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A Guide to Procedural Issues in International Arbitration

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International arbitration encompasses a number of rules which may differ from case to case according to the choice of the institutional framework for arbitration or, if no institutional framework has been chosen, to the ad hoc rules agreed upon by the parties. Moreover, domestic legislation can play an important role in numerous instances, mainly at the recognition and enforcement stage. A number of rules and practices, however, are common to any kind of international arbitration. The following is intended as a brief guide to the issues arising under these common rules and practices.

I. The Arbitration Clause

In preparing for a dispute settlement by arbitration, two points are of paramount importance for each party with regard to the expected outcome of the proceedings: the arbitration clause and the actual selection of the arbitrators.

Unless there is arbitration on the basis of an ad hoc compromise (compromis d'arbitrage), the first issue is mostly settled well before a dispute arises, while the selection of the arbitrator in most cases is done at a time a dispute is already apparent. This time element is important; it explains why, in many cases, the arbitration clause often is not tailored to meet a specific dispute situation which usually has arisen long after the arbitration clause was drafted.

How could this be avoided? Obviously, by an effort on both sides for clarity and completeness in the drafting of the clause. This seems obvious,

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but it is astonishing to see still today arbitration clauses which are not adequate and therefore confusing. Clarity and completeness require first of all a clear statement of the possible *scope* of arbitration. It would not be enough, for example, to state an agreement to submit to arbitration any dispute "arising under" the contract. This is too narrow a construction. The formula used in the intergovernmental Protocol on Arbitration Clause, signed at Geneva on September 24, 1923, is a much better one: "to submit to arbitration . . . . differences, that may arise in connection with (the) contract." By the same token, the wording of Section 1 of the Optional Arbitration Clause for Use in Contracts in USA-USSR Trade, prepared in 1977 by the American Arbitration Association and the USSR Chamber of Commerce and Industry,[1] is a useful model: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration . . ."

This model is not the only reference tool for the practicing lawyer confronted with the drafting of an arbitration clause. The UNCITRAL Rules[2] are another helpful reference point, as are the Model Clauses for the International Centre for the Settlement of Investment Disputes (ICSID), published by the Centre.

A. The Nature of the Dispute

Other possible problems, related to the *nature* of the disputes, require some consideration. For example, the Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereafter the ICSID Convention)[3] without defining the term "investment," provides that a dispute brought before ICSID for settlement must be a *legal dispute arising out of an investment*. This omission is intentional. The variety of transactions between the parties and foreign public entities is such that no definition can cover them all. There is, therefore, broad room for agreement between the parties. As the ICSID Convention is based on the principle of consent between the parties, they could agree for ICSID arbitration on a wide variety of issues, provided of course that *they* agree to consider their dealings as falling under the ICSID Convention and agree further that once a request for arbitration is filed no objections with regard to ICSID competence can be raised.

If and when the parties reach an agreement to submit their dispute to ICSID arbitration, even on subject matters which on their face are not clear investment matters, it seems to me extremely unlikely that the Secretary

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[1]16 I.L.M. 445 (1977).
[2]UNCITRAL Arbitration Rules, United Nations, New York (1977).
[3] March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090; 575 U.N.T.S. 159.

General of ICSID, according to Rule 6 of the ICSID Institution Rules,[4] would refuse registration of the request *ratione materiae*. At least on this point the so-called ICSID Additional Facility seems to me obsolete and therefore useless.[5]

A similar question arises under the 1958 New York Arbitration Convention.[6] This Convention provides, *inter alia* for a reservation by each Contracting State to the effect that the implementation of the Convention be limited to ". . . differences arising out of legal relationships, whether contractual or not, which are considered as *commercial* under the law of the State making such declaration." The United States, along with 19 other countries, have made use of this reservation option. The available caselaw under the New York Convention shows that "commercial" may be understood differently from country to country.[7] The draftsperson of an arbitration clause to be governed by the New York Convention should therefore be aware of such differences, as he or she should be familiar with the law governing arbitration in the countries concerned, for this or other aspects of implementation of an arbitral clause. This requires, in the first place, a knowledge of whether these countries are Contracting Parties to relevant inter-State arbitration treaties, as well as of the legal effects of accession of these countries to one or more of those treaties—bilateral and/or multilateral and their sometimes overlapping obligations and regulations. Such an assessment should also be made before deciding as to the venue of arbitration. Many cases have ended with an unpleasant surprise at the enforcement stage precisely because of the wrong choice of the place of arbitration.

B. Institutionalized Arbitration or Not

It is important for the draftperson of an arbitration clause to make a clear choice between *arbitration within a pre-existing institutional framework*

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[4]This Rule reads as follows:
Registration of the Request:
(1) The Secretary-General shall, subject to Rule 5(1)(c), as soon as possible, either:
  (a) register the request in the Conciliation or the Arbitration Register and on the same day notify the parties of the registration; or
  (b) if he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre, notify the parties of the refusal to register the request and of the reasons therefor.
(2) A proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request.

[5]Introduced in 1978 by Resolution of the ICSID Administrative Council. The purpose of the ICSID Additional Facility Rule is to allow parties which are not eligible to appear before an ICSID Arbitral Tribunal to avail themselves of assistance by an international secretariat according to pre-established Rules.

[6]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201–208.

[7]*See* A.J. Van Den Berg, New York Arbitration Convention of 1958, 51–54 (1981).

(e.g., ICSID, ICC, AAA), *or arbitration not related to such institutional framework*, sometimes called *ad hoc* arbitration (although there could be also *ad hoc* arbitration within an institutional framework).

There are some advantages to "institutional arbitration." One is the existence of a central point if and when arbitration proceedings are initiated, namely a permanent Secretariat, which handles registration of the request and communications between the parties. Another advantage is the existence of a set of procedural rules, although the coming into being of the UNCITRAL Rules has somewhat diminished this particular advantage. Further, the costs of proceedings are generally predictable with institutional arbitration. There can be, however, enormous differences from institution to institution as to the costs of proceedings. Some institutions base their fee structure on the value of the dispute at stake (e.g., ICC), others—like—ISCID—operate differently: a very small registration fee (US$ 100), a proposal for uniform compensation of the arbitrators, and the reimbursement of the actual costs incurred. Finally, "institutional arbitration" offers an authority which could, in case of need, proceed to the appointment of the sole arbitrator or the umpire if three arbitrators are envisaged. Of course, the UNCITRAL Rules also offer an appointing authority, but only as a residual and rather complex device, leaving it in the first place to the parties to choose themselves an appointing authority.[8]

C. The Choice of Law Agreement

There are other procedural issues to be mentioned that should be clarified in an arbitration clause. An important issue is the *choice of substantive as well as of procedural law* governing the contract and thus the arbitration. Each side may want the law of its own country to govern the contract and arbitration. If one side cannot give into the other, the choice of a third country's law is necessary. In loan agreements, the choice of an important financial place such as New York or London, would be the most natural one. In investment agreements, the law of the host country is very often controlling. But this might not be good enough, especially if the host country does not yet have a fully structured domestic law. A complementary rule is necessary. The ICSID Convention, for example, provides in Article 42 that in the absence of an agreement between the parties as to the applicable law,

[8]Article 6(2) of the UNCITRAL Rules:
If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

"the Tribunal shall apply the law of the Contracting State party to the dispute . . . and such rules of international law as may be applicable." It is noteworthy that this provision—at least in its English version—not only covers general principles of international law and customary law, but also treaty or unilateral obligations.[9] The ICSID provision may be more predictable as to its effect that the UNCITRAL Rule (Article 33, para. 1), which provides that failing agreement between the parties as to the applicable law, "the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable." This provision leaves too many questions open.

If the domestic law is applicable, it is of utmost importance to know—and to draft accordingly—whether it should be the law as it naturally develops over the years, or whether it should be the law as it stands at the time of agreement, in other words, whether a *freezing provision* should be added or not.

D. Prior Exhaustion of Local Remedies?

Another consideration to bear in mind while negotiating an arbitral clause is the question of *prior exhaustion of local remedies*. I do not recommend accepting such a condition, which seems to be asked for by a few developing countries.[10] Exhaustion of local remedies is understandable in interstate proceedings, but much less in international commercial or investment dispute settlement by arbitration. Arbitration is often chosen over domestic courts for the specific reason that a potential disagreement will be settled rapidly taking into account the international component of the dealings. In case of requirement of prior exhaustion of local remedies, protracted proceedings might be involved and any pronouncement of domestic courts, especially higher courts, would burden both the international arbitration tribunal and the authority of its pronouncement.

Therefore, prior exhaustion of local remedies should be rejected. A different question is whether the legal problems of a dispute should be split; for example, the recent Chinese-German treaty on investment promotion (signed on October 7, 1983) provides on dispute settlement, that in case of expropriation, international ad hoc arbitration should deal with the amount of compensation only, the question of the lawfulness of expropriation being left to the domestic courts.

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[9]It is to be observed that the French version of the ICSID Convention which is equally authentic, refers to "general principles of international law" only.

[10]For example in its bilateral investment promotion treaties with Great Britain, 1976 (Art.4(2)), France, 1976 (Art.8), Austria, 1976 (Art.5), Egypt, 1976 (Art. 4(2)), and the Federal Republic of Germany, 1980 (Art.3(3)), Romania insisted on prior exhaustion of local remedies for any dispute over the amount of compensation in case of expropriation.

Another approach for splitting the issue could be to agree that in case of a dispute the arbitral tribunal should proceed in two stages, the first of which would be pronouncement on questions of law only so that the parties, in the light of this pronouncement, could attempt to agree as to the financial and material consequences of it. Failing such an agreement after the first stage, the tribunal would make in the second stage a decision as to the actual settlement of the dispute.

E. The International Component of Applicable Law

As stated earlier, in case of absence of a specific agreement on applicable law, the ICSID Convention provides not only for application of the law of the State party to the dispute, but also for a corrective dimension by bringing into play international law criteria.[11] In case the law of the country is silent or obscure on the points at issue, the Convention further provides[12] that the arbitral tribunal must find an answer. But how? Here it would seem that a reference to international law rules could be helpful. But this might not be good enough. It might be equally useful, if not preferable, to provide in the arbitration clause, or leave it to the arbitrators to decide that *general principles of law* (not only of *international* law) should be guiding. If this were so, then it would be easy to agree—as well as for the arbitrators to find—that the usages and customs of the industry connected with the issue at stake are also controlling. But even if there was no agreement as to the application of usages and customs of the industry, what really matters is the reference to general principles of law. If that is agreed upon, the interested party could make a unilateral declaration, if possible in a side letter to the other party, according to which it is the understanding of the first party that usage and customs of the industry covered are part of the body of law which generates general principles of law.

F. Other Issues for the Arbitration Clause

In addition to the points mentioned above and an agreement concerning the choice of arbitrators (discussed *infra*), the arbitration clause should deal with the problems of interim measures, defaults of one party and the language in which the arbitration will be conducted. Most importantly, if a foreign sovereign is one of the parties, there should be agreement concern-

[11]Article 42, para. (1): "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[12]Article 42, para. (2): "The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law."

ing waiver of sovereign immunity both for the arbitration proceedings and the enforcement of an award. This clarification that the acceptance by a State of an arbitration clause necessarily implies a waiver of sovereign immunity is useful, even if one could easily construe it. Needless to say, this precaution is not necessary for ICSID in view of Article 54 of the ICSID Convention.[13]

II. The Appointment of Arbitrators

When addressing this category, two issue areas should be considered: one is the procedure for appointment; the other is the qualifications to be observed, including the problem of conflict of interests and subsequent procedure for challenging an arbitrator.

A. Procedure for Appointment

With regard to the procedure, the parties have to agree on the appointment of a sole arbitrator or—what is more and more prevailing practice—on the designation of three arbitrators comprising two to be appointed by the parties, one on each side. It then follows in most cases that the third arbitrator or umpire be selected by the two parties, or by agreement of the two arbitrators appointed by the two parties.

In the light of past practice, it seems to me that an appointment by agreement between arbitrators is preferable to the appointment by agreement between parties. Experience has shown, that the two-party designated arbitrators can more easily agree on a third person than the parties themselves. Indeed, for the parties the prestige element of "who" has made the first proposal is more important than for the two arbitrators.

In either case, if the two sides cannot agree, it is up to the appointing authority—if such exists because of special agreement to that effect between the parties, or the institutional framework chosen for the arbitration, or the acceptance of the UNCITRAL Rules or finally the law governing the

[13]Article 54:

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

arbitration—to make the choice. If the appointing authority, other than a domestic judge, comes into play, the choice has to be made with an overriding criteria in mind: to strengthen the authority of the arbitral tribunal by choosing a highly qualified umpire. As soon as the appointing authority learns about difficulties amongst the parties as to the choice of the umpire it should take the initiative to act as a mediator between the parties, by eventually suggesting names, so that the formal appointment be made, by the agreement of the parties (or the arbitrators, as the case may be), rather than by the appointing authority.

The authority and standing of the umpire is obviously linked to the *authority and standing of the appointment agency*. In some frameworks, the appointment is left to one person only (*e.g.*, Secretary-General of the Permanent Court of Arbitration, President of the World Bank, Chairman of International Arbitral Tribunal at the Chamber of Commerce, Stockholm). In other instances it is a collegiate body which is entrusted with that task (*e.g.*, the ICC Court of Arbitration). A *collegiate body* may have certain advantages over an appointing authority consisting of a single person, if only for the reason that different points of view and suggestions could be examined collectively.

B. Qualifications

Generally, in international arbitration there is no indication as to the *qualifications required for arbitrators*. One of the few exceptions is laid down in Article 14 of the ICSID Convention, which reads as follows:

> (1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.
> (2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

1. *Conflict of Interests—Disclosure*

Even without such stipulation, it is obvious that arbitrators be recognized as being impartial and independent, notwithstanding the procedure of their appointment. If, however, both parties agree that in a 3-member arbitral tribunal the two arbitrators appointed by each party should be considered more or less as representing the point of view of each party, it is of paramount importance that this be done "in the open." Otherwise the devices on challenging an arbitrator could not properly function. It is therefore necessary to insist always on the usual disclosure form.

Appropriate language to this effect can be found in Article 9 of the

UNCITRAL Rules[14] and also in Rule 6 of the ICSID Rules of Procedure for Arbitration Proceedings.[15]

2. *Disqualification*

The signing of such a disclosure form is of importance in case of a *petition for disqualification*. A number of arbitration rules do provide for such procedures. In some instances, it is up to the appointing authority to decide about the proposed disqualification. This is the essence of the UNCITRAL Rules (Rules 11(3) and 12(1)).[16] In other frameworks, like ICSID, it is initially up to the fellow arbitrators to decide on the proposal, and if they are equally divided, to the Chairman of the Administrative Council.[17]

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[14]Article 9: A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

[15]Rule 6: Constitution of the Tribunal

(1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:

> To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between . . . and . . . I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.
>
> I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes and in the Regulations and Rules made pursuant thereto.

Any arbitrator failing to sign such a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

[16]Article 11(3)

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in Article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12(1)

1. If the other party does not agree to challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in Article 6.

[17]Article 57 of the ICSID Convention:

A party may propose to a Commision or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of

As to the procedure to be followed in such a case, very little is to be found in such Rules. Only one condition is laid down in the ICSID Rule 9: the arbitrator to whom the proposal relates may . . . furnish explanations to the Tribunal or the Chairman, as the case may be.

Those explanations should not be given by way of a sort of oral pleading, nor should the two other members of the Tribunal formally sit and hear the arguments of the party that has challenged the arbitrator and those of the other party. The examination of a disqualification proposal should be as formless as possible, leaving it to the two fellow arbitrators or the Chairman to decide in the light of the argument, made in written statements and in informal discussions with the challenged arbitrator.

III. Fair Hearing

In most instances there are no precise rules of procedure which the Tribunal has to follow. Basically, three requirements should be met in order to meet the minimum standard of "public policy," which are of importance to avoid a subsequent challenge of the award at the recognition stage. They are:[18] (1) *audi alteram partem*; (2) to respect the contentious character of the proceedings; (3) to have the decision based on the opinion of the arbitrators and not on the opinion of somebody else (experts, etc.). In short, the basic requirements of a fair hearing have to be observed. These principles should govern the proceedings in its entirety, including the administration of evidence.

IV. The Motivation of the Award

The *motivation of the award* is most important. Some observers favor such an explanation in order to have a body of case law built up over the years. Unlike judicial pronouncement, however, arbitration has an ad hoc character and is very often handled by both parties under the seal of confidential-

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Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 58 of the ICSID Convention:

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliator or arbitrator, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

[18]R. David, L'Arbitrage Dans le Commerce International, 405 (1981). These requirements do not concern ICSID, which is the only self-sustaining system of arbitration operating outside the control of domestic jurisdiction.

ity. Case law as such has almost no place in such a framework. Rather, without proper motivation the award is not persuasive and is subject to challenges to its recognition,[19] or requests for interpretation[20] or annulment.[21] Article 52 of the ICSID Convention explicitly states that an award can be challenged by a request for annulment "if the award has failed to state the reasons on which it is based."[22] The UNCITRAL Rules are less stringent insofar as they require as a matter of principle that the tribunal states the reasons on which the award was based,[23] but leave it to the parties to derogate, by agreement, from this principle.

These are some of the procedural problems which frequently can be encountered in the process of preparing for and handling a request for arbitration. I have deliberately limited myself to discuss only a few of such problems, most of which I had the privilege to encounter in practice.

[19]*See* Art. 5 of New York Convention, *supra* note 6.

[20]*See* Art. 35 of UNCITRAL Rules, *supra* note 2; and Art. 50 of ICSID Convention, *supra* note 3.

[21]*See* Arts. 36 and 37 of UNCITRAL Rules, *supra* note 2; and ICSID Convention Arts. 51 and 52, *supra* note 3.

[22]*See supra* note 3.

[23]*See* Art. 31(3) of UNCITRAL Rules, *supra* note 2.