"The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – A Few Plain Rules and a Few Strong Instincts", in A.J. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9 (The Hague: Kluwer Law International, 1999) 396.

The existence, nature and scope of the arbitrator's discretionary powers constitute the hallmarks of arbitration, particularly in the international context, but these powers are not unfettered. In particular, they are tempered by the parties' rights of due process and the arbitrator's duty to ensure that those rights are respected and enforced. An arbitrator is accordingly exposed to a potential conflict between fairness, on the one hand, and efficiency, on the other. This reality bespeaks a profound confidence in the ability of arbitrators to conduct proceedings in accordance with the needs of the parties and the demands of justice.

Wolters Kluwer Law & Business | Kluwer Law International

Source: BOOK: ICCA Congress series no. 9 (Paris/1999), pp. 396 - 409

The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration - "A Few Plain Rules and a Few Strong Instincts"

L. Yves Fortier(**)

(*)

I. Introduction

Under most laws and arbitration rules, arbitrators enjoy broad power and wide discretion in determining how cases will be conducted, subject only to the agreement of the parties and to any mandatory provisions of the applicable law. This general proposition holds true in respect of both civil and common law jurisdictions, as well as across the spectrum of various institutional arbitration rules.(1) Following the example of the UNCITRAL Model Law (the Model Law), most jurisdictions and rules provide what has been referred to as a "liberal framework"for the determination of arbitral procedure and the conduct of proceedings, in which "the discretionary powers of the arbitral tribunal are considerable".(2) This enables arbitrators to seek to reduce delay and achieve efficiency by, among other means, controlling dilatory tactics employed by one party (typically the respondent) or another.

The existence, nature and scope of the arbitrator's discretionary powers constitute the hallmarks of arbitration, particularly in the international context. These powers are not unfettered, however. In particular, they are tempered by the parties' rights of due process and the arbitrator's duty to ensure that those rights are respected and enforced. As a result, the discretion accorded to the arbitrator to conduct proceedings (in contrast to the more structured system of trial rules which exists in most jurisdictions) can be viewed as the source of what one authority has described as the "never-ending battle between the interest of justice and fairness on the one hand, and finality and efficiency on the other".(3) ***"396"***

Between those two interests, and serving both, sits the arbitrator. On his shoulders rests the weight of ensuring the fair and efficient functioning of the arbitral process. He is granted wide discretion and extraordinary powers to determine the conduct of arbitral proceedings. Yet, here, as elsewhere, his every right implies a responsibility; every opportunity, an obligation. The arbitrator's burden is heavy indeed. As Redfern and Hunter have stated:

"This point cannot be over-emphasized. The reputation and acceptability of the arbitral process depends on the quality of the arbitrators. The task of presiding over the conduct of an international commercial arbitration is no less skilled than that of driving a car or flying an aircraft. It should not be entrusted to someone with no practical experience of it."(4)

Such is the system which we have inherited – and which some distinguished members of ICCA, present today, have created. Its foundations are sound. Its functioning, and continuing development, are the responsibility of all of us who write, teach and practice in the field. As Winston Churchill long ago exhorted his fellow subjects, girding for war, we should constantly remind each other: "Enter upon your inheritance, accept your responsibilities".

II. The Model Law

Much insightful comparative legal analysis has been done by authorities who have studied the laws and rules governing arbitration in various jurisdictions and institutional fora, focusing on what I have referred to as the "never-ending battle"between efficiency and due process,(5) including in the area of the tribunal's power to control dilatory tactics.

As mentioned, the specific means of balancing the two interests vary from State to State and institution to institution. However, as a representative statement of the "standard"approach to the question, I believe that there is no better place to look than the Model Law. Not only does the Model Law contain solutions which reflect international consensus on most of the important questions of arbitral procedure, it has also become, to a great extent, either by reiteration or straightforward incorporation, the actual law governing arbitrations in many jurisdictions.(6)

Art. 19 of the Model Law comprises part of what the UNCITRAL Secretariat has called the "*Magna Charta* of arbitral procedure". Briefly, Art. 19(1) guarantees the parties' freedom to agree on the procedure to be followed by the tribunal. Party autonomy is, of course, of the essence of arbitration. This basic rule is complemented by the ***"397"*** provisions of Art. 19(2), which confer upon the arbitral tribunal the power to conduct the arbitration in such manner as it, in its discretion, considers appropriate.

Sub-paragraphs 1 and 2 of Art. 19, governing the determination of rules of arbitral procedure, are expressly made subject to the provisions of the Model Law itself. The most relevant of these provisions, as regards limits to both the tribunal's discretion and party autonomy concerning procedural matters, is Art. 18, which incorporates into the Model Law the concept of due process, or natural justice. Art. 19 is supplemented – indeed, it is made whole – by the terms of Art. 18, which stipulate that the parties shall be treated with

equality and that each party shall be given full opportunity to present his case.

III. Efficiency v. Due Process: A Line in Shifting Sands

Reconciling the competing values and principles inherent in these concepts is the standard-bearer of arbitration: the arbitrator. As Redfern and Hunter note:
"It is sometimes difficult to operate these principles [of due process] in a manner consistent with minimising the duration of the hearing. However, an experienced presiding arbitrator can normally find a way of combining firmness with fairness."(7)
The discretionary powers of the international arbitrator, entrusted with the daunting task of "finding a way"through this thicket, are considerable. The rationale for this is perhaps best explained by the UNCITRAL Secretariat, commenting on Art. 19 of the Model Law:
"This enables the arbitral tribunal to meet the needs of the particular case and to select the most suitable procedure when organising the arbitration, conducting individual hearings or other meetings and determining the important specifics of taking and evaluating evidence. In practical terms, the arbitrators would be able to adopt the procedural features familiar, or at least acceptable, to the parties (and to them). For example, where both parties are from a common law system, the arbitral tribunal may rely on affidavits and order pre-hearing discovery to a greater extent than in a case with parties of civil law tradition, where, to mention another example, the mode of proceedings could be more inquisitorial than adversarial. Above all, where the parties are from different legal systems, the arbitral tribunal may use a liberal `mixed' procedure, adopting suitable features from different legal systems and relying on techniques proven in international practice, and, for instance, let parties present their case as they themselves judge best. Such procedural discretion in all these cases seems conducive to facilitating international commercial arbitration, while being forced to apply the `law of the land' where the ***"398"*** arbitration happens to take place would present a major disadvantage to any party not used to that particular and possibly peculiar system of procedure and evidence."(8) Broad discretion, therefore, is not only desirable, it is appropriate and necessary to the arbitrator's task. As one commentator has noted, "the discretion granted to the arbitrators thus serves a double purpose: it is designed to ensure informality and flexibility as features typical of arbitration ... and it helps to internationalise the proceedings in a nondomestic case."(9)
I would add that this discretion is a double-edged sword. It can be wielded so as to cut short unreasonable dilatory tactics and to permit reasonable preliminary proceedings; to determine, within limits, the nature and scope of hearings; and to continue proceedings and render an award, or not, in the event that a party fails to appear or to produce documentary evidence. In short, this discretion empowers the arbitrator to draw the line between "efficiency"and "due process"in a manner appropriate to the circumstances at hand, and thereby to serve both ends. Needless to say, such a line, by definition, shifts as circumstances "on the ground"change – as situations evolve and as cases vary from one to another.
Insofar as the mandatory rules of law of the forum governing the conduct of arbitral proceedings are concerned, it is trite to insist that, in exercising its considerable discretion, the tribunal must respect such rules so as to avoid the risk of its award being set aside by the courts of the State. However, as many commentators have noted, such procedural rules are, in any event, usually limited to the basic requirement, broadly stated, that arbitration is conducted in a manner consistent with due process.
In fact, legislation in most countries tends to enshrine the principle of respect for the arbitrator and the parties' decision to submit their dispute to him. This tendency on the part of legislatures, and the increasing acceptance by domestic courts of the values inherent in the basic principle of *deference to the arbitrators*– the essence of the Model Law and of the domestic legislation which it has engendered – is, in the end, no more than a restatement, albeit of great significance, of the notion that the effectiveness and credibility of the process is dependant principally on the arbitrator. It is not considered appropriate or necessary to prescribe detailed rules to be followed in all arbitrations. What is appropriate is to require that arbitrations be conducted in accordance with certain fundamental values. As one distinguished author has remarked, "few, if any, countries have provisions such as `... an arbitral award shall only be valid if it is delivered in a ***"399"*** loud voice by the president of the tribunal standing on his head at the top of the highest mountain in the land' " . (10)

IV. Judicial Treatment of Arbitral Discretion and Due Process

The acceptance of arbitration as a parallel jurisdiction by State courts, with the arbitrator playing the central role, necessarily means that there is a dearth of decisions which Prof. Hunter might say focus on the precise tone of voice, posture, topography or altitude, in or at which a valid arbitral award must be rendered. It is nonetheless instructive to consider how courts treat the interplay between discretion and fairness in the conduct of arbitrations. To that end, I propose to discuss briefly certain examples of recent case law in Canada. I believe that Canada's bi-juridical culture, within which the civil and common law traditions cross-fertilize and complement one another, presents an interesting mirror to the world at large, and reflects developments apparent in other countries. I would add that, in 1986, Canada became the first State to enact the Model Law.
In a 1997 decision of the British Columbia Supreme Court, the Chief Justice of the Province was asked to set aside an award rendered by a sole arbitrator on the grounds that the principles of natural justice had not been observed in the conduct of the arbitration. More particularly, the defendant claimed that he was denied an opportunity to respond to certain allegations which he considered offensive. The Court found that the arbitrator had, in all respects, conducted himself appropriately, and even applauded his handling of the case: "He refused to allow the arbitration to be turned into a series of brickbats between the parties ... he refused to allow the arbitration to be turned into a circus".(11) The Court went on to find that:

> "the Courts of British Columbia since the enactment of the Commercial Arbitration Act have shown great reluctance to interfere with Arbitral Decisions and clearly will only do so when there is an excess or want of jurisdiction, a breach of natural justice (the duty to act fairly) or an error in law which meets the standards of the Act..."

.(12)
This decision is in no way surprising, nor does it break new legal ground in Canada. Rather it is representative of the current strain of judicial thinking – though it may be noteworthy for its colorful language. Clearly, an arbitrator has the power, in fact the duty, to ensure that proceedings do not degenerate into "a circus". If this means, as was the ***"400"*** case in the decision cited above, that a party is barred from responding in kind to what the court called "disparaging remarks ... wholly irrelevant to the case", so be it.
Less than a month before the decision in the *Killam* case, referred to above, and not 500 miles distant, the Court of Queen's Bench of the Province of Alberta wrestled with the question of the constraints imposed by the requirements of fairness on the arbitrator's power to direct proceedings.
At issue in this case was "... whether or not the fact that the solicitor for the Respondents spoke [to the arbitrator] about this matter ... in the absence of the solicitor for the Applicant, is in the circumstances of this case, grounds to set aside the opinion of the Arbitrator".(13) After reviewing the relevant provisions of the Alberta Arbitration Act which, it said, codified the common law "pillars of natural justice"– impartiality and fairness – and quoting at length from the judgement delivered by Lord Denning in this regard in the case of *Kanda v. Government of Malaya*,(14) the Court found that the proceedings had been conducted fairly, and that the arbitrator had exercised his powers properly – up to the point where he ran afoul of basic rules.
The Court reasoned that the context of the dispute and the parties' agreement to submit the matter to an arbitrator meant that "... neither party can complain that the arbitrator sought out evidence in the absence of the other".(15) However, it was clear to the court that "there were to be no representations by one lawyer without involving the other [...]. This is a case of a party not being given an opportunity to respond to another party's case because of representations made in private by the other party."(16)
Here again, the decision does not represent "new law", nor does it explore uncharted waters. It reinforces certain basic concepts, while steering clear of the sort of detailed rule-making which is the province of the arbitrator.
Similarly, in Quebec, the courts have ruled, inter alia, that relying exclusively on written pleadings does not contravene natural justice or the specific rule of *audi alteram partem*;(17) the arbitrator is not required to provide in his award a detailed analysis of the parties' arguments so long as the parties have an opportunity to present their cases and the award is based on the evidence presented;(18) natural justice and procedural equity require that an award be quashed where one party discusses the case with the arbitrator in the absence of the other party.(19)
Such cases illustrate not only the nature but, more importantly, the boundaries of the powers of arbitrators to balance efficiency and fairness – boundaries which are especially relevant when arbitrators take measures against dilatory tactics. ***"401"***

V. Party Autonomy as an Element of Fairness

The literature is replete with discussion concerning the relationship between party autonomy and arbitral discretion, and the question of the arbitrator's right to impose procedures in the interest of efficiency and fairness.
Returning to a consideration of the Model Law, for example, we have seen that Art. 19 attempts to delineate the respective roles of, and the relationship between, party autonomy and the arbitrator's discretion in the procedural sphere. That relationship has been elegantly described as "dialectic", as opposed to "either/or". (20) I believe the point is of importance, and is often overlooked in the fruitless search for a comprehensive, normative system of rules of due process in arbitral procedure.
In practice, arbitrators faced with a procedural issue in respect of which the parties have not specifically agreed do not simply note the lack of such agreement and then pronounce their decision "from on high". The experienced – and, I dare say, effective – arbitrator will consult with the parties and counsel, and solicit their views and suggestions, going so far as to encourage agreement between them, prior to rendering a decision. Conversely, when faced with party consensus regarding a particular procedural matter, such an arbitrator might still choose to engage in a discussion with all concerned.
As Craig, Park and Paulsson state in respect to Art. 11 of the old ICC rules (Art. 15 of the 1998 Rules), which are analogous to provisions of the Model Law, "... the article leaves the manner in which the arbitral proceedings shall be conducted completely in the hands of *the parties and the arbitrators* [emphasis added]."(21) I stress the idea of a "partnership"between parties and arbitrators, which is implicit in this phrase, a concept with which I fully agree.
This practical opportunity for input by the parties into the decision-making process of the tribunal (and vice versa) represents, I submit, a significant extension of the protection of due process found in the (admittedly few) prescriptive provisions in most arbitration laws and rules. Technically, the tribunal's discretion is virtually unfettered in the absence of agreement between the parties. Practically, skilled practitioners – both counsel and arbitrators – understand that one of the important raisons d'être of arbitration is the avoidance of "technicalities"as a basis for decision-making. The result is a process which, while it is bounded by relatively few strict rules of procedure, as compared with the typical rules of practice of State courts, is both influenced by and responsive to the views and wishes of the parties to the greatest extent possible. What could be more fair?
At the end of the day however, arbitration is nothing if not an adjudicative process whereby rights and obligations can be finally determined by the binding decision of an impartial tribunal. This is, for the most part, as true in respect of procedural as substantive issues. It may well prove necessary in a given case for the

tribunal to flex its muscle, and to demonstrate leadership in the exercise of its discretion regarding the "402" conduct of proceedings. In this regard, I side squarely with the eminent practitioner and author who has stated:

"I would advocate the existence of a right for the arbitrator to lead – even lead firmly, when necessary – in establishing the arbitral procedures over the heads of counsel on both sides. The arbitrator does not have a judge's power to regulate procedures unilaterally, nor should he or she forget that party autonomy might be the most important arbitral principle of all. The scope for persuasion by the arbitrator before making a ruling is large, and the need to impose procedures thus should be rare. But it is possible – at least for one with a common law background – to imagine situations in which counsel for both sides may slide toward extended and acrimonious evidentiary procedures that could be shortened or avoided by an arbitrator who was prepared to `just say no'. This is an important right, one to be protected."(22)

VI. The Duty of Diligence and the Control of Dilatory Tactics

I mentioned at the outset that with freedom comes responsibility; with discretion, obligation. Arbitrators clearly have the power, within certain limits, to speed the arbitral process along – but they have more than that. They have a duty to do so. It is a generally accepted, though occasionally forgotten, principle that in accepting his task, the arbitrator undertakes to fulfill it with due diligence. In addition to the obligation to treat the parties equally and ensure that they are given every opportunity to present their cases, the obligation of due diligence is seen as one of the arbitrator's fundamental duties toward the parties.(23)

We are told that the drafters of the Model Law deliberately refrained from imposing a fixed time limit for the conduct of arbitral proceedings, leaving it to the parties and arbitrators to decide the issue. They believed that a set, "standard"time-period would unduly cramp the style of arbitrators, and preclude the flexibility required, especially in international arbitrations, to respond to varying circumstances.(24) The duty of due diligence is nonetheless implicit in the arbitrator's mandate, and is moreover reflected clearly in the rules of various arbitration associations, and institutions such as the LCIA and ICC, among many others.

Art. 20(1) of the 1998 ICC Rules (based on Art. 14(1) of the old Rules) captures neatly, in a single brief sentence, what I believe is the golden rule concerning the duty "403" of diligence: "*The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means*"(emphasis added).(25)

For their part, the new 1998 LCIA Rules provide one of the clearest, broadest statements of the arbitrator's fundamental duties in this regard, and, at the same time, of his wide discretion in determining how to fulfil those duties and the boundaries of that discretion imposed, inter alia, by the requirements of due process. Art. 14 of the LCIA Rules elegantly juxtaposes the notions of arbitral duty and arbitral power:

"Conduct of the Proceedings:

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 Art. 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such laws 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."

The objective of clarifying and delimiting the nature and extent of the arbitrator's powers is at the heart of the recent revisions of the ICC and LCIA Rules, both of which entered into effect on 1 January 1998. These revisions reflect the continuing evolution of arbitral practice caused by changing commercial and legal realities. In the case of the ICC, the intention was to update the existing rules, and to eliminate certain perceived lacunae, in particular so as to: reduce delays (a question of diligence, or efficiency); and reduce uncertainties in the conduct of arbitrations (an issue of due process, or fairness).(26) Similarly, as regards the new LCIA Rules, the various changes "... are aimed at greater procedural flexibility, shorter time periods for the service of pleadings and greater authority for Tribunals. It is hoped that these changes will facilitate more expeditious and "404" cost-effective proceedings."(27) In sum, the changes will reduce the opportunity for tactical stonewalling by recalcitrant parties and/or counsel.

The broad discretion granted to the arbitrator to determine the conduct of proceedings arms him, in effect, with a full quiver of arrows to be deployed in the fight against dilatory tactics. The rules of various institutions also include examples of specific measures available to be used by a tribunal. By way of example, the LCIA Rules have foreseen, and taken account of, the possibility that a party may deliberately prolong the process of appointing a tribunal, by providing for the "expedited formation of the tribunal"in cases of "exceptional

urgency"(Art. 9). Similarly, the LCIA Rules provide for "truncated arbitral tribunals"where one arbitrator on a panel of three refuses to participate in the arbitration; the remaining two may decide to proceed with the arbitration and render an award without the recalcitrant arbitrator (Art. 12).
The UNCITRAL Rules themselves also express the general maxim that a party's refusal to participate in an arbitration does not cause the proceedings to grind to a halt – in terms which reflect both the power of the tribunal to sanction dilatory behavior and the constraints on the exercise of that power imposed by the requirements of due process. Art. 28 of the Rules, paras. 2 and 3, state:
"If one of the parties, *duly notified under these Rules*, fails to appear at a hearing, *without showing sufficient cause for such failure*, the arbitral tribunal may proceed with the arbitration.
If one of the parties, *duly invited to produce documentary evidence*, fails to do so *within the established period of time, without showing sufficient cause for such failure*, the arbitral tribunal may make the award on the evidence before it (emphasis added)." Art. 6(3) of the ICC Rules simply stipulates that "if any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure."In the same spirit, Art. 21(2), similar to Art. 28(2) of the UNCITRAL Rules, provides that "if any of the parties, *although duly summoned*, fails to appear *without valid excuse*, the Arbitral Tribunal shall have the power to proceed with the hearing"(emphasis added). Similar provisions have been included in the AAA International Rules, Art. 23 (paras. 2 and 3) since the inception of those Rules. The new AAA International Rules also provide for a tribunal's power to "in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case"(Art. 16(3)), all of which flows from the general obligation that "the tribunal, exercising its discretion, shall conduct the proceeding with a view to expediting the resolution of the dispute"(Art. 16(2)).
The arbitrator's obligation to act diligently, which implies a duty to control the parties' various dilatory tactics, is also frequently manifested in specific rules of various institutions ***"405"*** which either impose or permit the imposition of time limits for the rendering of an award or the performance of specific procedural steps such as the rendering of an award, the signing of terms of reference, or the service of pleadings. It must however be acknowledged that another, at least equally important, rule of practice in international arbitrations is that time limits such as those referred to above may be, and very commonly are, extended for valid reasons.(28) The issue, however, is not whether time limits are rigidly enforced – they are not. The point is that such rules exist and constitute practical, though flexible, guidelines regarding the concept of due diligence and the obligations of the parties and the arbitrator in that regard. Their existence, combined with their mode of application, also supports the contention that inflexible rules blindly applied are the very antithesis of what international arbitration is all about. Arbitrators have wide discretion to direct and expedite the conduct of proceedings. That discretion is buttressed by various rules. However, there are limits to the measures an arbitrator may take to speed the arbitral process. In short, such rules demonstrate and serve to remind practitioners that arbitrators have certain interrelated duties to ensure that the fundamental principles of both efficiency and fairness are respected.
The former Secretary General of the ICC International Court of Arbitration, Mr. Eric Schwartz, has succinctly stated: in international arbitrations "time is of the essence."(29) Mr. Schwartz has also concluded, on the basis of extensive practical experience and a thorough knowledge of the various rules governing international arbitrations, that the concept of due diligence is relative. Simply put, reasonable people may differ with regard to what is reasonable.(30) Moreover, as we all know, the particular circumstances of a case will be significant factors in determining the expeditiousness with which a tribunal can reasonably be expected to conduct its proceedings. Particularly in international arbitrations, the arbitrator's desire – indeed his duty – to proceed diligently and to reduce the delays caused by one party or other cannot but take into account a number of factors which can, and do, delay the process inevitably.
Like Mr. Schwartz, I have in mind such "disparate international elements"(31) as: parties, counsel and arbitrators who reside in different countries, frequently on different continents; the law applicable to an arbitration may be foreign to a party's counsel who must therefore consult with a lawyer knowledgeable in that law; the law in question may be in a language which one or more of the parties do not read or speak, and for which translations are required. The list is potentially endless. None of these are particularly esoteric or complex considerations. All are practical in the extreme. Yet, each plays a critical role in determining the speed at which the arbitral process can, and should, proceed. What may be considered unduly dilatory in one case may, though it causes additional delays and expense, be entirely appropriate, even necessary, in another. ***"406"***
International arbitration is conceived as a flexible means of dealing with precisely this sort of practical question. Those who look for a list of detailed, normative rules for resolving these and the myriad of other issues which must be settled in the course of arbitration will, as I have said, be disappointed. Nor do I believe that such a list would be either feasible or appropriate. It necessarily falls to the seasoned arbitrator to assess the significance of the procedural issue at hand, in light of the particular case before him, and the effect of his decision regarding that issue on the parties' rights to a full and fair hearing.

VII. Conclusion

It used to be said that parties who chose international arbitration as a means of dispute resolution generally did so because they perceived the process to be more informal, more confidential, more expeditious and less expensive than litigation. *This is no longer the case*. Permit me to explain what, at first blush, might appear to be heresy.
As business becomes increasingly global in nature and scope, transnational contracts continue to proliferate in almost every sphere of commercial endeavors. These contracts frequently contain arbitration clauses. As a consequence, recourse to arbitration has increased exponentially in the last few decades. The fact is, parties choose arbitration because they perceive, and rightly so, the process to be the only effective means of

securing and enforcing their rights in a forum which is both neutral and attuned to the realities of international commerce. No longer an alternative mode of dispute resolution, international arbitration has become, to a great extent, the only game in town. That is not to say that the perceived benefits of arbitration to which I have referred are no longer relevant, just that they are not necessarily determinative in the international context.

That said, speed remains one of the main objectives of arbitration – not to mention one of the parties' (generally, the claimant's) principal preoccupations. Most laws and rules governing arbitrations impose upon the arbitrator a duty to conduct the proceedings expeditiously. Arbitrators have the right, the duty and the power to avoid unnecessary delays. Their scope of action in limiting dilatory procedures, however, is both bounded and balanced by the duty to ensure due process. As many authorities have remarked, there is a potential conflict between speed and fairness in the conduct of arbitrations. Yet no one would contradict the maxim that justice delayed is justice denied. Speed is of the essence of justice. Where to draw the line between efficiency and fairness, how to determine the point at which reasonable delay becomes unduly dilatory, and how to strike a balance appropriate to the circumstances at hand, are matters which are generally left to the arbitrator.

It must also be remembered that parties expect their influence on the selection of the arbitrators to result in awards rendered on the basis of expertise and experience regarding arbitration, generally, and pertinent to their particular dispute. One element of this "expertise"concerns the ability to tailor proceedings to fit the situation. Arbitration statutes and rules generally provide the parties and arbitrators vast discretion in determining the conduct of the arbitration. Rarely, however, do the parties set forth detailed ***"407"*** procedural rules before arbitration. Such "nitty-gritty"matters are usually either ignored or intentionally left to the arbitrators.

While party autonomy lies at the heart of the arbitral process, it has its limits in both law and practice. It is bounded by the requirement of due process, and it is supplemented by the discretion accorded to arbitrators to conduct proceedings in a manner which they deem appropriate. In practice, the formulation of rules by which arbitrations take place involves a process in which the parties and the tribunal participate.

Similarly, the extensive powers conferred upon arbitrators are not absolute. The arbitrator must, in many instances, accede to the demands of the parties. He should, in all instances, take account of those demands. He too is required to act within the bounds of generally accepted standards of fairness or due process. As noted above, he must control the use of dilatory tactics while respecting the parties' rights of due process.

The defect, or the beauty, of such a system – it all depends on one's perspective – lies in the fact that few, if any, laws or rules governing arbitrations stipulate what all of this means in practice. "Fairness", "equality", "full hearing", "diligence", "discretion", "due process"are terms which may be easy to describe; they are nonetheless extremely difficult to define. This is all the more true when the question is asked of parties, counsel or arbitrators who hail from disparate legal cultures and jurisdictions. Arbitrations may be conducted in an almost infinite number of ways. It is largely for the arbitrator to decide how best to proceed, how best to import meaning to the terms referred to above.

As I have said, I believe that all of this is for the best. It bespeaks a profound confidence in the ability of arbitrators to conduct proceedings in accordance with the needs of the parties and the demands of justice. It also implies a heavy responsibility. In this latter regard, I am reluctantly forced to agree with the statement that: "Just as some directors of limited liability companies accept their appointments with only the vaguest note of the legal duties they owe to the public at large, and to the creditors and shareholders in particular, there are people prepared to accept the role of an arbitrator without having an adequate knowledge of the duties and commitments involved".(32)

This is a sad truth indeed, for it can only discredit the practice of arbitration. I disagree, however, with the conclusion drawn by the authorities, which I have cited, who go on to state that "the blame for this rests primarily with the parties themselves, rather than with prospective arbitrators".(33) True, the party who fails to take seriously the selection of an arbitrator is at fault, however I would not so easily absolve the would-be arbitrator who accepts a mandate which he is not qualified to perform.

In selecting arbitration, the parties to a dispute choose to rely, in large measure, on the arbitrators, rather than on any particular system or institution, to ensure that justice is done. They grant the arbitrators the discretionary powers necessary for them to fulfill their task. In accepting to sit on a tribunal, an arbitrator in turn assumes the responsibility to guide with diligence and skill the proceedings through to their conclusion, in a manner at once responsive to the parties and true to the ends of justice. Party autonomy and due process limit his sphere of action. However, the arbitrator's discretion is in many senses, ***"408"*** "the better part"of the arbitral process. There can be no excuse for his inability or his failure to exercise that discretion wisely. ***"409"***

** Chairman and Senior Partner, Ogilvy Renault, Montreal, Canada; President, London Court of International Arbitration.

* From W. WORDSWORTH, "Alas! What Boots the Long Laborious Quest?" (1809).

1 See Howard M. HOLTZMANN, "Planning Efficient Arbitration Proceedings: The Accomplishments of Working Group One of the 1994 ICCA Vienna Congress", A.J. van den BERG, ed., *Planning Efficient Arbitration Proceedings – The Law Applicable in International Arbitration*, ICCA Congress Series No. 7 (1996) p. 18 (hereinafter *ICCA Congress Series* No. 7).

2 Gerold HERRMANN, "Power of Arbitrators to Determine Procedures under the UNCITRAL Model Law", *ICCA Congress Series* No. 7, p. 39 at p. 43.

3 E.D.D. TAVENDER, "Considerations of Fairness in the Context of International Commercial Arbitrations",

34 Alberta Law Review (1996, no. 3) p. 509.
4 A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, 2nd ed. (London 1991) p. 217.
5 See, for example, the many extremely thoughtful and articulate essays in *ICCA Congress Series* No. 7.
6 HERRMANN, *loc. cit.*, fn. 2, p. 41.
7 REDFERN and HUNTER, *op. cit.*, fn. 4, p. 350.
8 Remarks 5 and 6 on Art. 19, "Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration", United Nations document A/CN.9/264, reproduced in *UNCITRAL Yearbook,* vol. XVI (1985) Part Two, I.B., p. 125, and in H.M. HOLTZMANN and J.E. NEUHAUS, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer 1989) p. 584.
9 HERRMANN, *loc. cit.*, fn. 2, p. 43.
10 M. HUNTER, "Introduction: The Law Governing the Procedure", *ICCA Congress Series* No. 7, p. 320. Prof. Hunter also observes, accurately in my submission, that "experience shows that the way in which an arbitration is conducted in practice depends not so much on the *place of arbitration*, or on its laws, but rather on the background and experience of the arbitral tribunal"(emphasis added). This is, indeed, the thesis of this Report.
11 *Killam v. Brander-Smith*, [1997] B.C.J. No. 456 (20 February 1997) paras. 14-15.
12 *Ibid.*, para. 29.
13 *Hannaco Ltd. v. Lee*, [1997] A.J. No. 81 (30 January 1997) para. 18.
14 [1962] A.C. 322 (P.C.), p. 337.
15 *Op. cit.*, fn. 13, para. 23.
16 *Ibid.*, paras. 24 and 26.
17 *Silverberg v. Hooper*, [1990] J.E. 90-437 (S.C.).
18 *Parent et associés c. Gagnebin*, [1989] J.E. 89-448 (C.Q.).
19 *Kendrick v. Merling*, [1992] J.E. 92-1142 (S.C.).
20 HERRMANN, *loc. cit.*, fn. 2, p. 42.
21 W.L. CRAIG, W.W. PARK and J. PAULSSON, *International Chamber of Commerce Arbitration*, 2nd ed. (Paris 1990) p. 269.
22 J.H. CARTER, "The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness", *The Status of the Arbitrator – Special Supplement*, ICC International Court of Arbitration Bulletin (December 1995) p. 24 at p. 31 (hereinafter *The Status of the Arbitrator*).
23 Ph. FOUCHARD, "Relationships Between the Arbitrator and the Parties and the Arbitral Institution", *The Status of the Arbitrator*, p. 12 at p. 18.
24 C. HAUMANINGER, "Rights and Obligations of the Arbitrator With Regard to the Parties and the Arbitral Institution – A Civil Law Viewpoint", *The Status of The Arbitrator*, p. 36 at p. 42; and see notes in that text.
25 Various other arbitration rules contain a general expression of the arbitrator's duty of diligence, e.g.: Art. 20 of the Rules of the Italian Arbitration Association provide that "the arbitrator shall carry out the procedure within a period of time as short as circumstances will allow,"and Sect. 20 of the Arbitration Rules of the German Institution of Arbitration which provide that "the arbitration tribunal shall encourage an expeditious conduct of the proceedings and render the arbitration award within a reasonable time". The WIPO Arbitration Rules use equally broad language, in Art. 38(c): "the Tribunal shall ensure that the arbitral procedure takes place with due expedition...".
26 S. BOND and Ch. SEPPALA, "The New (1998) Rules of the ICC", 12 Mealey's International Arbitration Report (1997, no. 5) p. 35 et seq.
27 From "The New LCIA Rules – Key Changes in Brief", 2 LCIA Newsletter (November 1997, no. 4) p. 1.
28 As regards such "valid reasons", see below, fn. 31 and accompanying text, where I refer to the notion of "disparate international elements".
29 E.A. SCHWARTZ, "The Rights and Duties of ICC Arbitrators", *The Status of The Arbitrator*, p. 77.
30 *Ibid.*
31 *Ibid.*, p. 80.
32 REDFERN and HUNTER, *op. cit.*, fn. 4, p. 262.
33 *Ibid.*