WHITE & CASE

Fundamental Rules of Procedure: Whose Due Process is it?

Proskauer Lecture on International Arbitration
New York, May 6, 2014

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Due Process is Fundamental to International Arbitration: A Chance to Reflect, Initiate Discussion and Change

1. **As a matter of perception and reality, to retain its legitimacy, the arbitral system must provide due process as well as a fair and efficient method of dispute resolution**
2. **Perspectives:**
   - Parties/clients must feel their case was heard
   - Arbitrators – must be guardians of the process
   - Witnesses – not abused
   - Counsel – within rules agreed

The Challenging Nature of Fundamental Rules of Procedure

Mohammed Bedjaoui, *This Special Character, The Arbitrator*, in THE STATUS OF THE ARBITRATOR 130, 132 (ICC Bulletin, Special Supplement, Dec. 1995)

- **Balance must be struck in each case among the principles of:**
  - Equality of the parties, equality of arms
  - Each party's right to a full opportunity to present its case (right to be heard)
  - Each party's right to confront the opposing party's witnesses and evidence
  - Each party's right to defend itself
  - The ability of the tribunal to manage the case flexibly and with reasonable expediency

Purpose of Fundamental Rules of Procedure to Ensure the Quality of the Evidence and the Tribunal's Decision-Making

Focus on Real Issues of Due Process

- **Procedural schedule**
- **Allocation of time at hearing and for briefing**
  - Equal
- **Opportunity to confront evidence**
  - Selective production
  - Surprise/new evidence at hearing
- **Disclosure of tribunal's issues**
  - Tribunals failing to raise with parties the issues that trouble them or that they regard as central to deciding the case
- **Selection of witnesses for examination**
  - Each party must be permitted to call those witnesses it views as essential on the issues
- **Effects of one party's bad faith tactics**
- **Special issues with mass claims proceedings**

Equality & Right to be Heard vs. Speed & Efficiency

CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 987 (2nd ed. 2009); RESTATEMENT OF THE LAW THIRD, THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, Council Draft No. 3 (Dec. 23, 2011) § 4-13, cmt. c

- **UNCITRAL Model Law, Article 18:**
  - "The parties shall be treated with equality and each party shall be given full opportunity of presenting his case."
- **Schreuer:**
  - "The principle that both sides must be heard on all issues affecting their legal position is one of the most basic concepts of fairness in adversarial proceedings. It is expressed in the Latin maxim of *audiatur et altera pars*. It is reflected throughout the ICSID Arbitration Rules …."
- **Draft Restatement:**
  - "[P]rocedural fairness requires that each party have a fair opportunity to present its case to the tribunal and to rebut its opponent's case at a meaningful time and in a meaningful manner."

Right to be Heard vs. Speed & Efficiency

BIVAC v. Paraguay, ICSID Case No. ARB/07/9, Decision on Jurisdiction (May 29, 2009) ¶¶ 41-43

Request for Extension—Denied

- ***BIVAC v. Paraguay***
  - Respondent requested postponement of hearing on jurisdiction:
    - Recent significant change of political direction and government, after 60+ years of rule by one political party
    - Counsel had been retained only days before the hearing
    - Need for more time to master the complex issues in dispute
  - Tribunal rejected the request:
    - "The Tribunal explained that the decision was motivated by the need to strike a balance between the constraints of the parties and the obligation to conduct the proceedings in reasonable speed and bring them to an end within an expedient and efficient period of time. The Tribunal reiterated that the requirements of due process had been complied with, that both parties had been fully involved in the process, including in the setting of the timetable and agenda for the hearing on jurisdiction. The Tribunal expressed its understanding as to the challenges facing the new government, but nevertheless considered that the interests of the sound administration of justice would justify a continuation of the hearing."

Right to be Heard vs. Speed & Efficiency

Fraport v. Philippines, ICSID Case No. ARB/03/25, Award (Aug 16, 2007) ¶¶ 27-31

- ***Fraport v. Philippines***
  - Respondent requested 6-month extension of time for filing Rejoinder and corresponding postponement of hearing for extraordinary circumstances, which impeded Respondent's ability to fully present its case:
    - Recent political crisis resulting in resignation of important cabinet members and preventing proper communications with Respondent's counsel
    - Unavailability of key witness due to medical reasons
    - Claimant's failure to produce certain documents, contrary to Tribunal's order
    - Failure by local project company PIATCO to produce documents in related ICC arbitration, contrary to ICC Tribunal's order
    - Ongoing investigations involving Claimant in the Philippines, Germany and the United States

Right to be Heard vs. Speed & Efficiency

Fraport v. Philippines, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007) ¶¶ 27-31

Extension Granted

- ***Fraport v. Philippines (cont'd)***
  - Ultimately, Tribunal postponed hearing after Claimant produced documents and Respondent filed Rejoinder:
    - "The overriding circumstance which, in the final analysis, swayed the Tribunal is the situation which obtains today with respect to the many documents produced recently by Claimant to Respondent as well as those documents which will soon be produced by PIATCO to the Republic of the Philippines in a related ICC arbitration. The Tribunal accepts that all of these documents, once produced, will need to be examined and analyzed by Respondent and its experts. …
    - Claimant has also made a request for the production of documents by Respondent ….
    - In these circumstances, the Tribunal is concerned lest, if the hearing dates are maintained, both Parties may be prevented from fully presenting their case. The Tribunal is also concerned that … there be a serious risk that the evidentiary record will be incomplete and that the efficient conduct of the hearing would thus be impeded."

Right to be Heard vs. Speed & Efficiency

Barton Legum, *Treaty Arbitration—The Government Perspective*, at 6 (conference paper, 4th IBA Arbitration Day, Mexico City, March 9, 2001, *available at* www.ibanet.org); *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Annulment Decision (Dec. 23, 2010) ¶ 223; *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1, Annulment Decision (May 16, 1986) ¶ 90

- **Longer briefing schedules may be required where a State is a party**
  - "Counsel to a private investor needs only to identify the argument that will win the case at issue. Government counsel, on the other hand, needs not only to identify the winning argument, but also to ensure, through detailed discussions with his or her colleagues in other interested agencies, that that argument properly balances the interests of the [entire] government. Our arguments must achieve the right result not only in the case at hand but also in other, hypothetical cases that might arise in the future. This is, needless to say, an unusually complex and time-consuming exercise, and one that, in my view at least doubles the normal preparation time for government counsel in these cases."
- **More time may be needed for document exchange:**
  - In developing countries, "recordkeeping can be imperfect"
  - "The relatively low capability of an administrative agency efficiently to store and monitor and enforce the submission of formally required documentation is commonly a reflection of the realities of developing countries, and not an indication of bad faith towards investors, domestic or foreign."

Equality & Respect for Time Limits

Bernhard v. Pezold et al. v. Zimbabwe, ICSID Case No. ARB/10/15, & *Border Timbers et al. v. Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 3 (Jan. 11, 2013) ¶¶ 49-52

- **ICSID Arbitration Rule 26(3):**
  - "Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise."
- ***Pezold/Border Timbers v. Zimbabwe***
  - "Respondent has raised certain jurisdictional challenges and new defences after the time limits set for doing so ….
  - The fact of external counsel having been retained at a late date is not … sufficient in itself … to justify a finding of 'special circumstances' within the meaning of Rule 26(3).
  - … the issue is not the Respondent's right to be heard, but rather the Parties' equal right to due process and a fair proceeding, which includes respect for the time limits fixed by the Tribunals for each step in the proceedings."
    - Here: "special circumstances" were found to exist because Claimants' delay in bringing ancillary claims partly caused the problem

Substantive vs. Numerical Equality

Abaclat et al. v. Argentina, ICSID Case No. ARB/07/5, Decision on Disqualification (Feb. 4, 2014) ¶¶ 38-43

- ***Abaclat v. Argentina***
  - Respondent requested 11-month extension to file its Rejoinder (and postponement of the hearing) arguing that Claimants had had the same time to prepare their Reply
  - Tribunal rejected request:
    - "The Arbitral Tribunal does not find it justified or appropriate to rely on the number of days between the filing of Respondent's Counter-Memorial and the filing of Claimants' Reply Memorial to grant Respondent an exactly same amount of days for the filing of its Rejoinder Memorial. Both Parties have been occupied with various aspects of these proceedings, including most recently the Verification Process and the Database update issues, which are both relevant for the next steps of the proceedings, so that it would be inappropriate to assume that Claimants enjoyed 314 days to prepare their Reply Memorial. The Arbitral Tribunal believes that the period of 10.5 weeks as of receipt of Claimants' Reply Memorial is sufficient for Respondent to prepare its Rejoinder Memorial. The Tribunal notes that the Parties are aware … that the deadlines fixed for the filing of Claimants' Reply Memorial in Phase 2 and Respondent's Rejoinder Memorial in Phase 2 are equally calculated as of the date of the filing of the Final Verification Report …."

Substantive vs. Numerical Equality (cont'd)

Abaclat et al. v. Argentina, ICSID Case No. ARB/07/5, Decision on Disqualification (Feb. 4, 2014) ¶¶ 45, 48-50, 80; Procedural Order No. 23 (Feb. 7, 2014) ¶ 12

- **Does briefing time have to be the same if there are intervening procedures?**
  - Database verification
  - Document exchange
- ***Abaclat v. Argentina* (cont'd)**
  - Respondent proposed disqualification of Majority of Tribunal, arguing that:
    - "the procedural decisions on the briefing calendar demonstrate[] an 'absolute lack of equality in the treatment accorded to the parties to the detriment of the right of defense of the Argentine Republic which clearly prevents the challenged arbitrators from being relied upon to exercise independent judgment.' …
    - the periods allowed by the Tribunal for each party to prepare its defense in this case are disproportionate and result in a total lack of fairness in the treatment accorded to the parties."
  - Chairman of ICSID Administrative Council rejected the challenge:
    - "The mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention."
  - Tribunal ultimately granted Respondent 122 days (instead of 75 days) on account of 47 days of suspension of proceedings caused by Respondent's arbitrator challenge

Substantive vs. Numerical Equality (cont'd)

Glamis Gold, Ltd. v. United States of America, NAFTA/UNCITRAL, Procedural Order No. 8 (Jan. 31, 2006) ¶ 12

- ***Glamis Gold v. United States of America***
  - Tribunal extended the document production period between two rounds of written submissions "[d]ue to the extensive nature of this document production process and the desire to have evidence available to the Parties prior to their memorial submissions ….
  - In adjusting the schedule, the Tribunal is cognizant of Respondent's arguments that the Parties must be treated equally with respect to the completion of submissions to the Tribunal. …
  - As to the requirement that each party be given a full opportunity to present its case, the Tribunal observes that a period of approximately four months to prepare a memorial, whether that be the memorial or counter-memorial, is customarily an adequate amount of time, absent unusual circumstances.
  - A general delay in the proceedings, which as a consequence in theory provides more time to the Claimant for the preparation of its memorial, does not require … the granting of an equally long extended period of time to the Respondent for the preparation of its counter-memorial."

Speed & Efficiency vs. Right to Confront

Fraport v. Philippines, ICSID Case No. ARB/03/25, Annulment Decision (Dec. 23, 2010) ¶¶ 200, 202

- ***Fraport v. Philippines*, Annulment Decision**
  - "The right to present one's case, or 'principe de la contradiction,' in arbitral proceedings includes the right of each party to make submissions on evidence presented by its opponent."
  - "The right to present one's case is also accepted as an essential element of the requirement to afford a fair hearing accorded in the principal human rights instruments. This principle requires both equality of arms and the proper participation of the contending parties in the procedure, these being separate but related fundamental elements of a fair trial. The principle will require the tribunal to afford both parties the opportunity to make submissions where new evidence is received and considered by the tribunal to be relevant to its final deliberations."
    - A tribunal does not necessarily have to permit the parties to comment on new evidence that it considers irrelevant to its decision

Right to be Heard vs. Right to Confront

Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania, ICSID Case No. ARB/11/18, Award (May 29, 2013) ¶ 71, Procedural Order No. 3 (Jan. 9, 2013) ¶ 1(a)

- ***Burimi v. Albania***
  - "Claimants did not submit any witness statements with their memorials but sought to call witnesses for direct examination at the hearing."
  - "The Tribunal held that no such witness testimony could be heard because Claimants' request ran contrary to the clear terms of the parties' agreements as reflected in Procedural Order No. 1."
  - "[T]o hear such witnesses would be … prejudicial to Respondent, which would not be in a position to prepare cross-examination."
- **Need right to confront**
  - Compromised if the hearing consists only of cross-examination, where the opposing party in fact has the power to avoid an entire topic

Disclosure of Tribunal's Issues

Letter from the Solicitor General of the Republic of the Philippines to the ICSID Administrative Council at 3, 15 (June 27, 2011), attached as Annex 2 to ICSID Background Paper on Annulment (Aug. 10, 2012)

- **Tribunals should disclose what they consider to be the essential issues, especially where the parties have not briefed them**
  - E.g., *Fraport v. Philippines*
    - Annulment on the basis that the Tribunal had not granted the parties an opportunity to comment on a Philippine prosecutor's resolution issued after the hearing, which the Tribunal did not find relevant to its analysis.
    - "The Annulment Decision was the first and only indication that the Committee interpreted the Prosecutor's Resolution in the manner that it did. Neither the parties nor the Committee had raised this view of the Prosecutor's Resolution as being in tension with the Award at any time during the annulment proceeding. Thus the Committee did not have the benefit from any observations from the parties as to the principal basis for its annulment decision."
    - "[B]y not seeking submissions from the parties on this question, which the Committee considered to be the most troubling issue before it, the Committee denied due process and caused a serious and costly miscarriage of justice."

Equality vs. Party's Right to Fully Present its Case

EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 706 (1999); DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 49 (2012); Frank Berman, *Preparation of Cases Before International Courts and Tribunals*, ASIL Proceedings 2012, at 164

- **Depending on the issues, a party may prefer to devote more or less hearing time to:**
  - Witness examination – real problem with cross only approach
  - Factual argument
    - Explain documents
  - Legal argument
    - Gaillard & Savage: "The purpose of the oral pleadings is to enable the parties to recapitulate and present in an organized fashion most of the factual and legal points on which the parties disagree. That presupposes that the parties will be given sufficient time, particularly after the final witness hearings, to prepare their [oral] pleadings accordingly."
    - Caron & Caplan: "any party has the right to have hearings not only for the presentation of witness evidence, but also for oral argument."
    - Berman: "nothing could be more valuable at that point—when the tribunal's mind is at its freshest—for the tribunal to hear each side's view of the credibility and impact of the evidence."

Equality vs. Party's Right to Fully Present its Case

Metal-Tech v. Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) ¶¶ 85-100; *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007) ¶ 400

- **New documents at hearing**
  - Parties must be able to address
- ***Metal-Tech v. Uzbekistan***
  - New facts and documents surfaced at hearing
  - Tribunal ordered parties to:
    - Produce additional information and documents
    - Submit post-hearing briefs and witness statements
    - Answer specific questions
  - Tribunal held an additional hearing
- ***Fraport v. Philippines***
  - New documents were produced at hearing
  - Tribunal gave parties 2 weeks to comment

Equality vs. Party's Right to Fully Present its Case

Glamis Gold, Ltd. v. United States of America, NAFTA/UNCITRAL, Procedural Order No. 12 (Aug. 28, 2007) ¶ 10;
EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 707 (1999)

- ***Glamis Gold v. United States of America***
  - Parties had different approaches on how much hearing time to devote to oral argument vs. witness examination
  - Tribunal explained its guiding considerations:
    1) "that the parties be treated equally and that one way that this equality is achieved is through an equal allocation of time to each side during the hearing;
    2) that the basic structure of the hearing should be that Claimant present its case, that Respondent present its defense, that Claimant present its rebuttal and Respondent present its rebuttal; [and]
    3) that the manner in which each party is to present its case or defense is left to that party …."
- **Gaillard & Savage**
  - The principle of equal treatment of the parties requires that both must have the opportunity to present their case orally, but not, as some parties claim, that they should have exactly the same amount of time to do so."

Speed & Efficiency vs. Right to be Heard

- **Problematic trend to use written witness statements as substitutes for direct oral examination, and to focus hearings on cross-examination**
  - Contrary to original purpose of written witness statements
    - IBA Rules on the Taking of Evidence in International Arbitration, Preamble (3):

      "[E]ach Party shall … be entitled to know, reasonably in advance of any Evidentiary Hearing … the evidence on which the other Parties rely."
  - Allows opposing party to control which witnesses the Tribunal sees "live" and which topics are addressed
    - Potential distortion of what the Tribunal hears
      - Especially where re-direct examination is limited to topics raised on cross-examination
    - Human perception of credibility of "live" testimony is different than of written testimony
    - Arbitrators' perception of a case is distorted by the absence of all witnesses who address an important issue

Limits to a Tribunal's Ability to Safeguard Due Process

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 98-220

- ***Abaclat v. Argentina*: Procedural Details**
  - September 14, 2006 — Request for Arbitration
  - September 26, 2006 — Argentina's Opposition to Registration
  - February 7, 2007 — Registration of Request
  - February 6, 2008 — Constitution of Tribunal
  - April 10, 2008 — First Session
  - August 4, 2011 — Decision on Jurisdiction and Admissibility
  - September 15, 2011 — Argentina's Challenge of Arbitrators; Proceeding Suspended
  - November 2, 2011 — Argentina's Arbitrator Resigns
  - December 2, 2011 — Argentina's Request for Annulment
  - December 21, 2011 — Argentina's Challenge is Rejected
  - January 19, 2012 — Argentina Appoints Arbitrator; Reconstitution of Tribunal
  - February 10, 2012 — Argentina's Request for Security for Costs
  - May 9, 2012 — Procedural Hearing, Argentina's Request for Provisional Measures
  - September 14, 2012 — Argentina Stops Paying its Share of Advances on Costs
  - 2012-2013 — Briefing & Document Exchange
  - 2013 — Verification Expert Review and Report
  - December 19, 2013 — Argentina's Second Challenge of Arbitrators; Proceeding Suspended
  - February 4, 2014 — Argentina's Challenge is Rejected; Proceeding Resumes
  - June 2014 — Hearing

Giving Effect to the Parties' Choice of ICSID Arbitration

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 518, 519

- ***Abaclat v. Argentina*:**
  - "where the BIT covers investments which are susceptible of involving a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment, it would be contrary to the purpose of the BIT, and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration."
  - "where an investment … shows certain particular characteristics, these characteristics may influence the way of conducting the arbitration, and lead the Tribunal to make certain adaptations to the standard procedure in order to give effect to the choice of ICSID arbitration. … However, it is understood that adaptations made to the standard procedure must be done in consideration of the general principle of due process and must seek a balance between procedural rights and interests of each party."

Adaptations to Manner of Examination of Evidence

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 529-530

- ***Abaclat v. Argentina*:**
  - "[A]daptations to hear the present case collectively would concern not that much the object of the examination, but rather (i) the way the Tribunal will conduct such examination, and/or (ii) the way Claimants are represented."
  - "… the Tribunal would need to implement mechanisms allowing a simplified verification of evidentiary material … or random selection of samples …."

Balancing the Parties' Procedural Rights & Interests

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 536, 539

- ***Abaclat v. Argentina*:**
  - Tribunal needs to examine certain issues collectively and limit certain procedural rights while maintaining balance but considering where and under what conditions to change the method of examination to collective treatment
  - Also consider whether rights of defense are affected in one proceeding vs. 60,000 separate proceedings

Group Treatment of Homogeneous Claims

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 540-544; *Ambiente Ufficio et al. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013) ¶¶ 159, 161

- ***Abaclat v. Argentina*:**
  - "group examination of claims is acceptable where claims raised by a multitude of claimants are to be considered identical or at least sufficiently homogeneous."
  - 4-H: "Claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT."
    - Whether Claimants' contractual rights to repayment on the bonds are homogeneous is irrelevant because the arbitration concerns only Claimants' treaty claims.
- ***Ambiente Ufficio v. Argentina*:**
  - Concurred: "the necessary link among [Claimants] exists in terms of the treaty claim they jointly submit in the present arbitration."
    - No contractual link among Claimants is required for joint treaty claims

Effect on Respondent's Rights of Defense

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 545

- ***Abaclat v. Argentina*:**
  - "It appears that the effect of such examination method and procedure on Argentina's defense rights is limited and relative.
    - Whilst it is true that Argentina may not be able to enter into full length and detail into the individual circumstances of each Claimant, it is not certain that such approach is at all necessary to protect Argentina's procedural rights in the light of the homogeneity of Claimants' claims.
  - In addition, the only alternative would be to conduct 60,000 separate proceedings.
    - The measures that Argentina would need to take to face 60,000 proceedings would be a much bigger challenge to Argentina's effective defense rights than a mere limitation of its right to individual treatment of homogeneous claims in the present proceedings."

Conclusion

- **Due Process is essential for the system of international arbitration**
- **Reject notion of FRCP/FRE rules approach**
- **Institutions and arbitrators must appreciate importance to the parties and counsel:**
  - Fundamentally: presentation of witnesses must be balanced: back away from cross only
  - Tribunals must assure that parties and counsel can present their case with the approach that permits them to confront the evidence
  - Tribunals must disclose to parties issues they are considering and permit parties to address them