

## The Initiation of Arbitration Proceedings: “Whither Dost Thou Wander?”

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*Goosey, goosey, gander,  
Whither dost thou wander?*

ONCE THE PLEADINGS ARE IN (as Messrs. Brower and Townsend have described) and the arbitral tribunal constituted (the next panel will address that), it is time to start work to make sure the arbitration does *not* wander, but is organized to proceed in an orderly fashion to a resolution of clearly defined issues. That phase of the arbitration—the road map stage, if you will—is my topic. I will speak about terms of reference and preliminary conferences.

When one looks at what the various sets of arbitral rules say about these procedures, one sees marked differences. Each set of rules has its own history, and each bears the characteristic stamp of the institution that produced it. But what I find of particular interest and significance is that the *practices* under the varying sets of rules are tending to be more and more alike. Particularly after January 1, 1998, when the new ICC Rules take effect, the procedures of the various institutions are likely to be more similar in practice than dissimilar.

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Terms of Reference.”<sup>3</sup> Arbitrators in reported cases<sup>4</sup> have refused to receive evidence or argument on points that they considered beyond the issues defined by the Terms of Reference. If an award written by the arbitrators extends to points outside the Terms of Reference, the Court of Arbitration will call the arbitrators’ attention to this fact, and it is not likely to approve the award until the arbitrators have corrected any overreaching. If, despite the ICC Court’s scrutiny, an award decides matters beyond the scope of the Terms of Reference, the award may be set aside on appeal under the relevant national law or denied enforcement under the New York Convention.<sup>5</sup> I am not aware of any ICC award that has been set aside on the ground that it decided matters outside the issues defined by the Terms of Reference. The scrutiny of the ICC Court, coupled with the pro-arbitration biases of most national arbitration laws and the New York Convention, ensure that there will be few if any such cases. But there have been more than a few cases in which losing parties have at least held up the enforcement of awards by challenging the awards on the ground that they went beyond the issues defined by the Terms of Reference.<sup>6</sup>

The draftsmen of the new ICC Rules recognized that Terms of Reference are a distinctive and valued part of ICC arbitration. Indeed, when the ICC’s task force surveyed the ICC national committees, all but one committee recommended retaining the Terms of Reference process, and that one recommended only that Terms of Reference be optional. The new Rules, however, make some significant changes in the Terms of Reference process.

First, new Article 18 gives the arbitrators the power to omit the list of issues to be determined from the Terms of Reference. They may do so, however, only if they find that to include the list would be “inappropriate.” Where parties cannot agree to a proposed definition of issues, the arbitra-

<sup>3</sup> *Id.* Art. 16.

<sup>4</sup> *See, e.g.*, ICC Case No. 3267/1984, XII Y.B. Com. Arb. 87, 91-92 (1987).

<sup>5</sup> *See* U.S. Arbitration Act, § 10(d) (award may be vacated “when the arbitrators exceeded their powers”); English Arbitration Act 1996, § 67 (1)(a) (challenge to award based on arbitral tribunal’s lack of “substantive jurisdiction”); French New Code of Civil Procedure, Arts. 1484.3, 1502.3 (award may be set aside “if the arbitrator decided in a manner incompatible with the mission conferred upon him”); New York Convention, Art. V(1)(c) (recognition and enforcement of foreign award may be refused if “the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration”).

<sup>6</sup> *See* *Carte Blanche (Singapore) Pte. Ltd. v. Carte Blanche International, Ltd.*, 683 F. Supp. 945, 953-58 (S.D.N.Y. 1988) (award of consequential damages held within “issues to be determined,” although the list of issues referred only to “a claim for damages”).

tors and the ICC Court need not impose a definition on them. The issues will be framed by the claims of the parties (which must be summarized in the Terms of Reference), and by subsequent evidence and argument. The process will be much as it is under other rules.

It will nevertheless remain good practice, I think, for ICC arbitrators to take advantage of the ICC Rules' clear preference for an early definition of issues, and generally to seek the parties' agreement on what issues are in dispute. The arbitrators should seek whenever they can to include a "list of issues to be determined" in the Terms of Reference they write, even if one party or the other will not sign. Terms of Reference are prepared at a particularly opportune time—after the pleadings are in and, more and more frequently, after the parties' representatives and the arbitrators have met in a preliminary conference. The look of a case may have changed by then, and it may change further in the course of a preliminary conference. The conference may help focus the dispute and eliminate extraneous issues. Both the old and the new Rules of the ICC implicitly recognize the possibility of a pre-hearing conference. Terms of Reference, say both sets of Rules, may be drawn up either "on the basis of the documents" or "in the presence of the parties" (that is at a conference), and "in the light of their most recent submissions." In practice, the parties' "most recent submissions" may include oral statements made at a preliminary conference.

Furthermore, under the new ICC Rules, the risk that an over-narrow definition of issues in the Terms of Reference will limit the scope of an arbitration unfairly has been largely eliminated by a new Article 19, which provides:

After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference *unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.* (Emphasis added.)

Arbitrators under the new Rules can perhaps feel more free to be specific in defining the issues in a case, and parties may be more willing to sign the Terms of Reference proposed by arbitrators, because all concerned will know that there is a remedy if the definition of issues proves unduly restrictive. Arbitrators will be free to amend the list of issues to conform to the evidence and arguments emerging as the case proceeds. This new authority is subject, of course, to safeguards, as the language of Article 19 that is italicized above makes clear. Arbitrators should admit new claims only

if familiar standards of equity and good practice are met. There can be no undue surprise. Each party must have a fair opportunity to be heard on all issues. The proceeding must go forward with reasonable efficiency and dispatch. Terms of Reference under the new Rules may still be jurisdictional, in that they still may define the issues in a case. But they are not immutable.

One of the basic purposes of the changes in the new ICC Rules is to make ICC procedures, including Terms of Reference procedures, faster. To the extent the requirement of Terms of Reference has contributed—or has been perceived as contributing—to delays in ICC proceedings in the past, the revisions of the Rules have sought to eliminate the causes of delay. The revisions also make significant changes in procedures for the payment of advances to cover costs, and these changes too are designed to prevent undue delay. Under the present Rules and practice of the ICC, a case may not proceed beyond the pleading stage until an advance equal to the anticipated costs of the arbitration (arbitrators' fees and ICC administrative expenses) has been paid. The amount of the advance is fixed, case-by-case, by the ICC Court.<sup>7</sup> Until the advance is paid, the ICC will not transmit the file in a case to the arbitrators and the Terms of Reference can not take effect.<sup>8</sup> If one party does not pay its share, the other party may pay it and claim recovery in the award. In a large case, however, the advance may be burdensome, and in any event the delay in payment can slow the proceeding. It has been reported that in some cases delays in fixing Terms of Reference and in the payment of advances for costs have prevented ICC arbitrations from moving beyond the Terms of Reference stage for as much as a year.

The new ICC Rules authorize the Secretary General to fix "a provisional advance in an amount intended to cover the costs of arbitration until the Terms of Reference have been drawn up," and to request the Claimant to pay it.<sup>9</sup> This should speed things. Only the Secretary General, not the Court, will fix the amount of the provisional advance. The Secretary General may (and I am confident he intends to) fix the amount of the provisional advance promptly after the receipt of a Request for Arbitration. Only the claimant, not both parties (or the claimant for both parties), pays this advance. The amount will probably not be discouragingly high: costs through the drafting of the Terms of Reference are likely to be modest compared to the amount of an advance intended to cover the costs of an

<sup>7</sup> See ICC Arbitration Rules, effective January 1, 1988, Art. 9(1) and (2).

<sup>8</sup> See *id.* Art. 9(3) and (4).

<sup>9</sup> See ICC Arbitration Rules, effective January 1, 1998, Art. 30(1).

entire proceeding.<sup>10</sup> Under the new Rules, once this provisional advance has been paid, the file “shall” be transmitted to the arbitrators.<sup>11</sup> There is no longer any need to wait for payment of the advances fixed by the Court based upon the anticipated cost of the entire proceeding. The arbitral tribunal is required to draw up Terms of Reference “as soon as it has received the file from the Secretariat.”<sup>12</sup> Once Terms of Reference have been signed by the parties or approved by the Court, “the arbitration shall proceed.”<sup>13</sup>

## II. ESTABLISHING PROCEDURES

Now let me turn to the question of how procedures in an arbitration (as distinct from the substantive issues in dispute) can be determined early in the proceeding. Here again, the preliminary conference can be the key. If well prepared for and well conducted, a preliminary conference can go far to establishing reasonable and efficient procedures—a road map with milestones. I myself tend to favor a preliminary conference in most arbitrations, whether I am acting as counsel or arbitrator. Perhaps this will be perceived as a characteristically “American” view. I shall be interested in the views of colleagues from other nations.<sup>14</sup>

Some sets of rules expressly provide for preliminary conferences. The new AAA International Rules authorize a “preparatory” conference “for the purpose of organizing, scheduling and agreeing to procedures....”<sup>15</sup> The ICSID Rules provide for an early “preliminary procedural consultation,” which in practice is what practitioners under other rules would recognize

<sup>10</sup> Under the amended Rules, the ICC Court will still require payments of advances to cover the anticipated costs of an arbitration. See Art. 30(2). Under new Article 30(4), which is similar in substance to Article 14 of Appendix II to the present Rules, a party’s failure to pay a required advance after notice and an opportunity to be heard on the issue of whether the advance is due will be deemed a withdrawal of the party’s claim or counterclaim.

<sup>11</sup> See ICC Arbitration Rules, *supra* note 9, Art. 13.

<sup>12</sup> *Id.* Art. 18(1).

<sup>13</sup> *Id.* Art. 18(3).

<sup>14</sup> I hold to my views on preliminary conferences despite the unfortunate history of preliminary conferences at the Iran-United States Claims Tribunal, with which I have firsthand experience. The Tribunal operated under modified UNCITRAL Rules. In its early days, the Tribunal regularly scheduled pre-hearing conferences. Under the unique circumstances of that Tribunal, the conferences proved unduly time consuming, generally unproductive, and subject to abuse, and the Tribunal after a few years abandoned them. I attribute that failure to conditions peculiar to that Tribunal.

<sup>15</sup> AAA International Arbitration Rules, effective April 1, 1997, Art. 16(2).

as a preliminary conference, and list matters to be discussed with the parties in the consultation.<sup>16</sup> The ICSID list is not exhaustive. Matters not mentioned that are typically dealt with in an effective preliminary hearing or conference may include, for example, exchanges of witness lists, document discovery, translations, written witness statements in advance of the hearing, briefing and memorials, procedures for oral examination and cross-examination (if any) of witnesses, and arbitrators' fees (to the extent these have not previously been determined).<sup>17</sup>

The UNCITRAL Rules say nothing about preliminary conferences. It is my experience, however, that arbitrators under the UNCITRAL Rules will generally schedule such conferences, and will certainly do so if either party requests one. Although the ICC Rules presently in effect make no mention of preliminary conferences, it is nevertheless increasingly common for such conferences to be held. The procedural decisions made at such a conference have generally been incorporated into the Terms of Reference for the case.

The new ICC Rules now provide a significant further impetus toward the holding of a preliminary conference and the issuance of a preliminary procedural order. New Article 18(4) provides:

When drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal, after having consulted the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration....

The consultation referred to need not be a face-to-face conference, but clearly that is the most effective way to "consult." The "provisional time-

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<sup>16</sup> ICSID Arbitration Rule 20 provides the following list of topics to be addressed:

- (a) the number of members of the Tribunal required to constitute a quorum at its sittings;
- (b) the language or languages to be used in the proceeding;
- (c) the number and sequence of the pleadings and the time limits within which they are to be filed;
- (d) the number of copies desired by each party of instruments filed by the other;
- (e) dispensing with the written or the oral procedure;
- (f) the manner in which the cost of the proceeding is to be apportioned; and
- (g) the manner in which the record of the hearings shall be kept.

<sup>17</sup> Checklists of points that may be covered in pre-hearing conferences can be found in the arbitration literature. One checklist I have found useful is in H. Holzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, published in *International Arbitration in the Twenty First Century: Towards "Judicialization" and Uniformity?* [Twelfth Sokol Colloquium] (R. Lillich & C. Brower, eds., 1994).

table” will necessarily include a schedule for the filing of briefs, if any, and a hearing schedule. It seems likely, furthermore, that in most cases the “timetable” will extend to other preliminary matters that, in the interest of good procedure, ought to be decided early.

### III. CONCLUSION

What can be gained from a pre-hearing conference? Sometimes, as I previously indicated, the conference may produce a writing that defines and limits the substantive issues in dispute. Almost certainly the conference will produce at least tentative decisions on important procedural details left open under the applicable rules and the arbitration clause. It may even lead the parties to reconsider some of the decisions they made when they drafted their arbitration clause. I have seen at least one highly detailed arbitration clause, designed with one type of dispute in mind, modified by agreement at a pre-hearing conference to simplify procedures and tailor them to the dispute that actually arose.

Counsel to a party in an arbitration will likely have ideas on what procedures will be efficient, effective, and most helpful to the interests of his or her client. Experienced counsel will want to seize the pen (before opposing counsel does so), to request a preliminary conference, to propose an agenda, and even to draft a proposed procedural order. I think few arbitrators would find this to be overreaching—provided of course it is done with notice to the other party and an opportunity to respond. In fact, if no such procedural proposal is made by a party, many tribunals will invite the parties to make proposals and will on their own initiative schedule preliminary conferences to consider and determine procedures. A tribunal’s procedural order issued after such a conference will doubtless be “provisional,” as new ICC Article 18(4) expressly states such orders to be, and subject to change to meet the needs of the case as the case develops. It will, however, set the case on course and establish milestones. It will make wandering less likely.

The pre-hearing procedures of all the rules of the institutions that I have discussed have widely differing backgrounds and are often expressed in differing terms. The pre-hearing *practices* under these rules are, however, beginning to show marked similarities. This is not surprising. International arbitration today is more than a collection of separate arbitral regimes. It is increasingly a global process based on practices and procedures that are gaining global recognition.