

**Arbitrator's Case Management:
Experiences and Suggestions**

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1. A Personal Preface

In this book dedicated to Robert Briner, and having known him for more than 25 years, the reader may permit me a personal preface.

We first met at an ICC Seminar in Malbun (Liechtenstein), though I must admit that I forgot the topic of this seminar as well as the topics on which both of us presented papers. The first time we actually worked together – and in fact the only time both of us cooperated as arbitrators on the same cases – was between 1984 and 1988 at the Iran-United States Claims Tribunal at The Hague where Robert first chaired Chamber II of the Tribunal and later became my successor as President of the Tribunal. Since then, in various functions, we met at a great number of meetings and panels in places all over the world. A common feature seems to be, as I recall it from the regular meetings of the International Council for Commercial Arbitration (ICCA) that, whenever dates for meetings, conferences or congresses had to be chosen far in advance, Robert and I seemed to be the only ones who had calendars for the next four years containing whatever other events had already been decided to take place in that distant future.

On the personal level, a friendship developed, including our wives Frances and Ali, highlighted by wonderful dinners at our various homes as well as at well-chosen restaurants throughout the world.

For this contribution to the book, I have chosen a topic, which has been suggested to me and which, I know, meets Robert Briner's interest though, probably, I have little to say which is new to him.

2. Dare to Say "NO" to Appointments

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Many arbitrators will share with me the experience that they are approached by a party or by two party-appointed arbitrators or by an arbitral institution with the question whether they would be ready to accept an appointment for a certain case. And probably many also share with me the experience that there is a great temptation to accept all or many appointments. However, also in view of an efficient case management, I suggest we all might have to say "No" more often.

A first reason for the "No" may be that though we might feel independent and impartial in application of the normal objective criteria (including those now available from the IBA Guidelines), it is foreseeable that others involved in the case including a party or its counsel might see things differently and a dispute over conflicts of interest might hamper the efficient conduct of the arbitral procedure. Therefore, in case of doubt, it might be wiser to refuse appointment than to accept it. On the other hand, this does not mean that one should give in to abuses of the challenge procedure as we see it once in while from a party or counsel. That should not be accepted in the very interest of an efficient case management.

A second and probably more frequent reason to say "No" to possible appointments is a realistic time calculation. It is a natural and most welcome result of the growth of national as well as international arbitration that a continuously larger number of cases need appointments of arbitrators and that, though the number of possible candidates has also grown, many of us are asked more than before regarding our availability while many of us already have more parallel pending cases than before. In such a situation, over the years, I have frequently seen colleagues accepting appointments and then, once the procedure got started, having to point out that they had almost no or very little time available for procedural meetings, time-consuming file examination and hearings in the near and more distant future. An extreme example was a well-known London barrister who, as a co-arbitrator in a case in which I was trying to set up a time schedule for the procedure, told us that his first availability for one or two weeks of a hearing would be two years from now. Another example may be an also well-known colleague from another country who told me that he regularly did some "overbooking" in accepting arbitral appointments because, in his experience, some cases would fall away due to a settlement or otherwise. My suggestion would be that the arbitrators owe the parties more than that and that one should only accept an appointment if, taking into account the normal development of the pending cases and the suggested new case, we can be sure to have sufficient time available to deal thoroughly with all the work and meetings coming up in the respective procedure.

I am aware that, if an arbitrator dares to say "No" too often, he runs the risk of getting the reputation that he is generally not available. But I submit that this risk can be reduced, if one in a professional and friendly manner explains the reason for the refusal in a specific case and indicates that, after

a certain period, one would with pleasure be available again for a further case. Irrespective of that, I would also submit that the risk is at least as great for an arbitrator who first accepts an appointment, then proves not to be available for an efficient conduct of the procedure, and consequently gets the reputation of standing in the way of an efficient case management.

3. Getting a Good Start of the Procedure

Arbitration deals with disputes and therefore cannot be expected to always make everybody happy. This is true certainly for the merits of the case, but also to a lesser extent for the arbitral procedure. No arbitrator can assure, that, at every stage of the proceedings to the very end, agreement can be reached with the parties or between all three members of the arbitral tribunal. Nevertheless, or perhaps just in view of this, it is important to make every effort to have a good start of the procedure.

At the very beginning, it would seem preferable to make an effort by all concerned in order to select at least a chairman of the tribunal who is accepted by the parties and their counsel. It is therefore for good reason that most arbitral institutions, even if their rules do not mandatorily prescribe that, give the parties or the party-appointed arbitrators a period to agree on a chairman before they appoint one.

Obviously, such efforts will not always succeed. If they don't, again for good reason, most arbitral institutions have the practice of being rather strict in applying criteria for conflicts of interest at the beginning of the procedure to avoid that a chairman is subject to, if not challenge, at least doubt by one of the parties, a fact which will make it more difficult for him and the entire tribunal to shape the procedure in an efficient way.

A first task for the arbitrators is to establish a good working relationship between themselves because, during the entire length of the proceedings, and particularly once conflicts arise, such a good working relationship will greatly facilitate the case management. If, as it happens, two of the arbitrators have known each other before, they should make an effort to include the third and new arbitrator into their relationship and assure full transparency between all three of them.

Perhaps even more obviously, it is important that the arbitral tribunal makes an effort to establish a good working relationship with the parties and their counsel from the very beginning of the procedure. In my own experience, in this context, it is extremely helpful if a meeting in person can be arranged as soon as possible after the constitution of the tribunal. Insofar as the arbitrators and counsel of the parties do not know each other from former cases or meetings, it is helpful to be able to connect names with faces and

personal reactions. But even between arbitrators and counsel who do know each other, the opportunity should not be missed to have a free exchange of information and views regarding the further procedure before the tribunal starts its case management. Even in smaller cases, the costs involved for such a meeting are worth the result for the remainder of the procedure. Video conferences or telephone conferences are alternative options but cannot fully replace the meeting in person. In ICC cases, such a first procedural meeting may be connected with a common signing of the Terms of Reference. At such a meeting, the arbitral tribunal may also become aware of rather different approaches regarding the further procedure between parties from common law and civil law countries or between parties one of whom is represented by an experienced international firm while the other is presented by rather inexperienced in-house, government or local law firm counsel. Such circumstances have been taken into account by the tribunal in shaping and explaining its procedural decisions.

4. Clarify the Rules of the Game Early

There are many ways of efficient case management and it is one of the advantages of arbitration over court litigation that arbitral tribunals can shape a tailor-made procedure taking into account the many specifics of each case. But particularly in view of the options and possible variations, it seems important that the tribunal identifies the major rules of the game for its specific case as early as possible.

Before doing this, the tribunal will have to examine first, whether the parties have made use of their party autonomy regarding certain aspects of the procedure, whether applicable institutional rules provide a certain mandatory framework, and whether the earlier consultations with the parties lead to particular considerations or consequences in case management.

The most obvious need is to establish a time-table for the further procedure. This time-table should not only include the order of submissions, but also all other procedural steps that, based on the early exchange with the Parties, are likely to occur in the respective case, such as requests for interim measures, requests for disclosure of documents, submission of witness statements, expert reports etc. In any case, the time-table must be realistic. In modern practice, when it becomes more and more difficult to find dates or hearing periods at which all concerned are available, most often it is preferable to grant generous deadlines for submissions rather than have too ambitious deadlines leading to extension requests which then overturn the remainder of the time-table including the periods reserved for meetings and hearings. Whether one likes it or not, it is also a general experience that, if states or state institutions are involved as parties in the arbitration, their complicated decision processes will often require longer periods for submissions.

Provisions for interim measures or any kind of discovery are only necessary, if the early consultations with the parties show that such requests will be submitted to the tribunal. But the practice in recent years also shows that, more than before, such requests are forthcoming even from parties and counsel in civil law countries. While US style discovery has generally not been accepted in international arbitration, more limited requests for disclosure of documents have become a common feature for which the IBA Evidence Rules may be helpful and, in fact, are frequently used as a guideline.

Different from the procedure used in most civil law courts, it has also become common practice in international arbitration that the parties are requested to submit written witness statements and expert reports together with their briefs, sometimes separately at deadlines later than the briefs. Such statements and reports will mostly only be of actual evidentiary value if they can be tested by cross-examination in an oral hearing.

Both the parties, to make sure that their points come across, and the tribunal for its efficient evaluation of the parties' submissions, have a common interest that the tribunal can as easily as possible use the briefs, documents, witness statements and experts reports submitted from the parties. Experience shows that, depending on the country and jurisdiction and on the quality of the law firms or lawyers involved, such submissions turn out very different. The tribunal, therefore, should not shy away from discussing with the parties and ruling on relatively trivial logistic matters. As an illustration: It might be helpful if the briefs are submitted separate from the documents and starting with a table of contents, if the documents are submitted unbound (so that the tribunal can pull most relevant pages) with dividers between the documents, and if all submissions or at least briefs are, in addition, submitted in electronic form so that they can be read during travel and used in word processing.

Finally, though it is far away at the beginning of the procedure, it is advisable to already agree on dates of meetings and particularly hearings to make sure that all concerned can block such dates. Also the major features of how the hearing is to be conducted should be identified very early in the procedure, because parties and their counsel will have to take this into account when deciding on the contents and form of their written submissions (briefs, witness statements, expert reports, legal authorities) to the tribunal.

5. Adaptation of Procedure for Specific Types of Disputes

Though many experiences and suggestions regarding case management may be helpful for most arbitrations, one has to be aware that specific types of disputes require specific adaptations of the procedure. Sometimes, such adaptations are already taken care of by the specific arbitration rules

applicable for such disputes such as the ICSID Rules, the NAFTA Rules, the WIPO Rules. As already mentioned, arbitrations involving states or state institutions or international organizations as parties require taking into account the differences these disputes might have compared to those between private enterprises in arbitration.

But also in normal commercial arbitration cases, construction disputes, disputes on large infrastructure projects, merger and acquisition disputes, and multi-party disputes may require variations from otherwise normal case management.

6. Leave Room for Flexibility of Procedure

The suggested early clarification of the Rules of the Game should nevertheless leave room for a flexibility regarding the procedure at a later stage. As we all have experienced so often, the case develops and not seldom unexpectedly both for the parties and/or for the tribunal. What the parties considered as essential and most important at the beginning of the dispute, often reflected in the terms of reference in ICC cases, might change or might need additions once they have become aware of the submissions and arguments of the other party. And what the tribunal considered as the major issues at the beginning may also have to be reconsidered after the new submissions of the parties have been received and evaluated. Therefore, first, the tribunal cannot wait with studying the parties' submissions till shortly before the hearing, and second, this may require a new consultation between the parties and the tribunal as to what is the most efficient case management under such new circumstances. In view of these options, early decisions on the further procedure should not be taken in such a way that they can only be changed or amended in complete agreement between the parties and the tribunal, because at such later stage the interests of the parties or the approach of a party to the procedure may have changed in such a way that such full consent cannot be reached anymore. But the procedure has to continue efficiently nevertheless. However, before any changes or additions are decided, the tribunal should make sure that full consultation with the parties has taken place.

7. Be Firm Against Manipulation of the Procedure

While, as mentioned several times above, every effort must be made by the tribunal to consult the parties and to take into account legitimate procedural or substantive interests of a party, on the other hand, the tribunal should stand firm against any attempts of a party to manipulate or sabotage the proceedings. As we all know, this is not a theoretical issue. The limit between an effective representation of a party by its counsel on one hand and on the other hand attempts to get unfair advantages in the procedure are

not equally drawn in the various jurisdictions of the world and the professional practice of law firms involved in arbitration. Sometimes challenge procedures are abused, respondents apply delaying tactics, attempts are made to submit surprise evidence too late in the procedure or even only at the hearing.

Again, to be able to stand firm against such procedural behaviour, the tribunal should clarify the rules of the game to a sufficient extent as early as possible to avoid that, later on, a party can claim a "misunderstanding". Express indications regarding usually relevant aspects in this context may be helpful such as that no new evidence may be submitted after a certain date, that extension requests will only be considered under exceptional unexpected circumstances, that testimony of witnesses and experts at the oral hearing must be limited to issues already raised in their written statements or reports, etc.

Again, whether we like it or not, manipulation or sabotage may sometimes also come from one of the co-arbitrators. This may occur voluntarily or due to pressure exercised by a party having appointed that arbitrator once that party feels that the case might go against it. Most modern institutional arbitration rules provide for such a situation and give room for the majority of the tribunal to continue and decide. But one finds great creativity by parties and co-arbitrators in this context as recent cases have shown. For the majority to be able to continue to do its job it is important that from the very beginning full transparency is assured in the contacts and communications between the three members of the tribunal and that, once one co-arbitrator starts dissenting on procedural or substantive issues, every effort is made by the majority to continue keeping him fully informed, invited to and involved in its deliberations and decisions.

8. The Oral Hearing

Above, I have already explained why it is important at the very beginning of the procedure, not only to identify dates for meetings and hearing, but also to identify the major features on how the tribunal intends to conduct the oral hearing so that the parties can take that into account when deciding on the form and contents of their written submissions in the earlier procedure.

Nevertheless, as the case develops further, after the submissions are in, further details have to be clarified and decided regarding the oral hearing. Again, this should be done in consultation with the parties, either after a meeting in person, a telephone conference or comments by the parties on a draft circulated by the tribunal.

For obvious reasons, hearings on limited issues such as jurisdiction, requests for interim measures, or liability before quantum, may have to be shaped differently from a final oral hearing on all aspects and evidence of the case.

The period set aside for a hearing naturally depends on the volume and complexity of the case. In the modern practice of international arbitration, where all involved are highly busy and must accommodate with other cases and commitments, there seems to be no alternative to limiting the hearing to a certain pre-set period of time in advance. In some cases, an advance estimate of the time needed may prove to be particularly difficult. Therefore, sometimes, it may become necessary for flexibility to block an additional reserve period should it turn out that the calculated original time is not sufficient.

The tribunal, after consultation with the parties, but also from its own knowledge of the file by that time, has the responsibility to assure that the period of the hearing is most sufficiently used.

Furthermore, every effort should be made to avoid the possibility of ambush or surprise evidence at the hearing. By the time of the hearing, all major facts and arguments should be “on the table” creating a level playing field for the parties. For the same reason, as mentioned before, no new documents should be admitted at the hearing unless agreed between the parties or exceptionally authorized by the tribunal.

In today’s arbitration world where larger cases turn into battles of documents, the efficiency of the hearing depends to quite some extent on how those hundreds of documents of thousands of pages are used in the hearing itself. In preparation, it may be helpful if the parties prepare a Common Bundle or Hearing Binders with those documents or parts thereof which they actually intend to rely on and refer to in the oral hearing. And in the hearing, if counsel and their support staff have the required know-how, power point presentations of the documents or relevant parts, with highlighting of specific passages, may not only make the texts ad hoc available to all concerned, but will also save considerable time otherwise needed to search the document in the binders of documents.

9. Witnesses and Experts

Particularly, the examination of witnesses and experts during the hearing needs a very close consideration as to what is best, in the given case, to bring out the true facts and the most convincing evaluation. Most of the time it would seem advisable only to hear witnesses and experts whose written statements and reports have been submitted in advance. To avoid repetition at the hearing, as everybody is expected to have examined such written statements and reports before the hearing, testimony at the hearing should concentrate on a short introduction of the witness or expert by the presenting party plus any direct testimony on developments after the written statement, if any, followed by cross-examination, redirect examination etc. As far as I see, this is by now the method most widely used in international

arbitration though I am aware that the taking of evidence in courts of many civil law countries is quite different and other options may be appropriate if parties or counsel feel more comfortable with their traditional domestic practices.

The agenda of the hearing will have to depend on the particularities of the case and the procedure at hand. There is no one "best" way to conduct a hearing. As some readers will know, in many cases that I have chaired the tribunal and the parties agreed on what some colleagues such as Jan Paulson and Gabrielle Kaufmann-Kohler, in their publications, have called the "Böckstiegel Method": From the gross time available for the hearing one deducts estimated periods for coffee and lunch breaks, procedural discussions, and questions by the arbitrators to arrive at a net time available for the parties. This time will normally be divided by two between the two parties and each party will be free to use its time as it prefers for introduction and examination of witnesses presented by itself or the other party. This method tries to on one hand assure equality between the parties and on the other hand the widest possible discretion for a party to use its time for what it considers most important in the hearing.

But variations may be necessary: As an example, if many more witnesses are heard from one side than from the other side, one party may need more time for cross-examination than the other for introduction and redirect examination. If some witnesses or experts need interpretation, additional time may have to be calculated, even if simultaneous interpretation is applied to avoid the time lost by consecutive interpretation. Sometimes it may be advisable to recommend to the parties a limitation of the oral examination of legal experts, because experience shows that often their written legal opinion submitted before may be helpful while their cross examination is only of limited value. And finally, the option of witness or expert conferencing might be considered to help the tribunal make up its mind between conflicting testimonies regarding the same issue.

10. Photographs or Videos of Witnesses or Experts?

Finally in this context, permit me to raise a question I have wanted to discuss for some time and for which this learned volume written and read by leading practitioners of international arbitration may be the ideal forum to get some reactions: At least in large arbitrations with many witnesses and experts in which, after often two rounds of post-hearing briefs, the tribunal only deliberates several months after the evidentiary hearing, I have found not only myself but also my co-arbitrators, when evaluating the written and oral testimony of witnesses and experts, having difficulty to connect a face to that testimony though that would help in recalling the personal impression at the hearing. Reading the transcript and one's own notes helps, of course. But often the memory would be much better regarding the

conduct of the testifying person and its persuasiveness and credibility, if one would have at least a photograph available.

I must admit that I have never, in the practice of my own cases, discussed this option with the parties or even, in fact, asked for photographs. But I wonder whether using it would not only be considered helpful by myself but also by other practitioners. Could we ask for photographs attached already to written witness statements or expert reports, or at least of those actually examined at the hearing to be attached to the transcript of this testimony?

Videos have been used in cases of depositions and video-conferences have been used if a witness could not attend a hearing in person. They may serve as substitutes if the higher evidentiary value of live oral testimony at the hearing cannot be achieved for some reason. But would it even be considered helpful and worthwhile – at least in large cases – to have a video made of the oral testimony at the hearing? Would this be in conflict to any privacy protection, even if agreed by the Parties? I hope the reader will not consider it an abuse of this learned book, if I invite him or her to communicate his or her reaction. But, in view of how often cases turn on the personal impression and recollection by the tribunal of the oral testimony at the hearing, it seems worth a discussion whether the evidentiary value might be improved in such a way.

11. Promoting Amicable Settlements?

Let me at least shortly mention an issue which has been more frequently discussed in recent years. As many of us know, in domestic arbitration in a number of countries such as China or Germany, the parties expect the arbitrators to discuss an amicable settlement of the case at an appropriate moment in the procedure and, in fact, a majority of domestic arbitrations in such countries is concluded by such an amicable settlement. On the other hand, in many other countries and jurisdictions, such a role of the arbitrator is not expected and often not even admissible in law.

If one looks at present practice in international arbitration, it seems that an active role of the arbitrators in finding an amicable settlement is still the exception, but that, on the other hand, frequently the parties, once they are aware of the submissions of the other side, take the initiative and in fact reach a settlement either by themselves or with the help of the arbitral tribunal.

12. Deciding the Case

If no further briefs are due after the hearing, it would seem preferable most of the time for the members of the tribunal to have at least a first round of deliberations the day after the hearing while everybody still has a vivid memory of the testimony and arguments heard.

However, if an oral evidentiary hearing has been held with the examination of witnesses and possibly experts, most of the time it would seem advisable to invite post-hearing briefs from the parties in which they can present their evaluation of the oral evidence and of the case at large at the end of the procedure. At least in larger cases, parties will often prefer that they will be given an opportunity to reply to the post-hearing brief of the other side in a second round. For both rounds, it may be often appropriate to limit the number of pages of the post-hearing briefs to ensure some equality of the presentations from the parties. Finally, the tribunal will mostly need a statement of the costs of arbitration from each party to include a respective decision in its award.

As for the earlier procedure and for the hearing, there is also no "best" way to conduct deliberations of the tribunal. The particularities of the case, its volume and complexity, the variations in the relief requested by the parties, disputed procedural and substantive issues, the separation between liability and quantum etc. may have to be taken into account.

If the members of the tribunal, at this stage, still have a good working relationship between themselves, deliberations may be much more informal than otherwise. If, however, disputes on procedural and substantive matters have arisen, the chairman is well advised to conduct the deliberations in a rather formal and documented procedure.

In any case, full transparency is as important as the opportunity for each arbitrator to fully present his views. Most of the time, the first round of deliberations should be held during a meeting in person between the members of the tribunal to receive a first impression on the issues where agreements can be reached and on other issues where disagreement still exists. Again, it would depend on the circumstances whether it is more advisable for the party-appointed co-arbitrators to express their opinions first – in that case probably starting with the arbitrator appointed by the claimant – or whether the chairman discloses his inclinations so that the discussion can concentrate on issues where the co-arbitrators disagree.

Once the stage of drafting an award is reached, the most usual practice seems to be that the chairman makes a first preliminary draft on which the arbitrators then comment either orally or in writing. But particularly if the working relationship between the members of the tribunal is still good or if certain parts of the draft depend on particular expertise available with one of the arbitrators, it may turn out to be more efficient to split the drafting between the members of the tribunal.

The tribunal has to be aware that it owes answers to the parties who agreed to bring the case before it. An effort should therefore be made to deal with all major arguments and contentions of the parties, though, of course, it may

be appropriate and is admissible to indicate if a contention or argument is considered not relevant or persuasive.

Finally, it may be permitted to this author whose primary occupation used to be that of a university professor to submit: Decide the case, no more! The award is not the place for missionary feelings or academic ambitions of the arbitrators.