of Arbitrator should be as per the provision made in the contract Agreement. The procedure of appointment of Arbitrator other than illustrated in agreement between parties should be opposed since beginning. Factors to be considered in the selection of the arbitrator(s) as detailed in the agreement should be adhered to. For example, a contractor submitted the claim believe that a contractor arbitrator would be more sympathetic to his position, since they are in the same profession. At the same time, such a contractor would most certainly favour a lawyer arbitrator if the contractor has a very strong legal case (i.e.: favourable contract provision, such as owner's failure to give timely notice, or owners waiver of a right) and will approach the court to get him nominated. It should be opposed if required with help of experienced legal expert.

III. PRELIMINARY HEARING OR FIRST HEARING

An opportunity to accomplish a great deal in a matter of a couple of hours presents itself at a preliminary hearing. This is a pre-arbitration meeting among the arbitrator(s), parties' counsel, and usually the parties, during which the procedural methodology and format for the hearings can be established, as well as to establish the scope of any advance exchange of documents by the parties, which is generally routine in construction disputes.

This is an opportunity to the Respondent to ask the arbitrator(s) to direct the claimant before the hearings begin to identify intended exhibits, list witnesses, identify experts, provide witness resumes, provide outlines of planned witness testimony, provide a summary of all claims and their bases, along with a schedule of damages including method of calculation and back-up documentation. This is also a chance to the Respondent to have the arbitrator(s) direct the claimant to disclose the elements of" his case (statement of fact of claims) in advance of defending the case at arbitration. This usually can be achieved by requesting the Arbitrator(s) that each party" submit a written pre-arbitration statement outlining claims and/ or statement of facts of claims by the claimants and counter claims by the Respondent. Efforts made in Preliminary hearing are significant overall savings due to the efficient scheduling of hearings and advance marking and admission of evidence. Unless the amount in dispute is relatively small, this opportunity for efficient and inexpensive "discovery" of your opponents' case should be pursued with vigour. Substantial and expensive hearing time will be spared if the parties consent to use a defined set of documents as the evidence for both parties during the arbitration proceedings, while leaving only a few documents for ruling by the arbitrators as to admissibility.

IV. SCHEDULE OF HEARINGS

Once a hearing started by the arbitral tribunal, the Respondent will have to arrange all sort of the defence and be ready to defend the case during the actual hearing and request the Arbitrators to arrange hearing at regular interval. Regular scheduling of hearings promotes continuity and permits the arbitrator to become focused on the dispute with minimal outside interference. Nomination of outside tribunal should be opposed because hearing by conducted by such tribunal involves a significant cost feature. Typically, your arbitrators each receive compensation at a daily rate. Expert witnesses receive an hourly rate, and travel expenses. The place of the hearing generally involves a cost. The attorneys and/or party's time to prepare and present the case involves significant expense. These costs all must be factored into the decision on how long you take to present your case. In case of hearing by outside tribunal (nominated by court) a sufficient number of hearing days should be scheduled to permit continuity of the hearing without intermittent adjournments. Preparation of the same witnesses repeatedly for adjourned hearing dates can be very costly and generally is unproductive. The scheduling of one or more hearing days than you anticipate will avoid suspension of the hearings due to scheduling conflicts, minimize the need for costly postponements, and allow the hearings to proceed with an enviable degree of continuity. This approach also allows a "buffer" if testimony from witnesses either under direct or cross, extends longer than originally estimated.

V. SUBSTANTIVE PREPARATION

Once it is evident that the claims raised by the claimant will be arbitrated, the respondent should start to prepare the defence, i.e., what you need to prove. In the majority of construction disputes, one party has breached a portion of a written contract. Thus, the place to begin is the contract itself. The contract is invariably the best representation of what the parties intended and expected from each other. The most effective way to present your breach of contract case is to keep the defence simple and presentable to remember that generally you must show what the contract required, that you complied with its terms, and that the other party failed to meet the requirements of the contract, resulting in your entitlement to determine the contract and recover the damages. Conversely, in defending a breach of contract claim, you want to prove that the claimant did not comply with the relevant requirements, was not entitled to full compliance from you and, as a result, is not entitled to damages. Therefore, you should be intimately familiar with your contract, plans, specifications, addenda, requests for information (RFIs), field sketches, change orders including back-up documentation, correspondence, daily work reports, daily log, and other records or documents which need to produce in your favour. You should formulate a list of witnesses who personally are familiar with the contract, your compliance with its terms, and the other party's non-compliance. Moreover, you should assemble the relevant exhibits (documents, drawings, correspondence) to use to support the testimony of your witnesses. Showing that the other party has breached the contract may establish the liability of the other party. However, in order to defend the claimant's claims and to recover any money i.e. counter claims, you must prove that your organization suffered money damages as a consequence of the breach.

Thus, you should calculate any additional cost of contract performance, out- of-pocket costs, lost profits (Loss of expected earning by early completion of contract if it can be established) or other damages in support of your counter-claim. The calculated money damages should be easily understandable and, if possible, should be reduced to a single page or two. Your goal in arbitration is to prove in a simple and straightforward manner that you are entitled to recover your damages from the party who breached the agreement. After you have identified the basis of your Counter-claim (or defences to your opponents claim), the witnesses you intend to call, and the exhibits you plan to introduce at the hearings, you should begin to assemble the information in a format which will assist the arbitrator(s) in readily understanding your claims or defences. Remember, the validity of a claim can be diminished enormously if presented in a confusing, unorganized manner. Clarity is essential. Assembly of sufficient copies (one for each arbitrator, your adversary, you, a "witness" copy and an extra copy) containing all of the exhibits you intend to introduce is a useful tool. Another valuable tool is your Statement of defence i.e. statement of fact of counter claims" which can be most effective when proffered to the arbitrator(s) during your opening statement at the commencement of the first evidentiary hearings. A copy must be provided to your adversary. Any objection raised by your adversary to use of such document because it is not really evidence usually is readily overcome by acknowledging that fact while offering to provide full support of the Counter-claim statement during the presentation of evidence. Such a compact statement of your case quickly appeals to the inquisitive instincts of your arbitrator(s).
The Counter-claim Statement should contain:

1. A summary (providing remarks against demand for arbitration, answer and/or counterclaim),in narrative form, of each and every claim submitted by claimant and the damages you have suffered, with the method of calculating the damages briefly described;
2. A statement of the facts, specifying those which are not in dispute;
3. A comprehensive list of your fact and expert witnesses (which may be subject to change) with outlines of the subject matter of their testimony; and
4. Use tabs to separate each of the above classes of documents.

Aside from allowing you to present a well-organized, neat defence of your case, the exhibit book and Statement of Facts of counter Claims serve the greater purpose of forcing you to consider the relative strengths and weaknesses of your case. In most instances, you are best off presenting your strongest Counter-Claims/Statement of defences first. You can better decide which defences are not worth pursuing, if any, or at least which ones are unlikely to be successful. After preparing the exhibit book and Statement of Counter Claims, you are now prepared to arbitrate in a concise, clear manner.

VI. HEARING DAY

You should arrive at the hearing room at least one hour before the scheduled start of the first hearing and identify where you and your witnesses, and the arbitrators will be sitting. In view to make a more organized flow of your defence statement presentation and more confident witnesses. Before the start of the hearing, proceed to set up any graphic displays, which you intend to use. Having the graphics prearranged in the hearing-room reduces the likelihood- of - disruption of your presentation at the point when you actually refer these graphics to the attention of the arbitrators. A graphic identifying the relationship of the parties and other relevant entities can be a useful tool during an opening statement in complex matters where many parties are involved. Consider whether or not you will be more comfortable presenting your opening statement in a sitting or standing position. Either is acceptable. At this point, the important thing is for you and your witnesses to be comfortable with the surroundings, thereby serving to reduce the normal tension experienced when participating in an adversarial proceeding. Keep in mind that arbitration, although informal, should be carried out in a completely professional manner. Arbitrators expect, and usually insist, that the parties, though adversaries, are cordial and respectful, not only to each other but also to the arbitration process as well. You also should be sure to exchange greetings with your adversary. It makes everyone's day considerably more pleasant knowing that the parties, while adversaries, are not at each other's throat.

At the opening of the first day, you should introduce yourself to all of the arbitrators by shaking their hands and providing each of them with your visiting card. Before the actual start of the opening statement, it is good practice to request the arbitrators to direct each party to designate a single party representative who, whether testifying or not, will be entitled (and expected) to remain in the hearing room during the course of the entire proceeding. It also may be prudent to request that the arbitrator(s) exclude all other witnesses from the room except when they actually, testify. This avoids a witness "parroting" prior testimony. Now you are ready to begin.

VII. OPENING BRIEFS AND STATEMENTS

A common question is whether a written opening statement should be prepared and submitted in support of your defence. A short, concise statement of the elements of your counter claims, in an easy-to-read format, containing a minimum amount of T and C of the contract agreement supported by legal theories, if any, is helpful to the arbitrators who, for possibly the first time, will attempt to grasp and evaluate the merits of your presentation. Such a statement would contain the factual background of the project, the details of breach of contract, opportunity you have extended to the claimant to complete the contract and the relief, which you seek and, most importantly, the damages sought. If you have prepared Statement of Fact of counter Claims, you already have your written opening statement.

Having this information at the start of the hearings will greatly assist the arbitrators in evaluating the testimony of each witness. The absence of this information at the very start of the hearing is not only a disservice to your case, but also will result in keeping the arbitrators in the dark as why the claims raised by the claimant should not entertained why you are entitled for the relief you sought for. This frustrates the accomplishment of your ultimate objective - an award of damages or defeating your opponent's claims. Remember, clarity is paramount. Any confusion in the presentation of your case is self-defeating. Further, since the arbitrators are the people empowered to provide you with the relief you seek, it clearly is advisable to let them in on this information as early as possible. Remember, your written statement should be a well thought out, readable digest of your case. To maximize impact, the theory of counter- claims their justification should remain unchanged throughout the course of the hearings, so plan well in advance of the first hearing. As indicated above, the presentation of your written statement should be made at the start of the first day of hearings. The content of your written statement should be expanded upon during your oral opening statement. Your opening statement should draw the arbitrators into your story. You should identify the parties and their relationship, the project, the types and cause of the problems encountered by your client or the relief sought for or the representation submitted by the contractor during the course of the project, the steps you took to deal with the problems and details of relief or opportunity you provided to the contractor the counter claims you sought in the arbitration proceeding. It is important to remember that the arbitrators are there to resolve the dispute, not effect a compromise. Therefore, always present your case in a manner that will allow the arbitrators to formulate a fair resolution to the dispute referred to them for adjudication.

The opening statement is not a substitute for sworn testimony. It is merely a presentation as to what you intend to prove. If there is a failure of proof, all the golden words in the opening statement will be for naught. The oral opening statement is your first real opportunity to clearly and persuasively present your story by addressing the contract obligations and non- conformance by the other party. Your opening statement should provide, in general terms, the causal relationship between the failure by the other party to comply with the contract and the counter claims submitted by you. Employ the legal jargon only when necessary and then only sparingly. More often than not, the arbitrators are more interested in what happened on the project and why, not the intricate rules of law, which may, or may not apply. A basic tenet to remember when planning your oral presentation is to keep it short and simple. Generally, an opening statement should not last more than half an hour. Remember, even the most acute listener will get bored with long-winded orations containing a multitude of facts. Explain your case in the manner in which you would explain it to a friend or your spouse. Establish the strengths of your case and eliminate any misunderstanding about them. Simple concepts and simple words will bring about an effective result. Either during the opening statement or early on, if you believe a site visit would be appropriate, you should request the arbitrators make such an inspection. This visit usually should take place well into but prior to the close of the evidentiary hearings. A site visit helps the arbitrators to obtain a clear picture of what the project actually looks like after construction. If flaws in construction, brought out during the testimony, are visible, the site visit will reinforce that testimony. The site inspection enhances the ability of the arbitrator(s) to assess diverse features of the construction performance, including compliance with the plans, specifications and other contract documents, the quality of the workmanship, and the degree of completion of the project. Sometimes more facts can be decoded from a site visit than through days of testimony. Of course, it is important to choose the right escort for the arbitrators. For example, the site in-charge and his team members who actually supervise the execution of the work might be best suited to escort arbitrators, directing attention to the flaws in workmanship or malfunctioning systems or equipment.

VII. EVIDENTIARY PRINCIPLES

A hallmark of arbitration is the presentation of evidence (testimony and exhibits) free from complicated and legalistic rules of evidence. In arbitration, practically anything even remotely relevant to the dispute usually will be admitted into evidence.

The arbitrators prefer to accept any such document or other exhibit" for what it's worth," the presumption being that seasoned arbitrators, unlike a juror at trial, will assess the exhibit's value and relevance to the dispute and give such evidence the weight to which it is entitled with little risk of undue prejudice resulting from an inflammatory exhibit. Customarily, construction project records are admitted and relied upon by the arbitrators.

VIII. EVIDENTIARY PROCEDURES

The presentation of your defence should proceed like a good story, without distractions or interruptions.

A. DOCUMENTARY EVIDENCE

If possible, try to avoid disruptions regarding documents during the testimony by having the exhibits identified, and hopefully admitted, before the hearing begins. Construction contract disputes involve hundreds or thousands of records/documents of the project - which were distributed to all concerned during the course of performance of the construction work. Each of the parties has virtually all of the records/documents before the arbitration proceeding was initiated. Often, arbitrators will accept all exhibits into evidence en masse at the beginning of the first hearing in a construction project dispute. Some cases will require admission of exhibits one at a time. When there are limited, exhibits mark them for identification before examining the first witness. If there are more no of exhibits and many days of hearings, then have the exhibits to be used on a particular day marked before examining the first witness of the day. However, if there are other exhibits that come to mind, even if not previously identified, they should be introduced as well. Be sure to make a copy for your adversary, for each arbitrator, and a "witness" copy. Occasionally, arbitrators want an official copy for the record as well.

B. TESTIMONIAL EVIDENCE

As with the introduction of documentary evidence, arbitration generally permits wide latitude in testimonial evidence. There are two types of witnesses: fact witnesses and expert witnesses. Fact witnesses have personal knowledge of information relevant to the dispute between the parties. Fact witnesses come to possess such information through their own personal observation of conductor things. For example, an excavator may have knowledge of sub-surface conditions experienced at the job site. A person with specialized education, training or experience, resulting in. a high degree of knowledge or expertise in a particular discipline or work activity may be accepted as an expert and be allowed to provide expert opinion evidence in the proceeding. Experts generally are called to testify as to what went wrong at the project, why it went wrong, what caused the problem(s), what could have been done to correct the problem(s), and what effect the problem(s) had on the project and these parties. In construction disputes, both types of witnesses are frequently used. As they have personal knowledge of the job facts, lay witnesses such as the project superintendent, generally will compose the majority of your witnesses. While opinion evidence usually is accepted only from experts, fact witnesses may be asked for an opinion where the arbitrators deem it helpful to under- standing the case.

C. EVIDENCE FROM THIRD PARTIES

Situations invariably will arise where testimony, documents, or other information is sought from third parties (i.e., a person or company not a party to the arbitration) for use before or at the arbitration hearings. Request the tribunal to call such witnesses you want to produce if required take help of the court as per the provision made in the Arbitration Act.

IX. EFFECTIVE AND DIRECT CROSS EXAMINATION

The testimony of the witnesses at the arbitration proceeding will make or break your case. Unlike documentary and physical evidence, the parties have wide latitude in developing the nature and substance of this type of proof to suit the needs of the case. In presenting your defences, you must select which witnesses will testify and what subjects should be covered to best support your case. This is accomplished by questioning, i.e., direct examination, of your witness. Upon completion of each direct examination, your adversary has the opportunity to question or cross-examine your witness. The focus and methods of each type of examination differ considerably.

X. DIRECT EXAMINATION

During direct examination you are presenting testimony to support your defence. In essence, you want to elicit testimony from the Witness which demonstrates why your client should prevail. Out of the witness mouth should come the story you want tell to the arbitrators. The key ingredient to successful direct examination is a well-prepared, confident, and knowledgeable witness. The credibility of a witness is constantly being assessed. A witness who appears natural and sure of his testimony is clearly more persuasive than an ill-prepared or nervous one. One of your roles is to assist the witness to be as confident as possible during testimony. The first and most effective means of increasing that confidence is to adequately prepare the witness. Review well in advance with each witness every exhibit about which you intend to ask him questions. Conduct several practice examinations the day or two before testimony.

Counsel your witness to listen carefully to each question and wait until the question has been completely asked before answering. In examining a skittish witness, it is advisable to suggest that, after the question has been asked, the witness should pause briefly to completely formulate a response before responding to the question. Counsel the witness not to anticipate any questions; you may need to change the order or wording of some questions as the testimony progresses. This should not create any problems if the witness listens to the question being asked and answers truthfully. For greater impact, the witness should face the arbitrators when answering key questions. Remember, the goal in direct examination is to tell a good story. Every good story has a good narrator and, in direct examination, the witness is the narrator. Thus, the witness narrates the facts of the case and explains documents which prove to the arbitrators that the respondent is entitled to the relief. Take care that your witness should not feel nervous during direct examination

XI. DIRECT EXAMINATION OF EXPERT WITNESSES

Expert witnesses are commonly used in construction contract disputes. The cause and effect of site problems such as suspension of the work, defective performance, and delayed completion of the project are frequently key issues to be decided by the arbitrators in adjudicating the dispute. Assisting the arbitrators to decide in your favour by your use of competent expert testimony is a premier stratagem. However, before the arbitrators will consider, or even listen to, the opinion of your expert, you first must establish your witness expertise in his subject matter. The recognition of an experts expertise is based solely upon the judgment and discretion of the arbitrators. Start by eliciting testimony which portrays the professional background and experience of your witness. Possession of a relevant academic degree, state license, or other certification is customary - but not essential. A well-educated, licensed professional with a solid reputation who currently engages in the profession which will be the subject of his testimony generally makes the most reliable and believable expert.

XII. CROSS-EXAMINATION

Effective cross-examination of either lay or expert witnesses should consist of simple questions requiring one-word or brief answers. The goal of cross- examination is to impair the credibility of the witness and to impeach his testimony. As you prepare to cross-examine your opponents witnesses bear in mind that your own witnesses need to prepare for their cross -examination. Much of your witness anxiety over testifying may arise from the thought of cross- examination. He may fear that the other attorney or party will attempt to create situation for saying or admitting something injurious to the case. Therefore, engage in mock cross-examination of each witness utilizing whatever exhibits may be employed by your adversary. Familiarity with the topics upon which he will be cross-examined will usually ease his mind. Redirect or re-cross examination should be used only to clarify statements already made, or to elicit new testimony if it will help your case and the arbitrators will tolerate it.

XIII. HANDLING OBJECTIONS

The essence of the arbitration process consists of the use of evidentiary hearings to adduce reliable testimony and present trustworthy documentary and physical evidence in an orderly fashion so that the arbitrators can understand and assess the positions of the parties and render a fair award. Whenever an event transpires, which seems to undermine the process, is usually grounds to bring an objection to the attention of the arbitrators for a ruling. Likewise, when your adversary raises an objection, you should be prepared to demonstrate that you are within the bounds of fair arbitration process. Attempts to introduce exhibits frequently draw an objection. Presentation of arguments by the parties on the issue of admissibility of the exhibit can be very disruptive to the testimony being offered by your witness. To avoid such objection, attempt either to agree in advance to all exhibits, or, at least, present the exhibit in advance to your adversary, advising him of your intent to introduce it. If no advance consent is readily available, ask your witness questions, which provide the factual context out of which the exhibit arose. Questions, which are confusing or ambiguous, invite objection. Ask simple questions. There is no jury to impress. Therefore, pre rehearsal is required.

XIV. SCHEDULING OF WITNESSES

The scheduling of witness testimony is an important factor in determining the manner and sequence in which your story will be told. Normally, the first witness sets the stage and should provide testimony describing the project and identifying the parties and the nature of the dispute. While your first witness is frequently your strongest, he need not be. He must, however, have the ability to set the stage for the story which will be more fully developed by the later witnesses. Your last witness should be capable of summarizing the projects problems in terms of money. In determining who your witnesses will be, make sure you have at least one strong witness, that is, one who is knowledgeable, well-prepared, credible, and concise.

XV. SELECTION OF WITNESSES

Frequently, the most effective witness is the person who worked the project in the field and can explain with knowing recollections the problems encountered and the effect of those problems in terms of such issues as redeployment of manpower, materials and the like.

XVI. CLOSING STATEMENTS

Always make an oral closing statement. This is your last chance to have the arbitrators hear your side of the story as you want it told. It is also good practice to provide a written closing statement, specifically illustrating any money damages sought. The very purpose of the closing statement is to provide you with the opportunity to demonstrate that the evidence adduced during the hearing(s) proves your right to prevail. Use it for that purpose. As to each of your claims or defences, refer to the particular documents and testimony which lend support to your position. Your closing statement should provide a narrative synopsis which is compelling, comprehensive and well-organized. Highlight the important information heard during the hearing, recount who testified and the highlights of their testimony, and define your claim and precisely what relief is sought. Use this opportunity to point out the failures of proof by the other side. Likewise, be sure to note during the hearings which arbitrators found certain elements of your case interesting and emphasize those in their most favourable light.

XVII. CLOSING BRIEF

Always submit a written legal brief if requested to do so by the panel. When do you volunteer to submit such a brief? You do so when you want to rein- force your position using a principle of law, such as an expired notice requirement, or a statute of limitations. When citing a case decision, always attach a copy of the case with the important language highlighted. If required take help of a legal expert. As in all writings submitted to the panel, the brief should be readable and understandable with the minimal amount of legalese. In short, closing statements and/or legal briefs should be used to clarify testimony, highlight important factual and legal points and illuminate the opposing sides' failure to prove its case. They should, in essence, help the panel decide in your favour.

XVIII. CONCLUSION

Finally, there also are certain intangible elements, which can add "bonus points" to your position and affect the outcome of the award. Being well pre- pared, organized, somewhat impartial, knowledgeable of the facts and documents to be presented, always early or on time (at the start of the hearings or after breaks), neat, well-groomed, concise, and non-hostile toward the opposing party will enhance your chances of success. Also, being reasonable and firm in your requests well within the provisions made in the Arbitration Act-1940 or 1886 whichever is applicable for the instant can only help the arbitrators to believe in you and, hence, your position. Dawdling and lack of organization, no matter how strong your position is, will provide your opponents with the opportunity to think of additional defences and serve to create an air of uncertainty and incompetence in the minds of the arbitrators. Present your case in a clear, simple and concise fashion and in such a manner as to allow the arbitrators to formulate their opinion most favourable to your organization. Unfortunately, every construction project invites some error or mistake by any and all concerned, but the approach outlined above will increase your chances of obtaining the most rewarding result at arbitration.

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