Players' Interaction in International Arbitration

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DOSSIERS
ICC Institute of World Business Law

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ICC Institute of World Business Law

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Publications Department
33-43 avenue du Président Wilson
75116 PARIS
FRANCE

ICC PUBLICATION NO. 737E
ISBN: 978-92-842-0238-6

TABLE OF CONTENTS

FOREWORD

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This ninth Dossier of the Institute focuses on the main participants in the arbitration process: the parties, their lawyers, the arbitrators, their secretaries and the arbitral institutions. Although the above are described illustratively, this Dossier is not an album of photos. Its approach is definitely dynamic. Photos are replaced by film. The word "players" in the title has been chosen on purpose. What particularly interested the speakers and the audience of the 2011 Annual Conference of the Institute is the evolution of the complex and multiple interactions between the participants in an arbitration procedure before, during, and after the proceedings. All the players in an arbitration process are presented in action.

Lawyers like to use movie vocabulary when discussing their performance: were they any good, did they use the right tone, did they overact? Legal briefs often begin with a list of dramatis personae, even if the author may have forgotten that in Latin the word persona originally meant "actor's mask" before it came to signify a "role". There are several reasons for this use of movie analogy. Like a movie, an arbitration process tells a story in this case one which is full of flashbacks. The players in an arbitration procedure have a specific role to play and must respect given rules, much in the same way as people making a movie must. Participants in the hearing impersonate the characters of the President, the arbitrator and the counsel. They stop addressing each other by their first name, and for some hours or days play the role that has been assigned to them. But the analogy between movies and arbitration cannot go very far. Firstly, an arbitration is not a product of the entertainment industry. Not so much because it remains largely confidential, but because it can have very serious repercussions in the real life of one or all of the parties. Secondly, and more significantly, whereas the cast and crew of a movie are supposed to share a common goal–the production of a successful movie–the players in an arbitration procedure do not share the same agenda.

Arbitral institutions are eager to organize a good arbitration which leads to an award enforceable by law. The arbitrators' goal is to achieve justice, both from a procedural and substantive point of view.

However, they also want to manage the case within a reasonable time frame and at reasonable cost, as both these factors are a source of tension. Few lawyers are interested in either the quality of the arbitration or the correctness of the decision taken. Their objective is to win the case or, if they know it is impossible to win, to limit the inevitable loss that their client is going to suffer. At the same time they need to show their clients that they are fighting hard for them in order to maintain their

confidence, which can lead to a level of confrontation with the opposing parties and sometimes with the arbitrators, both of which are counterproductive. Finally, there is no common approach among the clients. It depends on their company's position in each case. But, in general, although they expect a fast and economic resolution of the dispute, they also wish to present their case without any limitation, regardless of the length or costs of the procedure. The interaction between those players with different but legitimate interests requires that, beyond the application of the rules of specific arbitration institutions and of some national procedural law, the rules of the game and basic ethical principles must be respected. The major players were very active at the 2011 Annual Conference of the Institute. Their presentations and the following discussions contributed to a better understanding of the need for such rules and principles. The reciprocal rights and duties at stake have been thoroughly analyzed. As a result, this IX Dossier is set to become another great vintage work in the Collection.

Table of Contents

Index

INTRODUCTION

The Council of the ICC Institute of World Business Law chose the interaction between actors in international arbitration as the theme for its annual seminar in December 2011.

In recent decades, arbitration has met with growing, even exponential, success. What used to be the business of a few specialized attorneys and a limited number of counsel has become an industry with a plethora of actors. This translates into a growing interest of lawyers in international arbitration, an increase in the number of institutions and, in parallel, the publication year after year of ever more journals—more or less technical—which are accompanied by a proliferation of seminars, trainings, congresses and education daystraining sessions and conferences. We have also witnessed the birth of companies specialized in financing arbitration procedures, namely so-called third-party funders.

Unfortunately, these considerable developments do not only have good sides. Arbitral procedures have seemingly become longer, costlier and more complex, and all actors complain about this.

In recent years, many actors have tended—incorrectly, in my view—to impute such problems too easily to arbitrators. Arbitrators do, of course, bear some responsibility in this regard. However, as law firms specialized in arbitration have become more sophisticated—with the good and bad that this brings—and busier, even overwhelmed, time limits have become longer (and fee notes bigger) and, despite this, procedural calendars are less respected. Institutions are also not far behind. Where several years ago the constitution of an arbitral tribunal or the notification of an award took several days, they can nowadays take several weeks or months. The increasing complexity of arbitral rules and the growth in guidelines and regulations of all kinds are no doubt largely responsible.

It thus seemed to us—like other institutions, for that matter, such as ICCA—that it was time to rethink the arbitral process and to address the interaction between the participants of international arbitration and, in this context, the respective rights and obligations of each, the final goal being to contribute together, as much as possible, to the improvement of the process, while respecting the ultimate goal of dispensing justice in a respectful and efficient manner, within short time limits, without costing too much to the parties to the procedure.

In this context, the council structured its analysis around four themes. The first theme focused on the duties that counsel and parties have towards each other and towards the arbitral tribunal. This theme was dealt with by four speakers. Horacio Grigera Naon addressed the duties of counsel towards the tribunal. Doak Bishop dealt with the question of whether "anything goes" in obtaining evidence. Johnny Veeder, QC, investigated whether counsel and clients really share the same interests.

Finally, Karl Hennessee submitted some thoughts and proposals regarding the need for greater involvement of in-house counsel in the arbitral procedure.

The problems addressed in the context of the second theme focused on the efficient functioning of the arbitral tribunal. First, Professor Julian Lew analyzed the rights and duties of the arbitral tribunal. Laurent Lévy then addressed more specifically the role of the chairman of the arbitral tribunal in its internal dynamics. In addition, since arbitrators' use of administrative secretaries is becoming increasingly common, Constantine Partasides attempted to identify good practices in this respect. Finally, Eduardo Silva Romero investigated the liability and immunity of arbitrators and tried to define the right balance between these two concepts.

The third session focused on the role of institutions. The question whether they truly add value to the procedure was dealt with by Professor Karl-Heinz Böckstiegel. Peter Leaver then spoke about the mutual rights and duties of institutions and arbitrators. Finally, Judith Gill, QC, examined the extent to which institutions must ensure procedural transparency, and Teresa Cheng considered the question of their liability.

The last session was devoted to a general debate on whether the various actors in international arbitration meet the expectations of the other participants and whether users are satisfied with the arbitral procedure. In this context, a representative of each group was invited to present a position: for in-house counsel, Jean-André Diaz; for counsel, Hamid Gharavi; for the institutions, Annette Magnusson; and, finally, for the arbitrators, Professor Pierre Tercier.

In keeping with the tradition of previous years, the Council of the ICC Institute of World Business Law has sought to ensure the publication of the papers presented at the seminar. The council hopes that the thoughts, suggestions and proposals formulated over the course of this seminar will be of great use to the arbitration community in its process of reconsidering the role of—and interaction between—the different participants in the arbitral procedure. Likewise, we hope that they will contribute to achieving the final goal of ensuring the harmonious and efficient functioning of the arbitration process in terms of time and cost, while respecting the legitimate expectations of the parties.

Bernard Hanotiau

Table of Contents

Index