ICC International Court of Arbitration

Bulletin

Cour internationale d'arbitrage de la CCI

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The world business organization

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Bulletin

Cour internationale d'arbitrage de la CCI

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Major Criteria for International Arbitrators in Shaping an Efficient Procedure

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Let me first say that it is a pleasure to participate in this 75th Anniversary Meeting of the ICC International Court of Arbitration. I still remember very well the magnificent celebration of the 60th Anniversary in Paris, when I was asked to speak about a topic different to the one which I have been assigned for today's meeting.

When, today, I speak about the "Major Criteria for International Arbitrators in Shaping an Efficient Procedure," the limited time and space available for this presentation within our meeting obviously does not permit me to go into much detail or even further references. Therefore, what I will try to do is to present a kind of extended check list of such major criteria with special consideration to the perspective of "Arbitration in the Next Decade," which is the overall title of our meeting here.

I - Arbitration as the product of party autonomy

First of all, arbitrators have to remember from the very beginning and throughout the arbitral procedure that the very basis of arbitration is party autonomy. Without the agreement of the parties to submit to arbitration, there is no arbitral procedure. And what the arbitrators are asked to do is to provide a service function to the parties. It is useful and important for arbitrators not to forget these basics though they are asked – and authorized – to issue a decision which is binding on the parties.

This does not mean, of course, that party autonomy is unlimited. When for the Joint Colloquium of the ICC, ICSID and AAA in New York I had to prepare a paper on the recognition of party autonomy in international treaties, national legislation and the jurisprudence of the courts, I noticed that, throughout the world, there is a detailed framework of such legal limitations. These have to be taken into account by the arbitrators.

Furthermore, the legal relationship between the parties and the arbitrators may also include limitations of party autonomy. The arbitrators are not at the mercy of the parties – and their counsel – on every aspect of procedure. For instance, if the parties want to change the mandate of the arbitrators at a later stage of the

procedure in a fundamental way such as choosing a new venue of arbitration where the security of the arbitrators is at risk or by unexpectedly extending the periods of oral hearings to many months, the arbitrators may refuse to continue the procedure. But this will only occur in a few and exceptional cases. Otherwise and in principle, the arbitrators have to pay as much respect as possible to any agreement regarding the arbitral procedure between the parties.

II - Limitations of arbitrators' discretion

In so far as the parties have not agreed on specific aspects of the arbitral procedure, all modern arbitration laws as well as the rules of arbitral institutions provide for a wide discretion of the arbitrators to shape the procedure. This authority is highly important for the efficiency of international arbitration. It provides the necessary room to shape the arbitral procedure in such a way that it can deal most effectively with the particular dispute at stake realizing the major advantage of arbitration over the usually much more formalized procedure of national courts.

Again, there are limitations to this discretion of the arbitrators. The first limitation comes from possible agreements of the parties regarding the procedure, which I have already discussed. Furthermore, mandatory rules of law regarding the arbitral procedure at the place of arbitration will have to be respected. Modern arbitration laws have reduced such mandatory rules to very few such as that the parties shall be treated with equality and that each party shall be given an appropriate opportunity of presenting its case.

Further limitations of the discretion of the arbitrators may be included in the rules of arbitral institutions. Some such institutional rules are more liberal than others and I cannot go into details here. But I take it that not only the arbitrators, but also the parties, have to respect all major provisions of the ICC Rules regarding the procedure, if they wish to proceed in an ICC arbitration.

III - Producing an enforceable award

Though many arbitrations lead to an amicable settlement between the parties and though, if they lead to a final arbitral award, in most cases these awards are fulfilled voluntarily by the parties, the procedure shaped by the arbitrators must from the very beginning aim at producing an enforceable award – should enforcement become necessary. Some modern arbitration rules contain an express provision to that effect such as Art. 35 of the new ICC Rules of Arbitration according to which the arbitral tribunal "shall make every effort to make sure that the Award is enforceable at law." But even without such an express legal obligation, this is certainly a general professional obligation of the arbitrators within their mandate.

To fulfil this obligation, the arbitrators not only have to make sure to the greatest extent possible that the award cannot be nullified at the place of arbitration, but

– as far as possible – they also have to take into account possible mandatory rules for enforcement in states where enforcement might be expected to be sought by a party in the particular case.

IV - Major aspects of an efficient procedure

In addition to these more general considerations, permit me to identify shortly some major aspects of the arbitral procedure which, in my experience of 25 years as an arbitrator, have proved to be of particular relevance in the practice of arbitration.

A. Input from parties before setting the framework of the procedure

International arbitrations are most of the time characterized by the fact that parties come from different social and legal systems and that the lawyers representing the parties are used to different traditions and rules of procedure. In order to arrive at a balanced procedure not producing undue advantages or disadvantages to one of the parties, it is therefore important that the arbitrators are or become aware of these different expectations before they set the framework of the arbitral procedure. Even if the applicable arbitral rules do not provide for this, the arbitrators should therefore make an effort to get as much input as possible from the parties at the very beginning of the procedure. Very often, a meeting in person between the parties and the tribunal early in the procedure will be very helpful to achieve this.

Of course, this does not mean that the arbitrators have to accept whatever expectation or demand is expressed by a party regarding the conduct of the arbitral procedure. First of all, if the parties express different opinions regarding a certain aspect it is for the arbitrators to decide. And even if originally the parties express common expectations, the arbitrators may use their experience in international arbitration to convince the parties that shaping the procedure in a different way will be more efficient.

B. Clear identification of the "Rules of the Game"

No matter whether it is by agreement of the parties or by procedural decisions of the arbitrators, it is highly important that the "Rules of the Game" be identified at a very early stage of the procedure. This is particularly so if the parties and their lawyers come from very different legal traditions and therefore might expect very different methods of conducting the arbitral procedure. Thus, after getting the necessary input from the parties, the arbitrators should clearly identify all major aspects of the procedure, be it in the Terms of Reference in the ICC Rules and/or in detailed procedural orders.

C. Timetable and appropriate speed

As we all know, in order to realize one of the main reasons for choosing arbitration it is important to conduct the procedure with appropriate speed. In this context, the qualification "appropriate" indicates that the speed of the procedure must be chosen taking into account all circumstances of the case. Not every arbitration is fit for a fast-track procedure. And as ICC practice has shown over decades, many larger cases cannot be concluded within the six months provided for in the ICC Rules.

In any case, however, again after input from the parties, the arbitral tribunal has to establish a timetable for the various steps of the procedure. Art. 18, para. 4, of the new ICC Rules now provides expressly for the establishment of such a provisional timetable. This gives the parties and their lawyers the possibility to plan their submissions and other preparation of the case from the very beginning. This, of course, does not exclude that, in view of the further development of the case, the arbitral tribunal may have to adapt and change the timetable.

D. Early clarification of role of written submissions and of oral hearings

Particularly if parties and lawyers both from the common law and civil law legal systems are involved, we all have experienced that an early clarification of the role of written submissions and of oral hearings is highly important. On the one hand I have noticed in the practice of arbitration over the years that written submissions tend to be given a much greater relevance, also by lawyers from the Anglo-American legal tradition and that lawyers from the continental European civil law tradition realize more the advantages of written witness statements submitted in advance and of cross-examination during the oral hearing. But on the other hand, in view of the wide scope of options in this context, arbitrators should give the necessary clarifications at an early stage of the procedure in order to permit the parties the best preparation of the case and to avoid unpleasant surprises at a late stage of the arbitral procedure.

E. Particular clarification of rules on evidence

For similar reasons, an early and particular clarification of the rules on evidence has proved highly useful in view of the considerable differences which national legal systems and certain arbitration rules contain in this regard. As we all know, specific difficulties can arise if both parties or at least one party wishes to rely on a discovery procedure. While American law firms engaged in international arbitration realize normally that a full-fledged discovery procedure as used in the US court system can normally not be applied in international arbitration, and while parties from continental Europe realize that certain aspects of discovery may indeed be helpful to clarify the facts of a case, as we say in Germany, the devil is in the detail. The old and new Rules on Evidence of the International Bar Association can provide a system in this context which may be considered an

acceptable compromise for an international standard. But in any case, arbitrators are well advised to clarify at an early stage in which way they intend to proceed in this regard.

F. Procedure, when a party is not participating

Finally, I'm afraid a number of cases in practice illustrate that the arbitrators must be prepared for a situation at some stage of the procedure where one of the parties refuses to participate any further. Modern arbitration rules expressly authorize the tribunal to continue the procedure in such a case, such as Art. 18(3) and Art. 21(2) of the ICC Rules of Arbitration. Sometimes even modern national laws expressly provide for this, such as para. 1048 of the New German Arbitration Law. But, of course, before such ultimate options are used, the arbitrators should make every effort to convince a party that a continued participation in the procedure is also in its own best interests.

V - Conclusion and perspective

As we are trying to establish here a perspective for "Arbitration in the Next Decade," allow me to start with a conclusion from the experience of the last two decades. I think the practice of international arbitration in this past period has shown a growing international harmonization both of national arbitration laws and of the rules of both national and international arbitral institutions. Shaping an efficient procedure when conducting international arbitrations has thus become easier over the years.

I would expect this development to continue in the future. Therefore, though it may sound strange, I would expect international arbitration to become more international in the next ten years.

With the growing number of international arbitration cases and the growing number of lawyers and arbitrators involved in international arbitration, I would also expect them to become less dependent on their specific national particularities and more open and flexible to the specific needs of disputes in the international context.

Changes and improvements can only be effected by people. In this context, it is certainly useful to have continuing exchanges of information and of views between arbitrators. It is even more useful to have such exchanges between the arbitrators and the lawyers representing parties. But we should not only preach to the converted, and those many lawyers and many enterprises that are not yet sufficiently acquainted with the arbitral process will only accept the message of arbitration if it is confirmed by what they experience in and hear about actual cases. Well-functioning and efficient arbitration in practice is and will be the most important means of promoting arbitration. And if the best promotion of arbitration is good arbitration, for obvious reasons arbitrators have a high responsibility in this context.