IS ARBITRATION ONLY AS GOOD AS THE ARBITRATOR?

STATUS, POWERS AND ROLE OF THE ARBITRATOR

Edited by Yves Derains and Laurent Lévy

DOSSIERS
ICC Institute of World Business Law

Is Arbitration Only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator

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FOREWORD

by **YVES DERAINS**
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Each year, the Annual Meeting of the Institute of World Business Law attracts a large number of participants and produces material of high quality which is published in the "*Dossiers de l'Institut*", a series that has gained international prestige. This success is explained by several factors: the choice of topics of practical interest; their treatment by eminent and experienced specialists from many parts of the world; the access to the exceptional think tank offered by the Institute Council. The Annual Meeting of the Institute is the place where practitioners are able to explore together issues which really impact their professional activities, either in the field of international arbitration or, more, generally, in the fields of international business law and practices.

The Institute's Annual Meeting held on 6 December 2010 was no exception to the rule, as reflected in this new Dossier prepared under the efficient supervision of Dr. Laurent Levy who was the main designer of the Conference. The Status, the powers and the role of the arbitrators central issues to the practice of international arbitration that international practitioners often approach with erroneous views, to the detriment of the whole arbitration process.

The contractual origin of arbitration is no longer seriously disputed. But, what is the arbitrator's contract? Is it a contract with the parties or in the case of institutional arbitration with the institution? On the contrary, is the institution only representing the parties? Is there a profession of arbitrator? Those questions must be answered in ordered to assess the arbitrator's responsibility towards the parties and his or her social responsibility. The latter may not be ignored.

The arbitrator enjoys a very large freedom as to the law applicable to the merits of the dispute and, unless there is a breach of international public policy, no recourse is available against an arbitral award which is substantially wrong, even if it condemns a party to huge amounts of money! Moreover,

although the arbitrator has been given a mission by the parties, its implementation may affect third parties, public authorities and the public at large. The existence or non-existence of a duty of confidentiality in arbitration, the relations of the arbitrators with the press, the question whether they may have a reporting obligation, e.g. in case of laundering, corruption or other offences, are issues at the heart of the problem.

But it is obviously in his or her relations with the parties and their counsel that the arbitrator's status and powers play the more significant role. The arbitrator's contract includes the obligations to conduct the proceedings. When fulfilling such obligations, he or she has often to decide between opposing views of the parties. Sometimes, the arbitrators are also confronted with common agreements of the parties on the proceedings that they feel unable to accept because they are unreasonably costly or delay the arbitration unnecessarily. What are the arbitrators' duties in this respect? And what happens when the behavior of counsel is incompatible with the ethics of the legal profession or, more, simply, with elementary rules of politeness. Should the arbitrator play the role of a police officer to maintain order and substitute the various bars to enforce deontological rules? Has an arbitrator the power to do so? The answer to those questions and many others may be found in this Dossier and allows the reader to decide whether arbitration is only good as the arbitrator.

In his introduction to last year's Dossier, Serge Lazareff stressed that "*to write the foreword of our recurrent Dossier*" is "*one of the most pleasant yearly tasks of the Chairman of the Institute.*" I understand the feeling, in particular when my first foreword is devoted to the result of the works of an Annual Meeting which was dedicated to him.

INTRODUCTION

YVES DERAINS* AND LAURENT LÉVY**

Arbitration is only as good as the arbitrator. This proposition is readily admitted by the arbitration community. But what makes for a good arbitrator? What are his or her qualities? Two of them come to mind immediately, as they are of the essence of the arbitral function: independence and impartiality. While they are necessary, they are not sufficient to make a good arbitrator, in particular a good international arbitrator. If an independent and impartial person has no ability to decide, he or she will probably be a poor arbitrator. If he or she is not available and/or lazy, the parties will be most disappointed. Without diplomacy and cultural neutrality, the arbitrator will have the greatest difficulty convincing the parties of the best procedural solutions and rallying the other members of the arbitral tribunal to the correct solution of the case. Independence and impartiality, ability to decide, availability and willingness to work hard, diplomacy and cultural neutrality seem to be the skills required from an arbitrator. Should the arbitrator also be a good lawyer and, in addition, a good case manager? Although it may be disputed, the answer, to both questions is yes-with some nuances. Each of the above-mentioned qualities requires some explanation and precision.

Independence and impartiality are generally considered to be two different concepts: independence is the objective absence of any substantial link to any of the parties as that may alter the freedom of judgment of the arbitrator; impartiality is the subjective will not to favour any of the parties. But what about the independence of mind that has been declared to be "one of the essential qualities of the arbitrators" by the French Supreme Court?[1] Is it not more a form of impartiality than a form of independence? This explains why, beyond subtle distinctions, a good arbitrator must guarantee that he or she is both independent and impartial. What matters is that the arbitrator be free of any prejudice *vis-à-vis* any party, whether because of links to one of them

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or because of personal preconceived views. National prejudices (everything is good or bad in a certain country), geographical prejudices (North is better than South, or vice versa), political prejudices (states versus private investors, multinationals versus small companies) are commonly found within any society. A good arbitrator must ignore them and keep an open mind.

The parties expect decisions from an arbitrator – good decisions rather than wrong decisions, but, above all, decisions. This applies not only to issuing an award within a reasonable time at the end of the proceedings, but also to deciding each time there is a disagreement among the parties during the proceedings. Such disagreements can occur at any stage of the arbitral process: when drafting the terms of reference, when organizing the schedule, when there is a request for the extension of a time limit, about disclosure or admissibility of documents, about confidentiality and so forth. During the hearing, arbitrators and, in particular, the chair of the arbitral tribunal, make several decisions by the hour, about objections to questions to witnesses, about the use of demonstrative evidence and, as the case may be, about an array of other matters. If an arbitrator is not able to make up his or her mind and decide rapidly, the whole process is jeopardized. The worst arbitrator is probably the one who hates to displease the parties. This affects his or her freedom of mind, as after issuing a legitimate ruling against a party this arbitrator is inclined to rule against the other party next time, regardless of whether it is right or wrong. This is not only unfair but does not even have the expected effect. The favoured party does not see the favour, as it is convinced that the decision was justified, while the other party is shocked by the injustice. If this is repeated several times, everybody but the arbitrator who wanted to please everybody is unhappy at the end of the arbitration. The purpose of arbitration is neither to please the arbitrators nor to please either Party at one or more discrete junctures. Rather, the parties (and hopefully hence the arbitrators) should be satisfied with the conduct of the entire proceedings.

Good arbitrators must work and have the time to work. Arbitration files are becoming more and more complex, often involving thousands of pages of documents. A good arbitrator must cope with them. This is time-consuming. Overbooking by some arbitrators is seen as a serious source of delay by many users of arbitration and is sometimes a real problem. The most common and visible manifestation of arbitrator overbooking is the difficulty in finding a convenient date for the hearing. However, overbooking may also have less apparent, and yet more detrimental, consequences. An overbooked arbitrator lacks the time to efficiently manage proceedings prior to the actual hearing, which reduces his ability to give useful guidance to the parties, as explained below. In addition, applications for time extensions may be granted or

dismissed in light of their effect on the arbitrator's own schedule rather than their intrinsic merit. Last but not least, an overbooked arbitrator may excessively delay the preparation of the award after the final hearing.

With a view to solving this problem, some arbitral institutions, among them the ICC Court of International Arbitration, ask arbitrators to show that they are available. This is a move in the right direction but not a *panacea*. When an arbitrator is invited to accept a new appointment, his or her ability to anticipate the potential impact of the appointment on his or her current schedule is limited for various reasons. Many cases are settled amicably before the file reaches the arbitral tribunal. Leaving amicable settlements aside, the period between the acceptance of an appointment and the reception of the file by the arbitrators may last one month, two months, six months or sometimes more. This depends on many circumstances that are beyond the arbitrators' control and, generally, beyond their knowledge. Each party and/or the institution are more or less in the same situation when they contact any potential arbitrator. Moreover, when the arbitrators receive the file, they do not know how many hearings there will be, when such hearings might take place or their potential duration. Consequently, the arbitrators can make no realistic plan before such time as the proceedings are actually organized, and this only occurs some months after they have accepted their appointment. Yet, taking all those practical difficulties into account, a good arbitrator must do his or her best to be available when accepting an appointment and to remain available during the course of the proceedings.

The ability to make decisions does not mean brutality in deciding. When time permits, which is rarely the case during the hearing, a good arbitrator must have the skill to explain his or her decisions and convince the parties of their correctness. Very often, good questions by the arbitrators prior to reaching a decision will defuse the tension, sometimes make a decision unnecessary and, in all circumstances, make the decision more enlightened and more acceptable to the parties on both sides. Likewise, when deliberating with the other members of the arbitral tribunal, the good arbitrator must make an effort to understand their views, in order to be able to make them accept what he or she considers to be the correct decision if agreement is not immediate. This requires a good knowledge not only of the facts of the case and the relevant law(s), but also of diplomacy and pedagogy. However, none of them can be efficiently implemented without cultural neutrality. It is necessary to be able to understand the cultural context of the positions adopted by the parties and the other members of the arbitral tribunal. This requires both knowledge and humility – knowledge of the major differences between legal systems with respect to procedural and substantive issues, and humility to avoid the natural assumption that one's own system is superior to all others.

Should a good arbitrator be a good lawyer? When the Court of Arbitration of the International Chamber of Commerce was created in 1923, it was a common idea among its founders that arbitration was a world without lawyers. Laymen were seen as the best arbitrators and businessmen were convinced that they were their own best advocates. The legal niceties were left to the courts. Almost 90 years after this mythical time, the situation has changed considerably. The vast majority of international arbitrators are lawyers, and no party would dare not to be represented by one or several counsel. However, the rules of the game are not those applicable in national courts and the skills of arbitrators are not those required of a national judge. Serge Lazareff demonstrated this eloquently in his famous article 'L'arbitre singe'.[2] First, the arbitrator, in particular the international arbitrator, is not necessarily expected to have a deep knowledge of the substantive law that is applicable to the merits of the case. What is needed is a good knowledge of the general characteristics of that law and an intellectual willingness to follow the more detailed explanations given by the parties. Moreover, the good arbitrator must be familiar with the general principles of international arbitration proceedings and the specificities of the arbitration law of the seat of the arbitration. Those limits on the required legal knowledge explain why, in an arbitration world dominated by lawyers, a number of non-lawyers happen to be excellent arbitrators.

The lack of proper case management by arbitral tribunals is often criticized by users of international arbitration, and rightly so, since it causes delays and unnecessary costs. The good arbitrator must be a good case manager. This does not only mean devising procedural rules that give each party a reasonable opportunity to present its case; it also implies that such procedural rules should be adapted to the characteristics of each dispute. Standardization and good arbitration are often at odds. However, in order to achieve success, the arbitrator must enter into the substance of the case long before the start of the hearing in order to provide appropriate guidance to the parties as to the most efficient way to deal with the case. The parties may decide to disregard such guidance, but they will expect to receive it. If the hearing is the first serious occasion for the arbitrator to fully understand the respective positions of the parties, to draw a distinction between the admitted facts and the disputed facts as well as to assess the relative importance of the legal issues, it is too late. For instance, how can arbitrators make proper decisions about the disclosure of documents without a clear idea of what is relevant to the solution of the dispute?

If the members of an arbitral tribunal have all the qualities that have been described so far, will the arbitration be as good as such arbitrators? The answer to this question is probably not. There are too many other factors on which the success of a given arbitration procedure depends; the talent of the arbitrators is only one of them. A pathological arbitration clause, poor arbitration rules or a badly chosen seat of arbitration with hostile judges may be enough to transform a given arbitration into a nightmare. Even in the absence of any of those negative factors, the parties and, more significantly, their counsel provide each arbitration procedure with its own specific features. The issue is not so much whether they employ dilatory tactics, unreliable witnesses, forged documents or any other incorrect behaviour aimed at derailing the proceedings: good arbitrators are supposed to cope with them and generally do. However, although arbitrators are in charge of making decisions on the conduct of the proceedings under most arbitration rules and laws, their intervention is limited by the views of the parties as to the best way to present their case. The arbitrators are responsible for the "nuts and bolts" of the proceedings, but the overall "design" of such proceedings is a matter for the parties and their counsel.

All this leads to a more general question. What is a good arbitration? The answer to this question is very subjective. That being said, arbitration users are unanimous in expecting fast and efficient proceedings at a relatively reasonable cost. However, this is an abstract concern. The same users, when involved in a concrete case, forget their general views as to what a good arbitration should be. What they want is to win their case, and this is perfectly normal. If they think that it is to the best of their respective interests, they will not hesitate to increase the duration and the costs of the proceedings. As a matter of fact, the statistics of the ICC Court show that the main part of the costs of a given arbitration procedure consists of the costs incurred by the parties to present their case (lawyers' fees and expenses, expenses related to witness and expert evidence, internal costs of the company, etc.).[3] Such costs are not imposed by the arbitrators. They reflect strategic choices of the parties that may result in long and complicated proceedings. This seems to be the main explanation for the excessive duration and cost of some arbitrations. Does that mean that such arbitrations are bad arbitrations? Not necessarily. It depends whether the dispute and its efficient settlement deserved the time and money invested by the parties. However, good arbitrators have a role to play in this respect, in particular as case managers.

In conclusion, while the parties may hope that a given arbitration will be at least as good as their appointees, president included, but the reverse is inescapable: bad arbitrators produce bad arbitrations.

ENDNOTES

1. Cass. 2e civ., 13 April 1972, *Revue de l'arbitrage* (1975) p. 235, case note by E. Loquin.
2. S. Lazareff, 'L'arbitre singe ou comment assassiner l'arbitrage', in G. Aksen et al., eds., *Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum Robert Briner* (Paris, 2005 pp. 477-490).
3. Administrative expenses of the ICC: 2%; arbitrators' fees and expenses: 16%; costs borne by the parties to present their case: 82%. Statistics based on those cases where a final award was issued in 2003-2004. See *Techniques for Controlling Time and Costs in Arbitration*, ICC Publication No. 843 (2007).