The Role of the International Arbitrator

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THE ROLE of the international arbitrator is a subject which may be considered from different perspectives. One approach is to examine the arbitrator's procedural powers in terms of the type of proceeding, adversarial versus inquisitorial, in which he or she is involved. Another approach is to investigate the true nature of the arbitral proceeding, whether merely contractual or (at least to a certain extent) jurisdictional. ¹

The essence of the adversarial procedure is that the judge listens to the evidence and arguments of the parties and decides between them. He does not make his own inquiries about the facts nor propose arguments or conclusions of fact and law differing from those which the parties put forward. By contrast, all these functions are exercised by the judge when the procedure is inquisitorial.²

The problem of the inquisitorial or adversarial character of the arbitral proceeding must be examined in a context different from that characterizing the experience of the national judge. The national judge finds the source of his or her powers in the rules of the lex fori which identify their character. These rules do not bind the international arbitrator, however, the latter not being an organ of state and therefore having no lex fori.

Accordingly, to determine whether proceedings before an international arbitrator are to be inquisitorial or adversarial, and what role of the

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1 The debate over the role of the international arbitrator has gained increased attention. One of the subjects of the ICCA Congress held in London on 12–15 May 2002 was devoted to the topic 'The parties, not the arbitrators, control the arbitration', with arguments being developed for and against the motion. See International Commercial Arbitration: Important Contemporary Questions (ICCA Congress Series no. 11, Kluwer, 2003).


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The role of the International Arbitrator should be, is an analysis which must be conducted on the basis of other terms of reference.

The issue is to determine whether and to what extent the arbitrator’s role is to be conceived as limited to watching a game played by other subjects (the disputing parties), as a neutral observer, and then proclaiming the victory of one of them when the game is over; or, rather, if the arbitrator may (or should) enter the playing field in order not only to guarantee full respect for the rules of the game but also, and mainly, to ensure that his or her conviction as to the solution of the dispute is founded on factual and legal elements which the arbitrator has contributed to identifying as a determinant of his or her decision. By thus assuming an active role in the conduct of the arbitral proceeding, particularly in the evidence acquisition process, the arbitrator ensures that the proceedings are conducted in a fair and expeditious manner.

The task of identifying this role is made difficult by the great diversity of situations which must be taken into account. Given the context, by definition transnational, in which the arbitral proceeding is to take place, various factors condition the arbitrator’s role, including the parties, the arbitrator him- or herself and the applicable legal rules (both procedural and substantive).

On one side are parties who, coming from areas of the world with different socio-cultural backgrounds, assisted often by counsel of diverse legal formation, have diverging views as to the conduct of the proceeding and the powers reserved to them as compared to those reserved to the arbitrator. On the other side, there is the presence of one or more personalities, the arbitrators, each having his or her own background and legal formation and who may not always be submerged in the somewhat abused distinction between ‘common law’ and ‘civil law’ jurists.

To reach a common approach within the arbitral board as to the arbitrators’ function and powers is, for its members, a fundamental step. Obviously, the primary role in this context will be played by the personality of the chairman, the latter constituting the real motor of the board’s activity. Account is then to be taken of the rules of procedural law in force in the place of arbitration, inasmuch as the latter may in various ways limit or enlarge the powers of the international arbitrator.

The rules governing the merits of the dispute also have a bearing, to the extent that they may confer specific powers on the arbitrator or he or she may enjoy a measure of flexibility in their application.

The starting point of any analysis concerning the arbitrator’s role is the identification of the value to be assigned to the parties’ autonomy in the present state of development of international arbitration. The arbitrator, as is well known, derives his or her powers from the will of the parties expressed in the arbitration agreement, within the limits set by the applicable legal system (particularly as to the subjective and objective arbitrariness of the dispute). To that extent, arbitration undoubtedly has a contractual foundation.

The idea that, given this source of his or her powers, the arbitrator is bound to respect the parties’ will in exercising his or her role and, more generally, in discharging his or her duties, has prevailed for a long time. That the arbitrator is the servant of the parties is still a widespread view. Only to the extent expressly authorized by the parties or in the latter’s silence may the arbitrator make rules for regulating the arbitral proceeding, particularly in the area where the two approaches – inquisitorial and adversarial – confront each other most often, that of evidence acquisition.

The question is whether the parties’ autonomy is to be given priority in defining and limiting the arbitrator’s role, or if he or she may exercise a proactive role concerning procedural aspects as well as issues of substance. There are good reasons to hold that the answer should be in terms of the recognition of a measure of autonomy of the arbitral function. Support for a proactive and autonomous role for the arbitrator is lent credence first of all by the evolution of the rules governing international arbitration, as much as they clearly manifest the particular value assigned to the arbitral function by the community of states.

In the last 20 years, there has been an unrelenting production by the great majority of states of laws regulating arbitration, many of them devoted to international arbitration. Countries of continental Europe, such as France with its law of 1981 and Switzerland with its 1987 law reforming private international law, have played a major role in this evolution. This process has been enhanced by the UNCITRAL Model Law of 1985, which inspired many arbitration laws enacted in the 1990s in continental Europe (Germany in 1997 and Sweden in 1999) and in England (in 1996).

A common feature of these various legal regulations is found in the widening of the parties’ autonomy in regulating qualifying aspects of the arbitration (number and manner of appointment of arbitrators; seat and language of the arbitration; rules applicable to the proceeding; rules applicable to the merits of the dispute; waiver of means of recourse against the award). More importantly, this legislative process has brought about the recognition of greater powers conferred on the arbitrator (e.g., the competence to decide on his or her own competence; the issuing of preservation or interim measures or of penalties to the parties; the choice, in the parties’ silence, of the applicable procedural and substantive rules as well as of the language and seat of the arbitration).

Concurrently therewith, the role of national courts has evolved from the supervision and control of the arbitrator’s activity to the more fruitful one of cooperation with a view to more efficient conduct of the proceedings, particularly in the field of evidence acquisition and of the enforcement of interim measures ordered by the arbitrator.

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3 The debate is enlivened in Italy, where part of the doctrine, with the support of some courts’ judgments and legal enactments, maintains that the arbitrator’s role is akin to that of the judge. Arbitration, would accordingly be contractual as to its source but jurisdictional as to its proceedings, hence supporting an autonomous role for the arbitrator in the conduct of the proceeding.

4 The greatest emphasis on the procedural powers of the arbitrator is given by the English Arbitration Act 1996, Section 34 opera with a broad proposition: ‘it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter’. The provision clearly strikes a compromise between the arbitrator’s role and the basic principle of party autonomy. See Hunter, ‘The Procedural Powers of Arbitrators under the English 1996 Act’ in (1997) 15 Arbitration International 371.
This development is clear evidence of the increasing attraction of arbitration as a method of dispute settlement within the community of states. Arbitration is viewed more and more as a factor of peaceful development of international trade. States, far from showing a lack of interest in arbitral proceedings having their seat in their territory, maintain a measure of control as regards the respect of such fundamental principles as arbitrator's impartiality, due process and conformity of the award with their public policy, sanctioning their violation by the annulment of the award or refusal of its recognition and enforcement.

The national legislator's activity in favour of arbitration has developed in parallel with the coming into force of international conventions on the subject, first of all the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, to which a considerable number of states have progressively become party. The result is that the Convention currently ensures for arbitral awards a degree of circulation within the Contracting States' territory for enforcement purposes much higher than that enjoyed by national courts' judgments.

The states' expectation that international arbitration will contribute to the development of economic relations by expeditiously and peacefully removing disputes originating in the context of those relations justifies the wider powers assigned to the international arbitrator by these normative developments. Considering that such powers are recognized in view of the attainment of objectives which are of interest for the community of states, thus transcending those of the disputing parties, a role for the arbitrator which is not merely that of implementing the parties' will is thereby rendered legitimate.

Even if this is an undeniable result of the reconsideration by states of the arbitral function, practical experience indicates a manner of exercise of this enhanced role in terms not of imposition by the international arbitrator of his or her procedural powers, but rather of a continuing search for co-operation with the parties.

The arbitrator's powers and functions must be evaluated in a context which sees the arbitrator co-operating in finding solutions which would allow the parties, in the majority of cases, to continue in their business relations. To this end, rather than invoking prerogatives which may be challenged or provoke negative reactions, the arbitrator should from the very beginning of the proceeding make an effort to establish a fruitful line of communication with the disputing parties and their counsel. Rather than talking of adversarial versus inquisitorial procedures, this process of communication may be more aptly characterized as 'interactive arbitration', meaning the search by the arbitrator for a continuous dialogue with the aim of overcoming the difficulties caused by the parties' conflicting approaches. As has been wisely suggested, this process of interactivity will have to be adapted to the specificity of each individual situation.

Once the proper atmosphere is established and there is no risk that the arbitrator's activities are viewed as prejudging the case, indications may be given by the arbitrator as to the manner in which the parties should present their arguments and evidence or as to the issues which the arbitrator would like to see developed in greater detail.

The process of interactivity between the parties and the arbitrator presupposes a sound spirit of co-operation and counsel of professional quality, willing to find solutions to the problems. This may not always be the case, practical experience showing how often one of the parties chooses to adopt an attitude of confrontation, or even tactics aimed at disrupting the course of the proceeding. This attitude is to be discouraged from the very beginning. Co-operation rather than confrontation will be enhanced by the parties' perception of the arbitrator's fairness and determination in reaching his or her procedural decisions.

Therefore we need to examine more closely the arbitrator's powers with reference to the conduct of the proceeding. These are considerable, due to a number of factors. Very rarely at the time of concluding their contract do the parties contemplate imposing specific procedural requirements upon the arbitrator, their agreement at this stage being limited in the large majority of cases to the reference, in the arbitration clause, to the rules of a given institution or, although less frequently, to ad hoc arbitration. All institutional rules of arbitration recognize the arbitrator's power, in the parties' silence, to regulate the proceeding in the most appropriate manner, as confirmed by a parallel provision in the rules of procedure prevailing at the arbitral seat. Such power is very large, the only practical limitation imposed by such rules and by applicable International Conventions being respect for due process. The latter may be summarized in three fundamental principles:

1. The right to be heard (at least in writing);
2. audi alteram partem (i.e., make each party aware of its opponent's case and allow it to rebut the same);
3. The right to be treated alike.

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5 The Final Act of the Helsinki Conference on Safety and Co-operation of 1 August 1975 recognizes that ‘the expeditious and fair resolution of disputes arising from international trade would contribute to expand and favour commerce and co-operation’ and that ‘arbitration is an appropriate manner for resolving such disputes’ (unofficial translation). The same role of international arbitration has been underlined by the unanimous vote of the UN General Assembly when approving in 1985 the UNCITRAL Model Law on International Commercial Arbitration. The Assembly, when approving in 1976 the arbitration rules prepared by UNCITRAL, has stated that “the establishment of arbitration rules in countries with different legal, economic and social systems will contribute in a significant way to the development of harmonious international relations.”

6 The Convention had 134 Contracting States as at 31 December 2003.

8 ibid., at 161.
9 Diamond, ‘The Psychological Aspects of Dispute Resolution, International Commercial Arbitration: Important Contemporary Questions’ in ICCA Congress Series No. 11, issue 1 at p. 329. Where the parties have prescribed procedural rules for the conduct of the proceeding, the arbitrator who is unwilling to accept the same may decline to exercise the arbitral functions or, if he or she has already accepted appointment prior to such rules having been agreed by the parties, the arbitrator may resign if such rules are in his or her view unreasonable, without incurring liability to the parties.
10 To respect due process is a reason for refusing enforcement of the award under the New York Convention [Art. V(1)(b)] and a ground for annulment under national legislation.
Some institutional rules of arbitration, among those most widespread, invite the arbitrator to adopt an active role in the conduct of the proceeding, recognizing that he or she enjoys wide flexibility and discretion in this field. Thus, according to ICC Rules of Arbitration 1998: 'The Arbitration Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means' (Article 20(1)). The rules governing evidence production and the hearing of witnesses are held to be among the matters to be determined 'by all appropriate means'.

It is accepted that this provision, even if it does not imply that the ICC Rules of Arbitration have adopted the inquisitorial process of the civil law, confers upon the arbitrator 'a more active role in managing and conducting the proceedings that might once have been the custom in common law jurisdictions'.

The autonomy of the international arbitrator has found the widest recognition in some recent national laws on arbitration, which have underlined specific powers and duties of the arbitrator beyond the will of the parties. Reference is made, in particular, to the German Arbitration Act 1998. Pursuant to Article 155, the arbitrator is given the right to conduct the proceedings, as well as to adopt procedures appropriate to the circumstances of the particular case, without unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. Similarly, the arbitrator is to decide whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law, a provision which has been hailed as authorizing the arbitrator to adopt the inquisitorial rather than the adversarial approach.

The English experience is of great interest, inasmuch as it confirms a clear tendency to shape an autonomous role for the arbitrator around principles which are considered essential by national legislators, such as those to act 'fairly and impartially' and to decide the case 'without unnecessary delay or expense'. As a matter of practice, the measure of autonomy enjoyed by the arbitrator derives from the particular mission entrusted to him or her, which is to resolve the dispute between the parties in their interest, but also in the interest of the community of states. The latter, as we have seen, have overcome their historical mistrust of arbitration, viewed as a derogation from the natural jurisdiction of their courts, to consider that it represents an important factor of stability and development in transnational economic relations. This implies that states expect that these functions and this role be exercised in a manner which is respectful of

basic notions of justice and of states' public policy and that the international arbitrator does not become an instrument for the violation of rules and principles considered essential by the plurality of states.

The liberalization of the rules governing arbitration allowed by states with a view to the harmonious and orderly development of international trade cannot be interpreted as an absence of rules and limits for all actors in the arbitral process, as the arbitrator bears the task and duty of ensuring respect for such rules and limits.

It is convenient at this point to examine the manner in which the arbitrator normally exercises his or her autonomous role according to practical experience. The greatest degree of liberalism characterizing international arbitration allows the arbitrator to organize the proceeding by finding inspiration in national juridical traditions, or even in a totally autonomous manner. The tendency is to organize a model of arbitration which, by establishing a strict co-operation between the arbitrator and the parties, produces an economic and efficient proceeding respectful at the same time of the equality of the parties and their right to be heard. It is at the initial phase of the proceeding that the arbitrator’s more active role may be developed, in particular through the means of the personality of the chairman. He or she needs to possess the personal and psychological qualities to enable the tribunal to listen to the parties, to understand

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13 Derains-Schwartz, supra n. 12 at p. 253.
14 The 1996 Act anticipates some of the basic principles which have inspired Lord Woolf’s reform of civil procedure in England and Wales which came into force on 26 April 1999.
15 1996 Act, s. 33(1)(b), (c). The mandatory nature of this provision means that the arbitration is subject to the right of the parties to agree any matters.
16 1996 Act, s. 34(1)(b).
18 See supra.
19 This is a subject to which prominent experts of international arbitration have devoted particular attention. Thus, Laliv has asked whether the arbitrator, who is clearly not an agent of any state although he or she does not act in a juridical vacuum, may not be characterized as an organ of the international community ‘be it the community of States or the international community of businesses … or both the international communities’ (see Laliv, “Transnational Commercial Arbitration” in Arbitration in International Commercial Cases (ICC Congress Series no. 3, 1997), pp. 271-272). For Goldman too, international arbitration is effective if, and because, in generating awards which meet that objective, it inspires confidence on the part of the international economic community and causes that community to justify this privileged way of settling international commercial cases (see Goldman, International Arbitration: A Look at the Future (ICC Publication, Paris, 1994), p. 268). Likewise according to Derains: ‘L’arbitre a des devoirs vis-à-vis des parties pour le compte desquelles il remplit sa mission, mais il en a aussi vis-à-vis de la communauté du commerce international, la société mercantile, laquelle a besoin de la stabilité et de la légitimité de l’arbitrage pour s’acquitter des missions qui lui sont confiées.’ Arbitrage international est un instrument qui sert les intérêts des parties et à cet égard, il est indispensable qu’il préserve son autonomie vis-à-vis des pays. Mais cette autonomie n’est acceptable que par la communauté internationale qui s’il est capable d’être aussi que le comité d’intérêts particuliers et s’il sait sauvegarder un certain nombre de valeurs supérieures à ces intérêts’ (see Derains, ‘Les tendances de la jurisprudence internationale’ in JD 1993, 385 at p. 846).
20 That would be the case (as experienced in arbitral practice) of an agreement between the parties to implement money laundering operations or to hide corruption.
21 Thus, an ICC award has held that it is the strict duty of the Tribunal to examine, even on its own initiative, the validity of the public policy of the applicants that are the basis for the claimants’ rights. The Tribunal must ensure itself, as a first measure and before examining the matters at issue, that these agreements are not tainted by an absolute nullity because they are illegal and contrary to public policy (cited by Racine, ‘L’arbitrage international et la pro-litigation dans les affaires d’activités de blanchiment’ in Arbitrage et publicité et commerce international à l’épreuve de la loi et de la justice, 1996, pp. 399-399). In the case Set Beav杀死 v. SNC Pridem, the arbitral tribunal was bound to respect the right of the parties to apply public policies in the interests of the parties (Note: the French courts, with the Paris Court of Appeal held that it is incumbent upon the parties to apply and enforce public policies "out of the need for the party or the public interest", and that the arbitrator "enjoys a power of order", see the relevant section of the Paris Court of Appeal, and "appel en désaccord" (cited by Derains to the said arrêt, id.)
their requirements and to shape the proceeding accordingly, without at this stage conceding anything to the opposing claims.

Experience and the peculiarities of the case will dictate the best solutions. The most appropriate venue for such an initial exchange of views is a 'pre-hearing' or 'preparatory conference'. This may offer the arbitrator the possibility of becoming better acquainted with the case and to indicate to the parties the manner in which he or she plans to conduct the proceeding. The undeniable advantage is for both the arbitrator and the parties to get to know each other and to evaluate jointly the problems to be faced, reaching, to the maximum possible extent, agreed solutions. This will permit the involvement of the parties in the administration of the dispute in a manner highly conducive to the mitigation of their confrontational attitudes and to the creation of a positive climate of cooperation by removing grounds for procedural objections and for possible attacks against the award. Equally, parties accustomed to a given procedural behaviour by reason of their diverse legal backgrounds may gain advance knowledge of the various steps through which the arbitral proceeding will develop, thus allowing them to adjust their procedural style to the requirements of the particular case, giving the best possibility of higher efficiency and a reduction of the time and costs of the proceeding.\(^2\)

This can be the first significant action in a role that may be developed by the arbitrator. He or she may be able to move from the position of a mere observer of what the parties are performing to that of an active driving force of the proceeding. Such a role will most successfully be developed where the arbitrator examines the file as thoroughly as possible, to understand the most relevant aspects of the case and the parties' expectations. This will permit the arbitrator to facilitate the emergence through the parties' arguments of the essential factual and legal elements out of the sometimes confused and undifferentiated presentation by the parties.

An essential condition for the performance of this more active and creative role is the arbitrator's availability, from the very beginning of the proceeding, to devote the necessary time to studying the parties' submissions, in contrast with the widespread tendency to postpone the examination of the case to a stage immediately preceding the first hearing.

The more active role of the arbitrator in this phase is manifested by a balanced exercise of powers aimed at avoiding the proceeding being unreasonably delayed. Even if it is true that the parties are free, should they be in agreement, to determine the duration of the proceeding, it is also true that the arbitrator is entitled to request that his or her mandate, which is made subject to a specified deadline as to the rendering of the award, be discharged without undue delay.

The most delicate task of the arbitrator is certainly that of achieving a fair balance between the requirement of efficiency of the proceeding (both in terms of expediency and cost-effectiveness) and the respect due to each party's right to plead its case fully. Reconciling speed with justice is a basic requirement of any arbitral process, given also the finality of this process and the limitations to the means of recourse against the award. Experience shows that a party, aware of the weakness of its case, may try all possible ways to slow down the pace of the proceeding by proposing new claims, by producing excessive documentation, by putting forward endless evidence requirements or by challenging the arbitrator's integrity and independence.

A second significant stage for the arbitrator's proactive role is the process of evidence acquisition. This role may lead either to the obtaining of more precise evidence on specific allegations by a party\(^2\) or to limiting evidence production which appears excessive or unnecessary for the arbitrator's decision.\(^3\) The essential premise of this power is the consideration that the evidence serves to found the arbitrator's convictions as to the final determination of the dispute and the reasons therefor. However, the international arbitrator's tendency is rather to admit all the evidence proposed by the parties, reserving evaluation of its weight at the time of the award deliberation.

In a more advanced stage of the proceeding the arbitrator may well try to define with the parties' concurrence:

1. those aspects of the case which appear sufficiently documented and as to which, therefore, there is no need to gather additional evidence;
2. issues of fact and/or law as to which there is no actual dispute, inviting the parties to concentrate their attention on the actual disputed issues;
3. the priority of importance of the issues still open, thus overcoming the parties' tendency to present each and every question in an undifferentiated manner, with the same priority being established with regard to the parties' experts' opinions.

What is important is that the rules of the game be fixed by the arbitrator reasonably in advance of the time when they are to be applied. The arbitrator must avoid the parties being caught by surprise in their legitimate expectations with regard to these procedural aspects, since this will prevent an adequate preparation of their case. Once established, the rules should remain fixed unless there are good and objective reasons to modify them. Changing the rules in mid-game may be felt by the parties to be unfair or a breach of due process.

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\(^2\) The ICC Rules of Arbitration provide that the arbitrator must prepare a procedural timetable of the proceeding on the occasion of the signature of the terms of reference or immediately thereafter (Art. 18(1)). Other organisations have developed further the question of what the arbitrator might do for the better preparation of the case. Thus, UNCITRAL has proposed a 'List of matters for possible consideration in p. 1065).

\(^3\) This particular power is conferred by certain arbitral rules. Thus, ICC Rules of Arbitration provide that 'At any time during the proceedings the Arbitral Tribunal may summon any party to provide additional evidence' (Art. 205).

\(^4\) An attack against an award on the ground that the arbitrator's refusal to hear oral evidence was 'contrary to natural justice' was rejected by the English Court of Appeal in 1977 (see Dalimex Dairy Industries v. National Bank of Pakistan [1978] 2 Lloyd's Rep. 221, commented on by Craig, Barx and Paulston, International Chamber of Commerce Arbitration (2005), p. 416, n. 2).
There may be a phase of the proceeding when the arbitrator may invite the parties to consider alternative ways for the settlement of their dispute, including direct conciliation. Even if the arbitrator's role as to this particular aspect may be questionable, it is important that the timing of the proceeding be organized so as not to preclude the parties from finding ways to agree on an alternative solution to their dispute.

In developing this proactive role, the arbitrator must avoid letting the parties believe that he or she has already reached a conclusion regarding the case, in order to escape a challenge of lack of impartiality or independence.

In conclusion, it should be underlined that the only ultimate limitation on the arbitrator's autonomous and active role in conducting the proceedings are the safeguards of impartiality and respect for due process.

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25 This role may be expected from arbitrators in countries such as China or Germany but is not encouraged by other legal systems. See Collins, "Do International Arbitral Tribunals have any Obligations to Encourage Settlement of the Disputes Before Them?" in Arbitration International 333.

26 These are commonly the grounds for challenging an international arbitrator: ICC Rules of Arbitration, Art. 11(7); LGIA Rules, Art. 10(3); Rules of the Netherlands Arbitration Institute, Art. 19(1); AAA Rules, Art. 8(1); Rules of the Russian Court for International Commercial Arbitration, Art. 24(1). These various Rules of Arbitration are published in Bernardini and Giardina, supra n. 22.