

By Karl-Heinz Böckstiegel, Cologne"

Party Autonomy and Case Management — Experiences and Suggestions of an Arbitrator¹

I. Introductory Remark

The organizers of the DIS Berlin Conference suggested for my address at the beginning of the Conference to focus on my experiences as an arbitrator over many years. This provided me an opportunity for an eclectic discussion of some fundamentals, but also of some selected details of case management. And I could do so with great liberty, knowing that the very distinguished and experienced colleagues speaking later in that conference would cover in much greater detail many of the issues raised by the topic.

II. Party Autonomy as the Basis of Arbitration

When we speak of "Party Autonomy", to avoid misunderstanding, a comment on terminology is required, because the term is used in different ways. Sometimes it is used in the more limited sense of conflict of laws as the autonomy of the parties to choose the applicable law. Sometimes it is used much more general as the autonomy of the parties to decide on all aspects of an international arbitration procedure, subject only to certain limitations of mandatory law.

In this latter sense, the principle of party autonomy is fundamental to arbitration in general and to international arbitration in particular. It is closely related to the freedom to conclude contracts and the freedom of the contractual partners to rule on the details of their relationship which in some countries including Germany is considered to be a constitutional right of every citizen. Further, party autonomy is fundamental to the functioning and development of private economy systems at the national level as well as of international trade and investment. The business community has a strong interest to shape its relationship to its needs and advantage and to select its own systems of dispute settlement.

There are several major aspects of party autonomy which are fundamental for arbitration: First, there is no arbitration without the consent of the parties to submit to arbitration. And secondly, if there is such consent, party autonomy provides the parties the right to appoint an arbitrator and select the procedure under which their dispute is to be settled.

Party autonomy to submit to arbitration will primarily be exercised by the parties jointly deciding on whether to go to ad-hoc arbitration, or — what is mostly happening — choose institutional arbitration.

This joint decision is normally exercised for commercial arbitration by the arbitration clause in the

* *

1) Address at the Conference of the German Institution of Arbitration (DIS) "Organising Arbitral Proceedings —Regulations, Options and Recommendations", Berlin 24/25 October 2012, slightly adapted for publication.

contract . For investment arbitration it is exercised first by the host state in a treaty of international law or a domestic investment law, and by the investor by requesting arbitration under such provisions .In view of recent publications particularly on investment arbitration, let me say here that for me it is a fundamental aspect of party autonomy that the parties have the right to appoint one member of the tribunal .If all three members are appointed by an institution, as has recently been suggested, a fundamental advantage of arbitration over domestic courts is lost in my view.

The arbitration rules of the institutions differ in how far they go on how the proceedings should be conducted, the new ICC Rules going perhaps further than most others . But it can be said that, subject to — normally few — mandatory rules, all institutions provide a wide discretion for the parties and the arbitrators to frame the procedure for a given case . And that — indeed — is one of the great advantages of arbitration .It should be used to frame the best procedure for the case at hand.

In this context, for most issues, it is again party autonomy which has priority, and the arbitrators' discretion is subject to this autonomy with regard to most issues of procedure . However, in practice, this is mostly not a real conflict, because case management should be, and in fact is, generally done in consultation between the parties and the tribunal.

Therefore, when I hereafter discuss case management, I do this from the experience and perspective of an arbitrator, but of course most of the options and suggestions made will need to be decided with the consent of the parties.

ill. Joint Determination of Case Management

When, many years ago, I started arbitral work, it was considerably more difficult and complicated to agree on the major issues of the procedure for a given case . Both domestic and international arbitration had long traditions in a number of jurisdictions, but by procedures which had developed in very different ways . Commodity or maritime arbitration as well as "normal" commercial arbitration, for example, were different between these categories and between various countries like England and Germany. And both counsel and arbitrators entering an ICC arbitration would to a great extent rely on their home experiences which made agreements on common denominators often difficult.

Today, at least in international arbitration, we have a different situation . The globalization of international commerce and investment has also spread the use of arbitration all over the world .On one hand, this brings many new players into the field who are not familiar with international arbitration .On the other hand, the enterprises, states, law firms and arbitrators gather common experiences in this process . Further, global instruments such as the IBA Rules and guidelines facilitate a harmonization of many aspects of the procedure.

In this environment, it is important to realize that differences in the legal culture of the parties, of their counsel, and of the arbitrators . They have to be taken into account in shaping the procedure . Otherwise, sur-

prises, misunderstandings and resulting conflicts in the management of the case are inevitable . Though I do not have time to enter into these any further, let me at least refer to the well known different approaches between common law and civil law jurisdictions, as well to other traditions in what I may call "non-western" jurisdictions in various parts of the world.

However, in recent years, I find these differences to have become less relevant, because common or at least very similar applications have developed in the practice of international arbitration . They include in particular a full written procedure including memorials on all aspects of the case, written witness statements and expert reports provided by the parties, some kind of document disclosure procedures, and cross examination at the hearing . However, as soon as a party is not represented by experienced counsel, or a private or state party is represented by in-house lawyers, or a member of the tribunal is less familiar with modern arbitration practice, the tribunal will have make special efforts to assure that neither party is surprised or at a disadvantage in the arbitral procedure.

Thus, what I will now discuss as options or suggestions for case management in international arbitration is based on many implementations in cases of both commercial and investment arbitration cases.

My first suggestion is to discuss as early as possible at the start of a new case what I would call the "Rules of the Game" as they should be applied for the procedure at hand . Only thereafter, a party can plan its strategy for the case without having to be exposed to later unpleasant surprises .To establish the Rules of the Game, the following steps may be appropriate:

- To discuss and hopefully agree the details, in my experience, a procedural meeting in person is highly preferable to provide an opportunity for the persons involved to get acquainted and have a free discussion.
- A draft Annotated Agenda for such a meeting circulated in advance avoids misunderstandings in detail and facilitates the discussion.
- After the meeting, that Agenda, incorporating the results of the meeting may be circulated again as a draft for a procedural order for comments to the parties.
- Taking into account the comments received from the parties, Procedural Order No.1 can then be set and serve as the common script on all major issues for all involved in the proceedings.

IV. Specific Aspects of the Procedure

1. Time and Cost Management

Setting a timetable for the proceedings is an obvious first task, and a mandatory requirement by some recently updated institutional arbitration rules.

While all agree in principle that it should provide for a speedy procedure, application of this aim in practice turns out easier said than done . Depending on the volume and complexity of the dispute, counsel for the parties will often request rather long periods for the submission of their major memorials including the attached exhibits, witness statements and expert reports . This is particularly frequent in cases where gov-

ernments are parties who depend on complicated decision processes in their respective hierarchies.

Though the tribunal may wish to speed up the procedure and press for shorter periods, being over-ambitious in setting an optimistic timetable may backfire. If the timetable is not realistic, extension requests are bound to come which endanger later parts of the timetable including the hearing dates.

Also in arbitration, more time means more costs. And when I see the cost claims the parties submit at the end of an arbitral procedure, I can only agree that they have grown too much and, in large cases, reach exorbitant amounts. However, the discussion often goes into the wrong direction. Those who attended the IFCAI Conference in Berlin last year, which exclusively dealt with costs, will recall that several reports came to the same conclusion: In the great majority of cases, an average of 90% of the costs claimed in a given case are the expenses of the parties, their lawyers and support staff, witnesses and experts, while the costs charged by the arbitral institution are in the range of 2 to 5%, and the fees and expenses of the arbitrators in the range of 4 to 7%. Therefore, if one wants to reduce costs, relatively little can be done in the latter range and considerable changes could only be achieved if one succeeds in reducing the parties' own costs. That is easier said than done. It is understandable if counsel, in the best interest of their clients, leave no stone unturned. It can indeed be argued that the battle of thousands of documents often resulting from this effort or the numbers of witnesses and experts should be reduced. But, beyond efforts of persuasion, there is not much even a pro-active tribunal can do in this regard without being told that it limits due process for a party.

2. Efficiency of Party Submissions

The communication between the parties and the tribunal is conducted in many ways. Oral exchanges will take place during meetings and hearings, or by a telephone or video conference involving all parties. As an arbitrator, I avoid telephone calls with or by only one party, because even calls on most trivial matters may be seen with some concern by the not involved party if informed about such calls. This approach may be due to the fact that I have been in many highly contested and politically sensitive arbitrations, but in this regard it would seem to me that being over-cautious is the preferable approach.

Communications in writing will obviously be by letters, nowadays of course mostly transmitted by email. More formal communications will be from the side of the parties by memorials starting with the Statement of Claim and by procedural applications, and from the side of the Tribunal by procedural orders.

Those of you who have recently been at the Swedish Arbitration Days in September 2012, will recall that there, in my short keynote address, from the view of an arbitrator to counsel of the parties, I identified what I would see as some possible improvements. Permit me shortly to reiterate some of these suggestions here in the wider context of case management.

Sometimes, counsel seem not to realize sufficiently that, in their major mission in the interest of their clients to convince or at least persuade the tribunal,

their submissions should be as user-friendly as possible.

This is particularly so if, as it often happens, the procedure turns into a battle of documents .It is understandable that counsel tries to submit all documents which may under any aspect be considered as relevant by the tribunal .As well, a party may purposely load the other side with great volumes of documents in order to make it more difficult for the opponent to reply. However, this must not lead to a situation where it is very difficult for the tribunal to grasp the factual and legal messages of the presenting party and to find and re-find major arguments of a party in their submissions on the relevant issues.

In this context, rather trivial aspects are frequently forgotten which play a role to enable the tribunal to not only read, but also re-read, evaluate, and use quotes from a party's submission:

- A Table of Content at the beginning of every larger memorial and other submission,
- Electronic versions of Memorials in a form which enables word search and copying of sections,
- Updated hyperlinked lists of all exhibits, witness statements and expert reports at every stage of the procedure,
- All exhibits in ring-binders to enable the arbitrators to withdraw any documents which they consider relevant in a certain context,
- Dividers between exhibits in folders identifying the exhibit number.

Again, participants at the Stockholm Conference will also recall that, in follow up to my address, the new E-Brief Technology was presented and demonstrated which, in my view, presents an option to make major submissions of the parties much more efficient and accessible in detail .It allows to hyperlink all references in the text or footnotes of memorials to exhibits, witness statements, expert reports and legal authorities, permits highlighting of parts of the text and adding notes to the text by every reader in an ongoing evaluation of a submission, both by the parties and later by the members of the tribunal .It would seem to me that at least in larger and more complex cases this new technology could be used as a win-win option to assure on one side for the parties that all aspects of their submissions reach the tribunal as efficiently as possible, and on the other side for the tribunal that it does not miss relevant aspects in a long and complex submission from a party.

3. When should which evidence be submitted?

The most common approach to evidence seems to be today that each party should submit all the evidence it relies on in a memorial with that memorial . This would include all documents, witness statements and expert reports . That in turn will make the elaboration of the submission both very costly and time consuming.

Depending on the particularities of the case, it may be preferable if a party only lists such evidence in its first memorial, and then a further procedural meeting with the parties discusses and identifies disputed relevant issues and the burden of proof . Thereafter, it may be possible to limit and better focus the evidence to be submitted.

However, it should be determined early in the procedure that relevant evidence must be submitted as early as possible and not late at the surprise of the other side, and that, after a certain point in the timetable, no further evidence can be submitted except in exceptional cases after a reasoned application by a party and authorization of the tribunal.

Having said that, one has to realize that a case may develop during the course of the procedure . Issues that were considered relevant for the relief sought by the parties at the beginning may turn out to be moot or irrelevant while new issues may come up . That is why I always felt that the traditional requirement of the ICC Rules to include in the Terms of Reference a "list of issues to be determined" was unnecessary, if not a waste of time .At this early stage of the proceeding often not even the parties, and even less the arbitrators are in a position to fully decide what are finally the relevant issues in order to decide on the relief sought by the parties . I note with pleasure that the new ICC Rule 23 now introduces this requirement by the wording "unless the arbitral tribunal considers it inappropriate".

My point in this context is that case management must remain flexible during the entire procedure .My suggestion to determine the "Rules of the Game" as early as possible in a meeting with the parties does not and cannot mean that all such determinations are cast in stone . They must be subject to revision and change if considered necessary in consultation between the parties and the tribunal.

4. Document disclosure

Not all procedures require document disclosure. But, at the first procedural meeting between the parties and the tribunal it should be discussed whether a party intends to request the disclosure of documents from the other side .If so, the respective procedure and timetable should be set at this early stage, so that later dates in the timetable and particularly the hearing dates must not be changed later at a time when this becomes much more difficult to include all involved . Again this timetable for the document disclosure must be realistic providing for the various procedural steps needed, the Redfern Schedules, the decision of the tribunal and the actual production of the documents ordered.

As to when this disclosure procedure should be located into the general timetable of the case, mostly it will be preferable to have the disclosure procedure after the first exchange of the major memorials, because only at that time will a party be able to come to an informed evaluation as to which documents it needs . Only in exceptional circumstances should a later new disclosure procedure be allowed.

Regarding the criteria and details of the disclosure procedure, the new MA Rules of 2010 can and will mostly be helpful, not necessarily as binding, but as a guideline subject to variations taking into account any particularities of the case at hand.

5. Preparation and conduct of the Hearing

As we all know, hearings are conducted in very different ways not only in comparison between domestic courts of national jurisdictions, but also in comparison between domestic and international arbitrations.

My suggestion to identify early the Rules of the Game must therefore include a sufficient clarification as to how the hearing will be conducted . Only thereafter can counsel plan and adjust their written submissions in the best interest of their clients in preparation for the hearing.

This is of particular importance if the parties, their counsel and the arbitrators come from jurisdictions with very different traditions for the conduct of hearings .As early as possible at least the following issues should be clarified:

- Dates for the hearing should be agreed preferably at the first procedural meeting, otherwise as soon as possible . Experience shows that, in today's world of very busy counsel and arbitrators, it is very hard to find and agree on periods for a hearing at which all involved are available even far in the future . And for the same reason, realistic timetables and then enforcement of these deadlines against unwarranted extension requests should assure an orderly and timely completion of the arbitral procedure.
- The necessary length of the hearing is difficult to judge early in the procedure . The parties, knowing the details of the dispute, will normally be in a better position to suggest a period needed for the hearing, be it first only on jurisdiction and/or liability, or on all aspects of the case . But again, in today's world of very busy counsel and arbitrators, maximum periods have to be agreed for the length of the hearing, because none of the players involved are available for open ended hearings .It is therefore common practice to agree on a maximum period, perhaps with some additional days blocked should an extension be found to be necessary.
- To implement this, as is known from publications and case practice, I initiated many years ago what Jan Paulsson first called and is now known as the "**Böckstiegel Method**"². Without any missionary feeling, let me very shortly identify this method which I nowadays see used in the practice of many international arbitrations:

The method is trying to make the best of an agreed limited period for the hearing .First of all, at some time before the oral hearing, in consultation with the parties, as part of the agreed total time allotted for the hearing, total numbers of hours are established which are available for each party for its opening statement and examination of witnesses and experts .These periods may often be equal for each party, but if many witnesses have to be examined from one side and few from the other, a different partition between the parties may be more appropriate . Within the period it is allotted, each party is free to decide how much of its total time it may spend on the examination of which witness and expert . I have found this preferable in most cases to the alternatives of no time planning or of the tribunal deciding in advance on the length of the examinations of particular witnesses and experts . I submit the suggested method gives a party the relatively best autonomy to choose its preferred strategy for the hearing and to grant equal treatment to the parties within the agreed limited total period of the

²⁾ Jan Paulsson, The Timely Arbitrator: Reflections on the Böckstiegel Method, in Arbitration International Vol . 22 (2006) p . 19 seq.



hearing .In fact, I recall that in a case I chaired some years ago, one of the most successful litigators in international arbitration decided to spend by far the major share of the time allotted to his party on the examination of one witness which he felt was the most important for the outcome of the case . And he won the case.

However, I have not proposed and in fact not used the method as a simple chess clock timing . There must remain some flexibility.Also, there may be cases where, after consultation with the parties, the hearing may better follow a timely structured issue-by-issue order of examination.

To avoid misunderstanding, let me also clarify that I do not propose to limit the time for questions by members of the Tribunal, though quite often, after counsel for the parties have completed their examination, less questions still need to be posed by the tribunal . This must be sufficient here as an explanation of the Böckstiegel Method.

- How should evidence be introduced at the hearing? Witness Statements and Expert Reports taken in lieu of direct examination, but full opportunity for cross examination, seems to be the most common approach.
- Should there be an option for witness-conferencing or at least expert-conferencing at the hearing? If so, the parties and the witnesses and experts should know this in advance . And particularly for experts on the same issues, it might be advisable to invite them to agree before the hearing an a short list of sub-issues on which they agree and disagree in order to allow a better focus at the hearing.
- While short Opening Statements by the parties summarizing their views on the major issues are usually helpful and a standard practice, oral Closing Statements may well be, and often are, unnecessary if Post Hearing Briefs are submitted by the parties. Indeed, such Post Hearing Briefs give the parties a better opportunity to present their evaluation of the hearing in carefully reflected and organized form, and they are more helpful for the tribunal to come to its own conclusions in this regard . Particularly for the Post Hearing Briefs as the last and final submissions from the parties, the use of the E-Brief technology may be of particular help both from the view of the parties and of the tribunal .In large and complex cases, the parties may wish to have the opportunity to submit a 2nd round of Post Hearing Briefs to be able to rebut what the other party has said in its Post Hearing Brief.

6. Deliberations and Decisions by the Tribunal

Finally, the planning and conduct of the deliberations by the tribunal after the hearing till the issuance of an award should also be part of case management.

As we know, it is often claimed that today arbitrations take too long . I agree, but must add from my own experience, that the length is mostly due to the fact that, as mentioned earlier, parties and their counsel request and indeed often need long periods to elaborate and submit their submissions and evidence.

However, I also see that some tribunals, after the hearing and closure of the procedure, take astonishingly long periods of time until their award is issued. This may be partly due to some arbitrators accepting

too many appointments, or to strong dissents between the members of the tribunal which cannot be resolved shortly, or simply that some are badly organized.

As some colleagues know from joining me on tribunals, I try to start early in the procedure the elaboration of what I call the Tribunal Working Paper (TWP) which summarizes the major procedural and substantive aspects of the case and contentions of the parties, of course without any pre-judgement of disputed issues . This TWP is distributed to my Co-Arbitrators and regularly updated as the procedure goes on, at the latest right after the hearing and possible Post hearing Briefs .It then provides the starting point for well informed deliberations of the Tribunal and usually allows a speedy process until the Award . But of course, depending on the complexity of the case and possible dissents in the tribunal, it may still not always be possible to issue the award very shortly.

V. Closing Remark

The above considerations offer some experiences from the past as well as observations and suggestions for the case management regarding present and future arbitrations .As I mentioned, I have no missionary feeling for my suggestions .If colleagues have different experiences or proposals, I will be very interested to hear them .We can only improve if we exchange our experiences and ideas.