

# Limits to Party Autonomy in Arbitral Procedure

by Michael Pryles<sup>1</sup>

## The Problem

Recently I was involved in an ICC case where an interesting question arose concerning party autonomy and the freedom of the parties to designate time limits. The arbitration in question had been proceeding for some time. After drawing up the Terms of Reference, the arbitral tribunal, after consultation with the parties, had prepared a Procedural Timetable. This specified the various procedural steps to be followed in the arbitration including the provision of submissions, the lodging of witness statements, requests for documents and a hearing. Dates were ascribed for each of these steps. Unfortunately there was considerable slippage in the adherence to the due dates and it became necessary to set new dates for the remaining steps in the arbitral procedure. The parties had already provided their major submissions (memorials) and the remaining submissions comprised a Reply and a Rejoinder. The arbitral tribunal, conscious of its obligation to proceed with reasonable expedition and also bearing in mind that the arbitration was proceeding much slower than anticipated, considered that the remaining two submissions should be provided within a short time. However the parties had conferred and had agreed that nine months should be allowed for the Reply and a further nine months for the Rejoinder. The question for the arbitral tribunal was whether it was obliged to accept the parties' agreement as to these new dates or whether, assuming it was not so obliged, it should accept them nonetheless.

## Party Autonomy

A basic principle in international commercial arbitration is that of party autonomy. It is described by the authors of Redfern and Hunter in the following terms:

"Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition..."<sup>2</sup>

Redfern and Hunter go on to cite article 19(1) of the UNCITRAL Model Law (Model Law) which provides:

"Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".

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<sup>2</sup> Redfern and Hunter, with Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th Edition, 2004 at p 315.

A broad and general provision is also found in section 1(b) of the *Arbitration Act* 1996 (UK) which states that the provisions of Part 1 of the Act are founded on stated principles including:

"(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."

In relation to procedure, section 34(1) achieves a similar result to article 19(1) of the Model Law. Section 34(1) provides:

"It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter".<sup>3</sup>

What then are the limits to party autonomy, if any? Can the parties agree on any matters they please, or are there restrictions? Is the tribunal always bound to follow the agreement of the parties?

In considering the limits to party autonomy it is necessary to distinguish the situation prior to the commencement of an arbitration and post the commencement of an arbitration.

### **Before the Commencement of an Arbitration**

When parties draft an arbitration agreement they enjoy broad freedom to construct a dispute resolution system of their choice. It can provide for ad hoc or institutional arbitration, the parties can designate the number of arbitrators, their qualifications and matters relevant to the procedure to be followed. They can prescribe time limits and can, for example, stipulate that an award must be handed down within a prescribed time. After the arbitration agreement has been concluded, and before an arbitration has been commenced, the parties are free to modify their agreement in any way they deem fit. They can alter the number of arbitrators, the procedure for the appointment of arbitrators and other matters which they may have previously agreed upon such as the sequence of pleadings and time limits.

The parties' freedom to agree on an arbitration regime of their choice and to prescribe the procedure to be followed is subject to few limitations. The arbitration agreement must be a valid one according to the law which governs it. This will usually be the law governing the substantive contract, in which the arbitration clause is embedded, but is not necessarily that law. The possibility of *dépeçage* arises because the arbitration agreement is regarded as a separate agreement to the substantive contract in which it is contained.<sup>4</sup> In addition the arbitral procedure itself should comply with the mandatory rules of law of the

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<sup>3</sup> "Procedural and evidential matters" are defined in section 34(2).

<sup>4</sup> See Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (Edited by Gaillard and Savage) 1999 at p 212.

the *lex arbitri*. The *lex arbitri* is often the law of the place of the seat of the arbitration, but not invariably so.<sup>5</sup>

Let us take, by way of example, the Model Law. Some of its provisions are mandatory and cannot, therefore, be excluded or modified by the parties. For example article 11(2) provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provision of paragraphs (4) and (5). Thus paragraphs (4) and (5) of article 11, are mandatory. While it does not expressly say so, it is almost certain that a court would construe article 18 as mandatory. It provides that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". Hence if the parties agreed that only the claimant would be heard in the arbitration, this agreement would be struck down as invalid on account of article 18 of the Model Law.<sup>6</sup> As noted by Holtzmann and Neuhaus:

"[t]he freedom of the parties [under the Model Law] is subject only to the provisions of the Model law, that is, to its mandatory provisions. The most fundamental of such provisions, from which the parties may not derogate, is the one contained in paragraph (3) [*Art. 18 in the final text*]."

Likewise section 33 of the *Arbitration Act* 1996 (UK) provides:

- "(1) The Tribunal shall-
- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
  - (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
- (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

This provision is listed in Schedule 1 of the Act and is therefore mandatory.

Other restrictions on party autonomy might arise where the parties select institutional arbitration but attempt to alter the rules of the administering body in a way which is unworkable or is not accepted by the administering body. Thus, for instance, if the parties provided for arbitration in accordance with the ICC Rules of Arbitration (ICC Rules) but provide that article 27 of the ICC Rules (which deals with scrutiny of awards by the ICC Court) will not apply, it is probable that the ICC Court would not accept the case as

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<sup>5</sup> Fouchard, Gaillard, Goldman, p 635.

<sup>6</sup> Holtzmann and Neuhaus, "A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary" p. 583.

an ICC case. Court scrutiny of awards is an important feature of ICC arbitrations and the administering body is unlikely to agree to waive it.<sup>7</sup>

Apart from mandatory provisions of the law governing the arbitration agreement and the *lex arbitri*, and subject to "unacceptable" amendments to institutional rules, the parties enjoy very broad freedom in selecting the arbitration regime they desire and in prescribing the procedure to be followed.

### **After the Establishment of a Tribunal**

Once a dispute has arisen, an arbitration has been commenced and the tribunal has been established, the freedom of the parties to determine the arbitral procedure may be circumscribed. In particular the constitution of an arbitral tribunal brings into existence a new set of contractual relationships concerning the arbitrators themselves.

There has been some debate as to whether the rights and obligations of arbitrators stem from their "status" as arbitrators and arise directly from law or whether they arise from a contract which is entered into when they accept their appointment<sup>8</sup>. The view expressed in Fouchard, Gaillard & Goldman is that a contract does necessarily exist between the parties and the arbitrators; the contract is bi-lateral and creates rights and obligations for both the arbitrators and the parties. However, where an arbitration is administered by an arbitral institution, the contractual relationship becomes triangular<sup>9</sup>.

Mustill and Boyd take a contrary view. They argue that:

"[t]o proceed by finding a contract and then applying to it the ordinary principles of the law of contract will not produce a reliable answer unless a contract really exists to be found. Even in the case of a massive reference, employing a professional arbitrator for a substantial remuneration, we doubt whether a business man would, if he stopped to think, concede that he was making a contract when appointing the arbitrator. Such an appointment is not like appointing an accountant, architect or lawyer. Indeed it is not like anything else at all.

We hope that the courts will recognise this, and will not try to force the relationship between the arbitrator and party into an uncongenial theoretical framework, but will proceed directly to a consideration of what rights and duties ought, in the public interest, to be regarded as attaching to the status of arbitrator."<sup>10</sup>

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<sup>7</sup> According to Craig, Park and Paulsson, "[t]he ICC Court will refuse to administer an arbitration with party agreed modifications to the Rules only when a fundamental characteristic of ICC arbitration (such as Court scrutiny of the award) is omitted": Craig, Park Paulsson, "International Chamber of Commerce Arbitration (3rd ed, 2000), p. 295.

<sup>8</sup> The debate is well summarised in Fouchard, Gaillard, Goldman, p 600ff.

<sup>9</sup> Fouchard, Gaillard, Goldman, p601-602.

<sup>10</sup> Mustill and Boyd, "Commercial Arbitration" (2nd ed, 1989), p. 223.

English courts, however, appear to disagree with the Mustill and Boyd view. In at least two cases it has been found that the arbitrators become parties to the arbitration agreement itself. In *Compagnie Européenne de Cerelas SA*<sup>11</sup>, Hobhouse J observed as follows:

"It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract."

While the arbitrators become parties to the arbitration agreement the judge stated that the arbitrators were not parties to the commercial contract and were not, in the proper sense of that word, bound by it.

A similar conclusion was reached in *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd*<sup>12</sup>. In that case, Mr Justice Phillips, after reproducing the comment of Mustill and Boyd, above, said that:

"[i]n the present case I do not find the contractual framework an uncongenial one within which to consider the position of the arbitrators and shall proceed upon the premise, common to both parties, that contractual principles should be applied.

The basic rights and obligations of the arbitrators can be simply stated. By accepting their appointments [they] undertook, in the words of s. 13(3) of the Arbitration Act 1950, 'to use all reasonable dispatch in entering on and proceeding with the reference' – a due diligence obligation. Having accepted appointments as arbitrators [they] have become entitled to reasonable remuneration for their services.

These are conventional features of a contract to provide services."

An appeal to the Court of Appeal was dismissed with each of the three judges giving reasons. The Vice-Chancellor said that:

"[f]or myself, I find it impossible to divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of those two elements.

The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: see *Cie Européenne v. Tradax*, [1986] 2 Lloyd's Rep. 301. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status."

If the arbitrators become parties to the arbitration agreement or contract it follows that after the tribunal is constituted, the parties themselves cannot unilaterally change the terms of the arbitration agreement without the consent of the arbitral tribunal. Thus if the arbitration agreement itself specified certain times for the taking of procedural steps the parties could not agree to change those times without the consent of the arbitral tribunal. This result must follow if the view is accepted that the arbitrators become parties to the arbitration agreement.

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<sup>11</sup> [1986] 2 Lloyd's Rep.301 at 306.

<sup>12</sup> [1991] 1 Lloyd's Rep. 260 (Commercial Court). The text of the judgments of the Court of Appeal dated February 21, 1991 is reported at [1991] 1 Lloyd's Rep. 524. The case went to the Court of Appeal but the contractual premise of the decision in the lower court was not rejected.

How does this conclusion sit with article 19(1) of the Model Law? As noted above, article 19(1) states that "subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". Is this freedom limited to an agreement reached by the parties before the arbitral tribunal agrees to be appointed, or also afterwards? This issue was discussed during the drafting of the Model Law:

"one matter that was considered at some length during the drafting of article 19 was whether there should be a limitation on when the parties could agree on a procedural point. The Secretariat suggested that the Working Group amend draft article 19 so as to require that any agreement on the arbitral procedure be reached before the first or sole arbitrator was appointed. The rationale for the proposal was that the rules of procedure should be clear from the outset and that any arbitrator should know from the beginning the rules under which he or she is expected to perform his or her functions. The Working Group rejected this idea, finding instead that the freedom of the parties to agree on a procedure "should be a continuing one"; the Working Group interpreted paragraph 1 to provide for such a continuing freedom. The matter was raised again before the Commission, where conflicting proposals were offered, one that the Working Group's understanding be made explicit and the other that it be reconsidered. After extended discussion, the Commission decided not to change the Working Group's draft. There was some sentiment in favour of each proposal, but it was noted that in any case the arbitrators could not be forced to accept any procedures with which they disagreed, since they could always resign rather than carry out the unwanted procedural stipulations. Moreover, if the matter was of strong concern, the timing of any agreement on procedure could be regulated by agreement between the parties and the arbitrators."<sup>13</sup>

In an arbitration conducted under the Model Law, the parties therefore have freedom to agree on the procedure even after the tribunal has entered into its contract with the parties.

The question that arises next is whether article 19(1) is mandatory and continuing or can be fettered by the parties themselves. If it is mandatory then, regardless of whether the arbitration agreement specifies the procedure to be followed, or nominates a set of procedural rules, the parties would remain able to agree on, and direct the tribunal to follow, procedural steps including in relation to time limits. The correct answer, it is suggested, is that article 19(1) is not mandatory. Holtzmann and Neuhaus take the same view:

"[a]s was noted by the Working Group, the freedom of the parties under paragraph (1) to agree on the procedure is a continuing one throughout the arbitral proceedings and not limited, for example, to the time before the first arbitrator is appointed ([*Fifth Working Group Report*,] A/CN.9/246, para. 63). It is submitted however, that the parties themselves may in their original agreement limit their freedom in this way if they wish their arbitrators to know from the start under what procedural rules they are expected to act."<sup>14</sup>

To hold otherwise, it is suggested, would defeat policy goals underpinning the Model Law. It may for example permit the parties to agree, after an arbitration has been commenced, on the removal of elements of an institutional arbitration which the administering body could not accept. An illustration would be an agreement to remove ICC Court scrutiny of awards in an arbitration under the ICC Rules, as discussed

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<sup>13</sup> Holtzmann and Neuhaus, "A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary" p. 556 - 567.

<sup>14</sup> Holtzmann and Neuhaus, p. 583.

above. Were such an agreement to be included in the original arbitration agreement itself the ICC Court would doubtless decline to accept the arbitration. Another consequence would be that parties could vary express terms of any contract they sign with the arbitral tribunal. This could lead to undesirable friction or conflict with the arbitral tribunal and possibly even the resignation of its members. Conferring a power to over-ride contractual relationships is hardly compatible with the sanctity of contracts which is a fundamental tenet of international trade and dispute resolution.

Section 34(1) of the *Arbitration Act 1996* (UK) which is similar in effect to article 19 of the Model Law is not mandatory because it is not listed in Schedule 1 to the Act. Accordingly a similar position would appertain to that which exists under the Model Law.

Returning then to the notion that arbitrators become parties to the arbitration agreement or contract, it is suggested that this idea needs some elaboration. I doubt whether the arbitrators could become parties to the arbitration agreement or contract itself. In the case of an arbitration agreement inserted into a substantive contract, it will usually provide for the submission of future disputes to arbitration. This could include several disputes over a period of time, each of which could be referred to a separate arbitration. It could not be the case that arbitrators, appointed in a first dispute, become parties to the arbitration agreement and therefore somehow involved in the reference of future disputes to arbitration. Rather, the principle espoused in the cases cited above, must mean that when a particular dispute arises, and is referred to arbitration, a contract comes into existence between the parties and the arbitrators which includes the terms of the arbitration agreement or contract.

In conclusion, where the arbitration agreement deals with the procedural point in question the parties cannot unilaterally change their agreement without the consent of the tribunal. Where the arbitration agreement is silent and does not deal with the procedural point article 19 of the Model Law enables the parties to make an agreement at any time during the arbitral proceedings. However even here I suggest that there may be some limits. When arbitrators accept appointment they do so on the basis of express and implied terms. The express terms would encompass the provisions of the arbitration agreement itself and any other express terms agreed between the arbitrators and the parties. But surely there are implied terms as well? Take, for example, the following situation. Assume that the parties agree on a period of 5 years for the exchange of memorials. Would an arbitral tribunal be bound to accept an extraordinary period of this length? I would suggest not and that the tribunal would be justified either in setting a shorter period or alternatively resigning. The reason is that while article 19 confers a broad power on the parties to agree on the arbitral procedure, they must do so within assumptions reasonably held by the arbitrators at the time when they accept their mandate. Expressed in another way, there is an implied term that any agreement the parties may come to on matters of procedure will be within usual or common parameters for commercial arbitrations of the type and nature of the arbitration before the arbitral tribunal.

Let us now return to the original problem posed at the beginning of this article. The parties agree on a long period for the submission of memorials. Is the tribunal obliged to accept the parties' agreement? If the time periods are stated in the arbitration agreement, these would apply and any modification of these dates could not be agreed by the parties alone but would have to be agreed by the arbitral tribunal as well.

Where, however, the arbitration agreement does not deal with the issue at hand (the date for submission of memorials) then the answer to the question of whether the parties can agree to those dates will depend on any mandatory rule of the *lex arbitri*, or, if there is no applicable mandatory rule of the *lex arbitri*, then the rules governing the arbitration; and, if there are no rules or if they are silent on the point, the non-mandatory provisions of the *lex arbitri*.

Previously reference was made to section 33 of the *Arbitration Act* 1996 (UK). It is expressed to be a mandatory provision. Paragraph 33(1)(b) requires the arbitral tribunal to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense. At first sight it might be thought that this provision requires the arbitral tribunal to make a ruling which will avoid "unnecessary delay or expense" and hence, perhaps, to override the parties' agreement. However the emphasis in section 33 is on fairness to the parties. In circumstances where the parties have made an agreement on the procedural point in question, fairness would generally be served by adhering to the agreement which the parties have reached.

In the case before me there was no applicable mandatory rule of the *lex arbitri* and hence the relevant principles were to be found in the applicable arbitration rules. The case being an ICC case and hence governed by the ICC Rules it is to the ICC Rules that we must turn to determine whether the parties can agree on the time for submission of memorials.

A basic rule is contained in article 15(1) of the ICC Rules which provides:

"The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

Thus this article sets out a hierarchy of rules to govern the arbitral proceedings as follows:

1. ICC Rules
2. Parties agreement
3. Arbitral tribunal determination

Articles 15(1) would appear to confer on the parties the power to agree on an applicable procedural rule (without the agreement of the tribunal) in cases where the ICC Rules are silent. The reference to the parties' agreement is presumably not confined to the parties' agreement prior to the constitution of the tribunal but would be construed as permitting the parties to agree, during the course of the arbitration, on an appropriate rule to govern the particular procedural point. However the parties' agreement will only

come into play when the ICC Rules are silent. Thus a question arises as to whether the ICC Rules contain a provision dealing with the time for the submission of memorials. Our attention must now focus on article 18 of the ICC Rules.

Article 18(1) requires the arbitral tribunal to draw up Terms of Reference "on the basis of documents or in the presence of the parties and in the light of their most recent submissions". This document is to include various particulars including "(g) particulars of the applicable procedural rules...". If the Terms of Reference include provisions dealing with the submission of memorials and time limits (which would be unusual) they could not be unilaterally altered by the parties without the consent of the arbitral tribunal.

As I have said, it would be unusual for the Terms of Reference to descend to such detail as the particulars of the pleadings to be delivered and the dates for their submission. However another paragraph of article 18 is relevant. Article 18(4) states:

"When drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal, after having consulted the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and shall communicate it to the Court and the parties. Any subsequent modifications of the provisional timetable shall be communicated to the Court and the parties."

The Procedural Timetable will commonly specify the pleadings or memorials to be delivered and contain dates. If the parties subsequently seek to vary these dates, can they do so without the consent of the arbitral tribunal? It would appear not, because the obligation to draw up a Procedural Timetable, contained in article 18(4) is imposed on the arbitral tribunal and not the parties. The arbitral tribunal must consult the parties but the Procedural Timetable is to be drawn up by the arbitral tribunal itself. It would seem to follow that an amendment of the arbitral tribunal (by changing dates for the submission of a memorial) would have to be ordered by the arbitral tribunal and it would not need the parties consent. The arbitral tribunal is obliged to consult the parties but not to obtain their consent or approval.

It would thus seem, that under the ICC Rules, procedural dates contained in the Procedural Timetable can be established, and varied, by the arbitral tribunal without the approval or consent of the parties; and, conversely the parties cannot by their own agreement vary the dates without the consent of the arbitral tribunal.

I turn now from the ICC Rules to consider the London Court of International Arbitration Rules (LCIA Rules). Article 14 provides as follows:

- "14.1 The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times:
- (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and

- (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute.

Such agreements shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties.

- 14.2 Unless otherwise agreed by the parties under article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.
- 14.3 In the case of a three-member Arbitral Tribunal the chairman may, with the prior consent of the other two arbitrators, make procedural rulings alone."

It will be seen that article 14.1 adopts the principle of party autonomy. However this is prescribed subject to certain limitations including the arbitral tribunal's general duty "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense....". The rules closely follow section 33 of the *Arbitration Act* 1996 (UK). It is not immediately clear whether a tribunal could, for example, decline to accept the parties' agreement allowing a long period of time for the provision of a memorial if it took the view that this would cause unnecessary delay or expense. Indeed one might wonder why a tribunal should be concerned about unnecessary delay or expense, a matter which will affect both of the parties, if the parties have agreed on the long period for the provision of the memorial. In any event the reference to fairness in article 14.1(ii) must be a reference to fairness to both parties and accepting the parties agreement is fair to them both.

A very broad discretion is conferred on the arbitral tribunal pursuant to article 14.2 in circumstances where the parties have not made an agreement within article 14.1. It might be thought that an agreement under article 14.1 would usually be made at the beginning of the arbitral proceedings. The first sub-article requires that the agreement be recorded in writing "by the Arbitral Tribunal".

Under the UNCITRAL Arbitration Rules it would appear that the arbitral tribunal is not bound to accept an agreement of the parties as to a period of time. Article 15(1) provides as follows:

"Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

In addition article 23 provides that the periods of time fixed by the arbitral tribunal for the communication of written statements should not exceed 45 days; however "the arbitral tribunal may extend the time limits if it concludes that an extension is justified". Further it should be noted that under the UNCITRAL Arbitration Rules, while it is the arbitral tribunal, rather than the parties, which is charged with the responsibility of determining the procedure in the arbitration, a number of rules expressly confer powers on the parties such as article 16(1) (Place of Arbitration), article 17.1 (Language of the Arbitration) and so on.

The International Arbitration Rules of the International Centre for Dispute Resolution are similar to the UNCITRAL Model Arbitration Rules. Article 16(1) is in the same terms as article 15(1) of the UNCITRAL Arbitration Rules.

### **Exercise of Discretion**

In those cases where the arbitral tribunal is not obliged to accept the parties' agreement but possesses a discretion, how should the discretion be exercised? In the first place if the parties' agreement is inconsistent with a mandatory rule of law then the parties' agreement may not be accepted. An instance of such a legal rule is article 18 of the Model Law. This requires that the parties be treated with equality and that each party be given a fair opportunity of presenting his case. But even here, the strict application of such a provision might be regarded as problematic. For example, if the parties agree that the respondent would be allowed more time for its submissions than the claimant, should this be struck down by the arbitral tribunal as a breach of article 18?

There are other obligations which are imposed on arbitrators. Redfern and Hunter state that "an arbitral tribunal has an obvious moral obligation to carry out its task with due diligence; justice delayed is justice denied"<sup>15</sup>. The authors refer to various national laws and arbitration rules (such as the ICC Rules) which impose a time-limit on the rendering of an award. Other laws such as section 33(1)(b) of the *Arbitration Act 1996* (UK) impose an obligation on the arbitrator to act "without unnecessary delay". Article 14(1) of the Model Law provides, inter alia, that if an arbitrator "fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination". But if the parties themselves agree on the long time period for the provision of a submission or memorial can it be said that the arbitral tribunal is derelict in its duty of acting expeditiously?

In deciding whether to accept the parties' agreement, or reject or modify it, the arbitral tribunal should evaluate the parties' request in the light of the arbitral tribunal's own obligations and duties and after considering the position of the arbitral tribunal itself. In carrying out this evaluation it will be helpful if the tribunal is able to identify the reasons why the parties have reached their agreement, insofar as the tribunal is able to do so.

The parties' reason for reaching their agreement, and their underlying interests, can be significant. For example in our problem at hand, where the parties have agreed to a nine month period for the provision of relatively minor memorials, the parties may seek a relatively long time because of the complexity of the arbitration, new developments, the pendency of settlement negotiations, the determination of related court or other arbitral proceedings and so on. These would be strong and compelling reasons for supporting the parties' agreement. On the other hand if the agreement for further time was predicated on the needs of the

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<sup>15</sup> Redfern and Hunter with Blackaby and Partasides, at p290.

parties counsel (who may be busy with other matters and not as diligent as they should be with the subject arbitration) then the compulsion for accepting the parties' agreement is much less compelling.

The parties' agreement must be evaluated by the tribunal in the light of its own obligations and duties. The primary duty bearing upon the problem we are considering, is the arbitral tribunal's obligation to proceed with diligence and expedition. This is a duty to be taken with seriousness but is not necessarily determinative of the question at hand. Where the parties' agreement for extra time is predicated on substantial and significant considerations such as pending settlement negotiations or the results of a related arbitration or court proceedings, then it might well be thought that the duty of the arbitral tribunal to proceed with expedition should take second place. After all the obligation to proceed with expedition largely exists for the benefit of the parties themselves and if the parties have good reason for not wishing to proceed quickly, it is difficult to see why the arbitral tribunal should force them to do so. However where the motivation of the request for extra time is predicated on the convenience of counsel, the obligation to proceed with diligence would exist as a strong and perhaps compelling factor.

The arbitral tribunal is also entitled to consider its own position. The members of the tribunal may wish to finish the arbitration relatively quickly, so as to proceed with other work and obtain payment of their fees. But if this interest is weighed against the interest of the parties seeking extra time on account of settlement negotiations or other substantive factors, the arbitrators' interests should give way. What of a slightly different situation? Let us assume that the parties have agreed to extend the date for submissions not by nine months but by, say, three years. Here the interests of the arbitrators may be more significant. When accepting appointment as members of the tribunal, the arbitrators would have contemplated an arbitration run according to usual practices. Periods of several years, for the taking of procedural steps, is extraordinary and would have been outside the contemplation of the tribunal. The members of the tribunal may not wish to be involved in an arbitration which would extend over an inordinately long period of time and could well consider their own position to be significant when weighed against that of the parties.

Let us consider a different scenario. Let us assume that the parties have agreed, not on an extension of time for the provision of a submission, but on the time required for a hearing. Let us further assume that the case involves an arbitration under the ICC Rules where the arbitrators are paid on an ad valorem basis. In our hypothetical situation let us assume that the parties have agreed that there will be brief memorials, no witness statements but a long hearing of say 12 months. ICC arbitrations typically involve relatively short hearings and instead there are extensive memorials and the provision of evidence prior to the hearing in the form of production of documents and witness statements. However in our example the parties have chosen to arbitrate upon the basis of a traditional common law trial where all the evidence is introduced at the hearing and where oral submissions are made at the same hearing.

Hearings in ICC arbitrations are commonly a matter of weeks not months and rarely anything of the order of 12 months. There are many reasons for this. Submissions are generally made prior to a hearing and are extensive in nature. In addition evidence is produced prior to the hearing. Further, it is time consuming and inconvenient for parties from many countries to assemble at the place of hearing for a long hearing. A long hearing would considerably extend the time which the arbitrators must invest in the arbitration and, in the case of an arbitration where they are paid on an ad valorem basis, the arbitrators fees could be very modest when viewed from the perspective of the amount of time spent on the reference. Moreover a 12 month hearing may be impossible for the arbitrators in light of their other commitments.

In such a case I would suggest that the arbitrators' interests in the allocation of their time and in having reasonable remuneration for their services outweighs the parties' desire to conduct the arbitration in the form of a traditional common law trial. In such a case the arbitrators could well exercise their discretion against granting a hearing of the duration sought and agreed by the parties.

## **Conclusion**

1. The application of the principle of party autonomy to determine the freedom of the parties' to agree on the procedure to be adopted in an arbitration can be a complex matter.
2. Where the applicable procedural rule is agreed upon prior to the constitution of the tribunal, in the arbitration agreement itself, it is doubtful that it can be changed by the parties without the consent of the arbitral tribunal itself.
3. Where the arbitration agreement is silent on the procedural rule, the parties freedom to adopt a procedural rule during the course of the arbitration will be dependent on the lex arbitri and the institutional rules chosen by the parties to govern the arbitration (if any).
4. The lex arbitri may confer freedom of the parties to establish the relevant procedural rule (as for example does article 19(1) of the Model Law). But this may be circumscribed by institutional rules which the parties may have incorporated in their arbitration agreement.
5. In cases where the parties do not have an unfettered right to establish the applicable procedural rule but require the consent of the arbitral tribunal, the arbitral tribunal should be cautious before it seeks to impose a rule at variance with that agreed upon by the parties. In deciding whether to make an order in terms of the parties agreement the tribunal should carefully consider the reasons underlying the parties agreement, insofar as it is aware of them, and the position of the arbitral tribunal itself.