Players' Interaction in International Arbitration

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CHAPTER TEN

RECIPROCAL DUTIES OF INSTITUTIONS AND ARBITRATORS

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1. THE CASE FOR ADMINISTERED ARBITRATION

Much of what I will be discussing in this article will be familiar to most readers and is relevant to all arbitral institutions. I am not aware of any definitive research on the ratio of administered to *ad hoc* international commercial arbitrations. However, received wisdom would suggest that this is somewhere between 40/60 and 60/40—let us call it 50/50. In this article, I will refer on a number of occasions to the rules of the LCIA. I do so not in order to make any particular point in favour of the LCIA but rather to illustrate the similarity between the procedures of the LCIA and the ICC and other institutions. For a comparative study of the rules of many of the arbitral institutions worldwide, it is worthwhile attending the Annual Conference of the Swiss Arbitration Association, because copies of the rules of most of the arbitral institutions in the world are always available there. A comparison of the rules of the various institutions demonstrates that the vast majority of procedures are common to all institutions. The differences are, in my view, comparatively minor and insignificant.

The case for administered arbitration includes:

(i) certainty in drafting/a proven set of terms and conditions;

(ii) taking care of the fundamentals without recourse to state courts;
- appointment of arbitrators, including default;
- challenges;
- multi-party arbitrations;
- interim measures;
- progressing the arbitration in the absence of a party;

(iii) managing costs and time; and

(iv) selection and appointment of arbitrators.

2. THE DUTIES OF THE ARBITRATOR

Prior to his appointment, the arbitrator has a duty to consider the identity of the parties (including associated companies and controlling interests) and the parties' counsel, in order to be able to complete his statement of independence accurately and honestly. In addition, he must assume a continuing duty to disclose any new circumstances, between the date of his appointment and the date on which the arbitration is concluded, that might give rise to doubts as to his independence or

impartiality. Such duties are set out in materially identical terms, for example, in Articles 11(2) and 11(3) of the ICC Rules, and Rules 10.4 and 10.5 of the SIAC Rules. Prior to his appointment, the arbitrator also has a duty to consider whether he can devote sufficient time to the proceedings and to decline the appointment if he cannot.[1]

Once the arbitrator has been appointed, most institutional rules provide him with a clear statement of general duties, which usually mirror the UNCITRAL Model Law and/or (as in the case of the LCIA Rules) the procedural law at the most commonly selected seat.

The basic standard is set out in Article 18 of the Model Law:

> *"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."*

It is expanded in Article 17.1 of the UNCITRAL Arbitration Rules:

> *"… the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."*

Article 14.1 of the LCIA Rules similarly provides that the tribunal has a general duty at all times:[2]

> *"(i) to act fairly and impartially 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 fair and efficient means for the final resolution of the parties' dispute."*

These, then, are the overarching duties of the arbitrator. Prior to accepting appointment, he must consider whether he is free of conflicts and whether he can devote sufficient time to ensure the expeditious conduct of the arbitration. Thereafter, he must set a realistic procedural timetable (in consultation with the parties), from which he should not deviate without good cause.

Such is the importance placed by the LCIA Court on this duty that, under Article 10.2 of the LCIA Rules, an arbitrator in breach of this obligation may be considered unfit in the opinion of the LCIA Court and may be removed. Similarly, under Rule 14.3 of the SIAC Rules, the Chairman of the Centre may at his discretion remove any arbitrator "if he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits."

There are a number of other specific duties to which reference must be made.

First, the arbitrator has a specific duty to ensure that the institution is kept fully informed of progress, which will generally be achieved simply by copying the institution on relevant correspondence between the tribunal and the parties.[3]

Second, under Article 24.2 of the LCIA Rules, though not under the rules of institutions charging on an *ad valorem* basis, the arbitrator must ascertain "at all times" from the secretariat that the institution is in sufficient funds to cover the ongoing costs of the arbitration, absent which he may not proceed.

For this purpose, and for the assessment of the costs of the arbitration for inclusion in his award, the arbitrator must keep a careful and accurate record of time spent.

A great deal naturally turns on the outcome of any arbitration, whether that outcome is purely monetary or the consequence of some declaratory relief. In some cases, the outcome has a direct impact on the survival of businesses.

One of the most common charges currently laid at the door of arbitration is the failure of tribunals to issue their awards in timely fashion. The tribunal must, therefore, strive to deliver its award within a reasonable time of the conclusion of the proceedings. For example, the ICC Rules and the Rules of the Camera Arbitrale Milano both set a presumptive deadline for the final award of six months from the finalization of the Terms of Reference and/or constitution of the tribunal, while the SIAC Rules go even further. In particular, Rule 28.2 of the SIAC Rules requires the tribunal to submit a draft award to the Registrar of the Centre for approval within 45 days of the date on which the tribunal declared the proceedings closed, unless the parties agree otherwise. In the event of unavoidable delays, the parties should be kept apprised and not be left in the dark.

3. THE DUTIES OF THE INSTITUTION

If the arbitrator's overarching duty is to decide the dispute in a fair, timely and cost-effective manner, the reciprocal overarching duty of the institutions is to provide efficient and cost-effective administrative services to support the arbitrator and the parties in the achievement of this end.

It is often said that the single most important responsibility of an institution (after satisfying itself that there is *prima facie* jurisdiction) is to get the right tribunal in place as quickly as possible.

This will always mean proceeding expeditiously with the constitution of the tribunal, in accordance with the contractual timetable and/or the timetable set out in the institution's rules. Thus, for example, Article 13(2) of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provides that, where the tribunal is to consist of a single arbitrator, the parties have ten days to jointly

appoint the arbitrator, failing which the Board itself will appoint the arbitrator. Similar provisions can be found in Article 12(3) of the ICC Rules and Article 14.5 of the SIAC Rules. It may also mean expediting the appointment of the tribunal in cases of exceptional urgency (see, e.g., Article 9 of the LCIA Rules) or the appointment of an "emergency arbitrator" (see, e.g., Article 29 of the ICC Rules and Rule 5.2 of the SIAC Rules).

The first duty of the institution is thus to facilitate the selection and appointment of the arbitrator or arbitrators, whether nominated by the parties, the party nominees or the institution itself.[4]

It is, perhaps, also worth bearing in mind that the parties and the institution may have different objectives when selecting arbitrators.

Parties ultimately want to succeed in their case and may reasonably be expected to seek arbitrators whose track record and/or public statements (oral or written) suggest that they may be sympathetic to their position. Points to note in this regard include arbitrator interviews, beauty parades and so forth.

The institution, on the other hand, ultimately wants the arbitration to succeed, irrespective of the outcome. In other words, its aim it to reach a just and binding conclusion as expeditiously and cost-effectively as due process will allow.

With this in mind, the institution must provide the selected arbitrator, prior to his appointment, with sufficient information about the parties and sufficient background to the dispute to enable the arbitrator to properly consider: (a) the existence of disqualifying conflicts or the likelihood of that such conflicts will arise; (b) whether he has the requisite experience and expertise; and (c) whether he has the time to devote to the case given, for example, any early indications as to urgency and complexity.

While it is not for the institution to interfere with the proceedings or to second-guess the tribunal, it is a proper part of the institution's supporting role to monitor the timetable, as agreed or directed, and to enquire of the tribunal if it is apparent that there is slippage in the timetable for reasons of which it is unaware. The pace of an arbitration can be significantly slowed by the failure of one or both parties to cooperate, and an institution may be able to communicate with and influence an uncooperative party or a tardy tribunal.[5]

Just as the arbitrator must keep the institution fully informed, so the secretariat must pass on any correspondence that comes to it without a copy to the tribunal and remind the parties of their obligation to keep the tribunal in the loop.

Moreover, just as the arbitrator must be free of conflicts at the time of his appointment and throughout the proceedings, so the institution must be ready to deal swiftly, effectively and in an even-handed manner with any challenge that

may be brought against an arbitrator. In the ICC Rules, for example, the relevant procedure is set out at Article 14. This is also a particularly significant duty in the case of the LCIA, which, uniquely, provides reasoned decisions on challenges. An institution may also provide a list of suitably qualified arbitrators to assist a party in selecting a replacement.

For the purposes of funding, the secretariat must keep the tribunal advised of the receipt and disbursement of parties' funds, and not simply leave it to the tribunal to check that there are sufficient monies to proceed.

The secretariat should therefore regularly call for interim fee notes and should apprise the tribunal of accruing administrative charges, of which tribunals sometimes do not take proper account. Thus, under Rule 30.4 of the SIAC Rules, responsibility falls on the Registrar of the Centre to direct the parties to make further advances towards the costs of the arbitration. Similarly, under Article 36 of the ICC Rules, the Secretary General is empowered to call on the parties for an advance on the costs of the arbitration, and the amount of such advance may be subject to readjustment at any time during the arbitration (under Article 36(5)).

Under Article 33 of the ICC Rules, the ICC Court scrutinizes and approves the award before it can be issued. The same is true under Rule 28.2 of the SIAC Rules, which provides that the Registrar's review is not limited to identifying clerical errors but extends even to drawing the attention of the tribunal to "points of substance". Under the LCIA Rules, it is the LCIA Court (through the Registrar) that physically issues awards to the parties. Therefore, just as there is an onus on the tribunal to render its award promptly, so there is an onus on the institution to carry out its obligations in connection with the issuing of the award; confirm the costs of the arbitration for inclusion in a final award; efficiently and expeditiously scrutinize the award (if this is the practice of the institution); and efficiently and expeditiously prepare certified copies, bind and stamp the award and dispatch it to the parties.

4. SECRETARIES TO THE TRIBUNAL

Although some aspects of this topic have already been covered, it is worth emphasizing that a line should be drawn between the services of the institution, the duties of the tribunal and the duties of secretaries to tribunals.

The duties of the secretary should neither conflict with nor duplicate those for which the parties are paying the institution nor should they constitute any delegation of the tribunal's authority.

While the institution should be willing to liaise with the secretary on administrative matters, the institution should take responsibility for such things as finalizing arrangements for hearing venues, transcripts and so forth; providing any reminders that may be required in connection with the procedural timetable; and dealing with all matters required of it under the institution's rules.

Secretaries should therefore be primarily concerned with such matters as organizing papers for the tribunal, highlighting relevant legal authorities, maintaining factual chronologies, keeping the tribunal's time sheets and so forth.

5. THE ARBITRATOR, THE INSTITUTION AND THE PARTIES

There is a further important but often overlooked catch-all provision in the ICC Rules (Article 41), the LCIA Rules (Article 32.2) and the SIAC Rules (Rule 36.2), which, if not express, should be implicit in all institutional rules. In the words of the LCIA Rules, it provides:

> *"In all matters not expressly provided for in these Rules, the LCIA Court, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that an award is legally enforceable."*

6. THE RESULT OF EFFECTIVE COLLABORATION

If the tribunal and the institution perform their reciprocal duties in a positive and cooperative fashion, there is every chance that the goal of every arbitration, whether institutional or *ad hoc*, will be met. That goal is the rendering of a well-drafted, reasoned and just award, on time and within budget.

In this context, I would like to mention some recent research carried out by the LCIA. An analysis of 55 recent LCIA cases that ran their course from the initial request for arbitration to the issuing of a final award suggests that such collaboration between tribunal and institution can indeed deliver on time and cost.

The LCIA's research shows that around 50% of cases administered by the LCIA were concluded within 12 months or less, and around 75% within 18 months or less.

Finally, if it is not already clear (as I hope that it is), I cannot stress sufficiently that the aim of every institution must be to add value to the proceedings in everything that it does. And, for the avoidance of doubt, every arbitrator should also share that aim.

Endnotes:

1 The LCIA India Rules provide expressly, at Article 5.3(b) that an arbitrator must, prior to appointment, confirm his ability to devote sufficient time, and, of course, the ICC's statement of independence now includes a detailed "*availability*" section.

2 The parallel provisions in the ICC rules are at Article 22 and 11(5), under which arbitrators "undertake to carry out their responsibilities in accordance with the Rules". There are similar provisions in the SIAC rules at Rule 16.

3 See, for example, Article 13 of the LCIA Rules. In the ICC Rules, see Article 23(2), which provides that the tribunal must send the Court the agreed Terms of Reference, and Article 24(2), which provides: "The procedural timetable and modifications thereto shall be communicated to the Court."

4 In 2010, 41% of the arbitrators appointed by the LCIA Court were selected by the parties; 10% by the party nominees; and 49% by the LCIA Court itself.

5 As noted in *Russell on Arbitration* (23rd ed.) at 3-053.