DIVERSITY IN INTERNATIONAL CONSTRUCTION ARBITRATION - IS IT TO BE AVOIDED OR WELCOMED?

This note is prompted by experiences in various forums with different procedural laws, with parties from diverse jurisdictions and with Arbitrators from different traditions. Even when arbitrating under a common set of rules, such as the ICC or LCIA Rules, the procedures adopted vary widely and often lead to one or more of the parties involved (including the Tribunal Members) operating in a format distinctly different from what they would regard as *"normal"*. This covers procedure generally, including procedural directions given at the outset of the arbitration, through the arbitration process itself and the Orders and Awards made at the conclusion, particularly as regards costs.

By contrast, the result of an arbitration (to the extent one can know or guess) is probably substantially the same whatever procedural system or rules are applied. This is at least my impression, although there is of course no way of knowing for sure. There may be an exception where, unusually, there is a dispute about the applicable law, the outcome of which may have a decisive effect on issues, such as limitation. However, even where theoretically different conclusions might result from the application of different laws, other factors of general application, such as waiver or estoppel (or their equivalents under different legal systems) may intervene to secure the same result. An example may clarify this point.

So does diversity in procedure simply amount to different approaches to achieving the same result? And if so, does the procedure matter? Whatever the answer, is diversity to be avoided?

or is it to be welcomed as giving parties from different jurisdictions the opportunity to enforce, or resist the enforcement, of rights in their own familiar way?

Procedure Generally

Apart from the universal requirement to act fairly and impartially, arbitration rules and laws are generally silent as to procedure to be adopted, in contrast to court rules of civil procedure which typically set out a more or less rigid format and timetable. With regards to procedural directions, some Arbitrators (and parties) are content to work on the barest directions simply giving dates for service of pleadings, production of documents and a hearing date; while others (generally those regarded by the English as *"Continental")* tend to give lengthy and detailed procedural orders with every step specified in detail. The different approaches may be of little consequence provided that due account is taken of the applicable rules. For example, when using the UNICTRAL Rules it is easy to forget that, while most of the Rules are simply commonsense, some have substantive effect such as Article 25.2 which says:

> *"If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the Arbitral Tribunal and to the other party the names and addresses of the witnesses he intends to present and the subject upon which and the languages in which such witness will give their testimony."*

A party who has forgotten this provision can find the hearing suddenly thrown into disarray with no obvious way out.

Pleadings and Submissions

Most arbitration Rules make some provision as to service of an initiating *"claim"* document, to be followed by a responsive document. One of the problems is that there may well have been

such an initial exchange before the Tribunal is appointed, but more detail is obviously called for. The typical English approach may be to order a formal *"Statement of Case"* followed by *"Statement of Defence and Counterclaim"* etc. A simpler and often less repetitive process adopted by many civil law jurists is simply to order an exchange of documents referred to as *"Submissions"* which contain or enlarge upon the claims, counterclaims and responses. At the end of the day the Tribunal will get the same material out of submissions as would appear from pleadings.

Although frequently not stated in any rules or directions as such, there is a generally recognised rule that parties should be kept to the arguments advertised in their submissions and most parties recognise that they cannot expect to run a materially different case at the hearing. The juridical basis for this convention lies in the extent of the Tribunal's jurisdiction but, surprisingly, it is exceptional for such arguments to be raised.

One practical and significant point of diversity is whether pleadings or submissions should be exchanged sequentially (the normal approach) or by simultaneous exchange. There can be advantages in the latter where both parties are pursuing initially independent claims so that the procedural order would take the following form:

1. Each party to serve its positive Statement of Case by date X.

2. Each party to serve its Responsive Case by date Y.

3. Each party to serve a Reply Submission to the Responsive Case by date Z.

Such an approach in theory reduces the time taken by half. The procedure can certainly be useful in getting a large and complex case into motion without the usual very long delays.

Evidence, Factual and Expert

The rendering of evidence into written statements is now universal. The advent of word processing now means that Arbitrators are sometimes overwhelmed by huge volumes of written evidence dealing with every detail of the dispute, often involving serious overlapping and repetition. This is in stark contrast to the position only 30 years ago when evidence was generally oral and Arbitrators suffered from having too little evidence. The task now is to separate out what matters and where the parties are genuinely at issue.

Expert evidence will usually be the subject of separate directions aimed at identifying respective pairs of experts dealing with the same issues. One significant point of diversity is in the type of challenge mounted by opposing Counsel to expert witnesses. The English approach, generally adopted in civil law jurisdiction with increasing familiarity, is to seek to rebut the expert by traditional cross-examining methods. An entirely different approach frequently adopted by US Attorneys is to challenge the qualification of the witness by seeking to discredit his credentials or in some other way to impugn his standing whilst otherwise ignoring the detail of his evidence. This can be somewhat unnerving to an Arbitrator who has not previously encountered such an approach. The instinctive reaction of the non US Arbitrator is to give the experts' testimony

rather less weight, if the challenge is successful, but not to ignore it unless satisfied that it is plainly wrong or irrelevant.

Another surprising point of diversity relating to both expert and factual evidence is in the exclusion of witnesses from the hearing room. Some jurisdictions regard it as axiomatic while in others it would be regarded as highly unusual. The former category, curiously, include Scotland and at least some civil law jurisdictions, while the latter include England and most other common law jurisdictions. The difficulty for the Arbitrator is that, if faced by party representatives from the same jurisdiction, they are likely to agree whether or not witnesses should be excluded despite the Tribunal perhaps taking the opposite view.

Where witnesses are excluded, they are generally allowed to remain in the hearing room once their evidence has been completed. This often leads to a problem of giving equal treatment since the Respondent, when cross-examining the Claimant's witnesses, will not have his own witnesses (including experts) in the room to assist him, whereas the Claimant's Counsel will have this advantage. The Arbitrator must make sure that there is no challenge to his impartial handling of the case on this ground, or if there is, find a way to deal with the imbalance.

Disclosure of Documents

This is perhaps the most diverse area under different procedural laws and practices. At one extreme one may have disclosure limited to documents relied on by the party in question with no other documents being produced; and at the other extreme, disclosure of everything backed up by oral deposition proceedings. The latter represents US Court style discovery and in the former

the position in some civil law jurisdictions. In most cases there is some middle ground represented by the disclosure of relevant documents specifically identified by the opposing party, which may extend to relevant classes of documents.

A real problem for International Arbitrators is to achieve a proper balance where one party is likely to give full and genuine discovery, aided and guided by experienced lawyers; while the other party may not properly or genuinely comply, whatever Order is made. In such a case the Tribunal has a problem to secure equal treatment and reciprocity in the disclosure process.

Discovery in Construction Arbitration can produce huge volumes of documents and a stream of procedural disputes about which document should be disclosed and which not. Where a Tribunal is located in a different country, this can pose serious and burdensome problems. A solution that has been adopted with success is to appoint, with the agreement of both parties, a *"Discovery Arbitrator"* to deal with these disputes at a local level. The precise juridical basis of the decisions of the Discovery Arbitrator may be open to some analysis, but the process has worked well in at least one substantial arbitration.

Choice of Applicable Law

This relates to the law to be applied to the substantive issues, rather than the procedural law. As noted above, there may be cases in which the outcome of the dispute is dependant upon the applicable law, one example being the application of the law of limitation. Even where the parties purport to choose the applicable law the position may be complex. For example, if the chosen law is English, the common law of England regards limitation for some purposes as

procedural, and therefore dependent on the law of the forum. English law as applied in England, by contrast, generally applies the limitation rules of the *lex causae*[1].

Where the parties have not chosen the applicable law, both the ICC Rules (Article 17.1) and the LCIA Rules (Article 22.3) require the Tribunal to apply *"the rule of law which it considers appropriate"* (the wording of the two Articles is almost identical). Thus, the Tribunal is not simply required to determine the proper law of the Contract in accordance with conventional rules of conflict of laws (which may also be in dispute).

The net result in such a situation, even where the choice of applicable law is crucial to the outcome, is that the matter is left to the Arbitrators to determine as they think *"appropriate"*. The commentaries on the respective rules present material and authorities on the way in which the Tribunal may approach the question, but it provides another example of a situation in which diversity from different Tribunals can be anticipated. A possible way round this element of diversity is the application of what are generally regarded as universally applicable remedies known under English law as waiver and estoppel. Such principles will be found in most legal systems under different names, and may allow different Tribunals to reach the same conclusion, where justified by the merits..

Costs

This often represents a very substantial proportion of the sums in dispute between the parties, particularly in construction arbitrations. Under the ICC Rules the Tribunal is required to decide how the costs are to be borne (Article 31.3) but with little or no guidance. The LCIA Rules in

[1] Foreign Limitation Period s Act 1984.

contrast provide that, subject to any agreement of the parties, the award of costs *"should reflect the parties' relative success and failure ... except where ... this general approach is inappropriate"*. This reflects a similar (but more detailed) approach set out in the UNCITRAL Rules. This approach is now generally accepted, but can still result in diverse application, for example where both parties succeed in part on claim and counterclaim.

What remains very uncertain is the attitude of the Tribunal towards the ascertainment or determination of the amount of costs to be recoverable out of the total costs extended by the successful party. In this regard Tribunals are known to vary between awarding the whole of the costs incurred and only a modest proportion (perhaps 30%) of those costs on some notional basis that the costs incurred are excessive. This can have a major effect on the economics of the dispute process.

Conclusion

Whilst diversity in general may be something to be welcomed, uncertainty of outcome is not. All the above matters are eminently capable of agreement between the parties in such manner as to bind the Tribunal. In some cases the Tribunal itself may prefer to retain its discretion but in others there may be a case for the parties to be reminded in a timely fashion that they should seek to agree such matters so that the unpredictability of the outcome is thereby reduced.

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