PARTY AUTONOMY *VS.* CASE MANAGEMENT IN INTERNATIONAL ARBITRATION

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ÖZET

Yazar, uluslararası tahkimin iki ilkesi arasındaki ilişkiyi tartışmaktadır: Bir yanda irade muhtariyeti diğer yanda ise hakemin basiretli bir dava yöneticisi olarak tahkim yargılamasını adil, hızlı ve gereksiz masraflara yol açmayacak şekilde yürütmesi yükümlülüğünü konu edinen ilke. İlk ilke hemen hemen evrensel olmakla birlikte, ikinci ilke açık bir şekilde ilk defa 1996 tarihli İngiliz Tahkim Kanunu'nda ifade edilmiştir. Bununla birlikte, ICC Kuralları'nın (2012) son reformu ve Kurallar'ın, uluslararası tahkim uygulamasındaki büyük önemi sonucunda hızla yayılmaktadır. Bu ilkeler arasında bir etkileşim söz konusudur. Söz konusu etkileşim, özellikle hakem heyetinin halihazırda kurulmuş olduğu durumlarda dahi tarafların, hakemlere danışmaksızın usulî düzenlemeler konusunda anlaşmalarını mümkün kılan ülke hukuklarında ön plana çıkmaktadır. Özellikle İngiltere'de, deneyimli bir hakemin, taraflara üzerinde hemfikir oldukları usulî anlaşmanın ne yol gösterici ne de makul olduğunu bildirme konusunda gereken beceriye, karizmaya ve yetkiye sahip olduğunu söylemek genel olarak mümkün gözükmektedir.

Yazarın görüşüne göre hakemin tarafların anlaşmasını dikkate almamasının, tüm ülke hukuklarında aynı sonucu doğurduğunu söylemek mümkün gözükmemektedir. Çözüm, tahkim diplomasisinde değil; hukukta aranmalıdır; gerekli olduğu takdirde, hakemlerin makul olmayan usulî anlaşmaları dikkate almama konusunda yetkili olmaları gerektiğini kabul etmenin zamanı gelmiştir; şüphesiz ki bu, son derece ihtiyatlı yaklaşılması gereken ve usulî anlaşmaya uyulmasının, hakemlerin görevlerini yerine getirmesini engelleyeceği ve istenmeyen sonuçlara neden olacağı durumlarda başvurulması gereken bir istisna olmalıdır. Bu tür bir istisnaya başvurulmadan önce tahkim yeri hukukunun konuya ilişkin yaklaşımı da

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değerlendirilmesi gereken noktalardan biridir; zira özellikle UNCITRAL Model Kanunu'nu benimsemiş olan ülke hukuklarında, taraflar arasındaki usulî anlaşmanın hakemlerce dikkate alınmamış olması hakem kararının iptali sonucunu doğuran bir sebep olabilmektedir.

Anahtar Kelimeler: Uluslararası tahkim, tahkim usulü, irade muhtariyeti, yargılamanın yürütülmesi, hakemlerin yetkisi.

ABSTRACT

The author discusses the relationship between two rules in international arbitration: party autonomy, on the one hand, and the principle whereby an arbitrator has a duty to act as a good case manager and to conduct the arbitration fairly, expeditiously and without unnecessary costs on the other. Whereas the first rule is virtually universal, the second has been clearly spelt out in the English Arbitration Act 1996, for the first time. However, it is quickly spreading as a consequence of the recent reform of the ICC Rules (2012) and their considerable influence on international arbitral practice. There is a tension between these principles. This is so especially in those jurisdictions in which the parties may agree on procedural arrangements without consulting the arbitrators, even in case the arbitral tribunal has already been constituted. Received wisdom has it, especially in England, that an experienced arbitrator has the skills, the charisma and the authority required to let the parties know that their procedural arrangement, agreed as it may have been, is neither conducive nor sound.

The author's answer is that the raising of eyebrows by an arbitrator does not, by far, attract the same consequences in all jurisdictions. The solution should not be looked for in arbitral diplomacy but in the law; the time has come to accept that arbitrators must be entitled to depart from unsound procedural agreements when it is right to do so; this is, of course, an exception to be resorted to most sparingly and to be applied only in those cases in which abiding by an agreed arrangement on a matter of procedure prevents the arbitrators from correctly carrying out their duties and would produce a perverse result. The position of the law at the place of arbitration is one of the points to be considered before using such an exception, especially in UNCITRAL Model Law jurisdictions, in which the disregard by the arbitral tribunal of a party agreement on procedure is a ground on which an award may be set aside.

Keywords: International arbitration, arbitral procedure, party autonomy, case management, power of arbitrators.

I. INTRODUCTION

The simple title of this lecture concerns an issue of policy of some importance which requires consideration of two principles of law. The first principle is the generally accepted rule of party autonomy as to procedure in international arbitration. The second principle may be regarded as an emerging rule (albeit a rapidly emerging one, as we will see): it is the rule saying that arbitrators are in all cases to act as diligent case managers, to conduct an arbitration fairly and do their utmost best to avoid unnecessary delay or expense. This paper discusses the question how conflicts between these two principles are best solved as a matter of law and practice.

This paper deals with each principle and briefly recalls the provisions contained in international treaties and national legislation which one should bear in mind, as well as certain recent arbitration rules.

Then the main point will be discussed, which is about the possible tensions one may encounter in practice between party autonomy and good case management, between the parties' right to agree on points of procedure as they deem fit and the arbitrator's reluctance to abide by agreed points of procedure found to be unacceptable obstacles in the way of his or her duty to conduct the arbitration in a fair manner and avoid unnecessary delay and expense. This paper discusses practical ways to avert and, where that proves impossible, solve conflicts between agreed points of procedure and the requirements imposed by the arbitrator's duty to act as a diligent case manager in accordance with applicable principles of law. A few examples will be discussed to ensure that the discussion is based both on law and practice.

II. PARTY AUTONOMY AS TO PROCEDURE IN INTERNATIONAL ARBITRATION

A definition may be appropriate at this stage of what is generally understood by "*party autonomy as to procedure*" in international arbitration. It is the parties' right to agree on points (or rules) of procedure, that is to say the manner in which the arbitration is to be conducted by and before the arbitrators. This concept of agreed points of procedure is distinct from that of the system of law governing the arbitration as proceedings (and in particular matters such as the fundamental duties of an arbitrator, the requirements in order for an

arbitral tribunal to be validly constituted and for an award to be valid and binding), often referred to by the Latin expression *lex arbitri*[1].

1. International Treaties

The Earlier Treaties. The Geneva Protocol on Arbitration Clauses (1923) provides in Section 2 that "[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties *and* by the law of the country in whose territory the arbitration takes place" (italics added). The Geneva Convention on the Execution of Foreign Arbitral Awards (1927) provides in Article 1 that "to obtain such recognition or enforcement, it shall, further, be necessary:— (...) (*c*) [t]hat the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties *and* in conformity with the law governing the arbitration procedure" (italics added).

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (NYC). It may be convenient to recall, first of all, that the NYC does not deal with arbitration as a whole, but only with arbitration agreements (not mentioned in its title due to an oversight) and the recognition and enforcement of foreign arbitral awards. This international treaty has been ratified by and is in force in a very significant number of countries, including Turkey[2].

The provisions of the NYC move away from the formula referring to the parties' agreement *and* the law in force at the place of arbitration used by the earlier treaties to which reference has just been made. Article V(1)(d) of the NYC provides that the recognition and the enforcement of an award may be refused if "... the arbitral procedure was not in accordance with the agreement of the parties, or, *failing such agreement*, was not in accordance with the law of the country where the arbitration took place"[3] (italics added). Commentators take the view that this

(1) *Poudret*, J.-F./Besson, S.: Comparative Law of International Arbitration, London 2007, p. 458 §523.

(2) A list of all countries in which such treaty is in force is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XXII-1&chapter=22&lang=en#Participants.

(3) Compare Art. V(1)(d) NYC and the formula "in accordance with the agreement of the parties" with Art. V(1)(a) NYC and the formula "... the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon,

provision applies or may apply *mutatis mutandis* as a choice of law rule (a conflicts rule) dealing with arbitral procedure[4]. If there is an agreement between the parties as to the procedure, Article V(1)(d) of the NYC would let such agreement prevail over the law at the place of arbitration.

The (Geneva) European Convention on International Arbitration (1961) (EUC). The European Convention is the sole treaty in force that deals with arbitration as a whole, albeit not in a comprehensive manner. It was ratified by, and is in force in, Turkey[5]. Article IV(1) of the EUC provides that "[t]he parties to an arbitration agreement shall be free to submit their disputes *(a)* to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of such institution, *(b)* to an *ad hoc* arbitral procedure; in this case they shall be free *inter alia ...(iii)* to lay down the procedure to be followed by the arbitrators"[6].

Conclusion on Party Autonomy under the International Treaties. The most recent international treaties refer to the system of law, in force at the place of the arbitration, with respect to arbitral procedure only for the case in which there is no agreement between the parties with respect to

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under the law of the country in which the award was made". The first formula refers to a procedural agreement, not an agreement to select the law applicable to the arbitral procedure; the second formula refers to the parties' agreement as the criterion for the determination of the proper law of the arbitration agreement.

This distinction was discussed by commentators who took the view that the arbitral procedure need not in principle be governed by any system of law, but simply by the parties' agreement, which will be enforced under the NYC and the (Geneva) European Convention on International Arbitration (1961) (EUC), see *Fouchard*, P.: L'arbitrage Commercial International, Doctoral Thesis, Paris 1964, p. 328-329 §506, 332 §512 and 335 §515; *Van Den Berg*, A. J.: The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation, Deventer 1981, p. 38-39; *Nacimiento*, P.: Commentary of Art. V(1)(d) NYC, in: *Kronke*, H./*Nacimiento*, P. et al. (Eds.), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, The Hague 2010, p. 283.

(4) See *Goldman*, B.: Les Conflits de Lois Dans L'arbitrage International de Droit Privé, Recueil des cours [Hague Academy of International Law], 1963 II [109], p. 349-483, 385, 461-462; *Born*, G. B.: International Commercial Arbitration, New York 2009, vol. 1, p. 1254-1260; *Van Den Berg*, p. 38-39, 322-331; *Nacimiento*, p. 283-284; *Poudret/Besson*, 2007, p. 838-841.

(5) A list of all countries in which such treaty is in force is available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en.

(6) *Fouchard*, p. 333 §513.

arbitral procedure. There is therefore an obligation on contracting states, courts and arbitrators to implement the parties' agreements with respect to procedure. Yet the provisions contained in these international treaties are fairly general and the question of principle which they do not address is whether the parties' right to agree on procedural arrangements is unlimited and, in case the answer to that question is in the negative, what are the limitations or qualifications which affect the parties' right to agree on points of procedure under the particular system of law which is to be considered in a particular case as the *lex arbitri*.

2. National Legislation

Codification of the Law of Arbitration in Recent Decades. Selected Jurisdictions. In Turkey, the International Arbitration Act (No. 4686) is just ten years old. If one turns to other jurisdictions, the first wave of new enactments took place in the 1980s, starting with a major piece of legislation in 1981 in France (with an update in 2011)[7], followed by the UNCITRAL Model Law in 1985 and then Switzerland in 1987 [8]. This paper may occasionally refer to other systems of law, but for present purposes it will concentrate on codifications having some influence beyond their country of origin. If one then leaves the 1980s and considers the following decades, the codification which is worthwhile mentioning is the English Arbitration Act 1996. As is well known, some of those statutes distinguish between domestic and international arbitration and contain a specific set of provisions for international arbitration, as is the case in France, Switzerland and Turkey; some others contain provisions which govern arbitration as a whole without that distinction as is the case of the UNCITRAL Model Law.

Party Autonomy with Respect to Procedure in National Law. The various statutes on arbitration grant the parties the right to agree on

(7) Decree No. 2011-48 of 13 January 2011. The 1981 Decree (Decree No. 81-500 of 12 May 1981) codified the existing judicial practice based on the decisions by the Cour de cassation.

(8) The Swiss law of international arbitration is contained in the codification of the Swiss private international law, in Chapter 12 of the Federal Private International Law Act, 1987, entered into force on 1 January 1989. The new Federal Code of Civil Procedure (2008) entered into force on 1 January 2011, contains provisions on domestic arbitration.

procedural matters; this is the case in particular of English law[9], French law[10], Swiss law[11], Turkish law[12] and the UNCITRAL Model Law[13].

Limitations on Party Autonomy. Mandatory Provisions in General. Party autonomy is limited by mandatory rules according to a general principle of law, as expressly provided in English[14] and Turkish[15] law as well as the Model Law[16].

Equal Treatment and the Parties' Right to Put their Case before the Arbitrator. In other systems, there is no provision dealing with mandatory provisions of law in general, but an express provision of law states that any procedural agreements between the parties are subject to the arbitrator's duty to grant the parties equal treatment and to the parties'

(9) Sect. 1(b) of the Arbitration Act, 1996, provides that the parties should be free to agree how their disputes are resolved, subject only to safeguards as are necessary in the public interest. Then Sect. 34(1) reserves the right of the parties to agree on procedural and evidential matters and Sect. 38(1) states that the parties are free to agree on the powers exercisable by the arbitral tribunal. Sect. 4(1) states that the mandatory provisions listed in Schedule 1 have effect notwithstanding any agreement to the contrary.

(10) Art. 1509 of Decree No. 2011-48 of 13 January 2011 states that the arbitral procedure may be dealt with in "the arbitration agreement."

(11) Art. 182(1) of the Federal Private International Law Act, 1987, states that the parties may agree on arbitral procedure directly or by reference to arbitration rules or by referring to a procedural law of their own choice.

(12) Art. 8(A) of the Turkish International Arbitration Act of, 2001, states that the parties are free to agree on procedural rules by reference to a law or institutional rules, subject, however, "to the mandatory provisions of this Act."

(13) Art. 19(1) of the UNCITRAL Model Law states that the parties are free to agree on the procedure to be followed "subject to the provisions of this Law."

(14) Sect. 1(b) of the Arbitration Act, 1996, provides that the parties should be free to agree how their disputes are resolved, subject only to safeguards as are necessary in the public interest. Then Sect. 34(1) reserves the right of the parties to agree on procedural and evidential matters and Sect. 38(1) states that the parties are free to agree on the powers exercisable by the arbitral tribunal. Sect. 4(1) states that the mandatory provisions listed in Schedule 1 have effect notwithstanding any agreement to the contrary.

(15) Art. 8(A) of the Turkish International Arbitration Act, 2001, states that the parties are free to agree on procedural rules by reference to a law or institutional rules, subject, however, "to the mandatory provisions of this Act." See also *Akıncı*, Z.: Arbitration Law of Turkey: Practice and Procedure, New York 2011, p. 84-85.

(16) Art. 19(1) of the Model Law provides that the parties' right to agree on the arbitral procedure is "subject to the provisions of this Law."

right to put their case before the arbitrators. That is the case in French law[17], the Model Law[18], English law[19] and Swiss law[20].

Further Statutory Limits on Party Autonomy. (1) Procedural Agreements Subsequent to the Constitution of the Arbitral Tribunal. In some systems of law, provisions of law limit party autonomy in some further respects (the limitations arising from mandatory provisions are always to be implied even where no specific provision has been enacted to that effect). One limitation is expressly provided for in Italian law with respect to the time when the parties make their agreement as to a point of procedure and the form requirements to be complied with: agreements made *prior to* the constitution of the arbitral tribunal are in principle binding on the tribunal, provided that they are contained in the arbitration agreement or they are made in writing. *A contrario*, procedural agreements made after such time would seem to require approval by the arbitral tribunal[21].

In French law, agreements on points of procedure made by the parties after the constitution of the arbitral tribunal are not binding on the arbitrators; however, this proposition is based on learned opinion rather than judicial decisions[22].

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(17) Art. 1510 of Decree No. 2011-48 of 13 January 2011 provides that the arbitrator shall grant equal treatment and comply with the parties' right to put their case before him or her irrespective of the procedure adopted by the parties or the arbitrator.

(18) Art. 18 of the Model Law.

(19) Sect. 33(1)(a) and 33(2) of the Arbitration Act 1996.

(20) Art. 182(3) of the Federal Private International Law Act 1987.

(21) Art. 816bis of the Italian Code of Civil Procedure (2006). The latest commentary published on Italian law does not mention any decisions in point, *Benedettelli*, M. V./*Consolo*, C./*Radicati di Brozolo*, L. G.: Commentario Breve al Diritto Dell'arbitrato Nazionale ed Internazionale, Padua 2010, ad Art. 816bis, p. 190 §13.

(22) *Mayer*, P.: Le pouvoir des arbitres de régler la procedure. Une analyse comparative des systèmes de civil law et de common law, Revue de l'Arbitrage 1995, p. 163-184, 183; Prof. C. Jarrosson appears to hold the same view (albeit expressed in more tentative language) in his note on Soditif, Cass. civ. 1re, 8 March 1988, Revue de l'Arbitrage 1989, p. 481-489, 488; *Pinsolle*, P./*Kreindler*, R. H.: Les Limites Du Rôle De La Volonté Des Parties Dans La Conduite De L'instance Arbitrale, Revue De l'Arbitrage 2003, p. 41-63, 50, take the view that whilst the parties cannot impose a change of the rules of the game on to the arbitrator after the acceptance of the appointment by the arbitrator, the arbitrator who is unable to abide by such a subsequent agreement should resign. As will be explained in more detail below, resignation (often referred to as an

(2) Other Statutory Restrictions. The Swedish law of arbitration provides that the arbitrator shall in principle proceed in accordance with the parties' agreement as to procedure, unless (literally) the tribunal finds that "something prevents" compliance with the parties' agreement[23].

Swiss Law. As just mentioned, Article 182 of the 1987 Act contains no express limitation on party autonomy except the mandatory procedural guarantees represented by equal treatment and the right to be heard (or the parties' right to put their case before the arbitrators). There are no cases decided to date on whether there are any further limitations on party autonomy apart from the limitation imposed by the mandatory provision in Article 182(3) of the 1987 Act. The opinions expressed by commentators may be summarised as follows.

The First View: Pacta Sunt Servanda. The first group of commentators hold the view that arbitrators have abide by with any procedural agreements, however repugnant, unreasonable or counterproductive such agreements may be, even where such agreements were made in the course of the arbitration. As this paper will attempt to show, such a view is as bold as it is (mostly) unsupported by any legal analysis, and it is, in the present writer's view, devoid of legal foundation as a matter of Swiss law: by focussing on the absence of express qualifications or limitations in Article 182 of the 1987 Act, this view elevates form over substance.

Early commentators on the Concordat (the old law of domestic arbitration) took the view that an arbitrator was bound by procedural agreements made by the parties even after the tribunal had been constituted and even where such agreements modified directions given by the arbitral tribunal, who could always resign if need be[24].

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option also by English commentators) should be considered only in the most exceptional cases and with utmost reluctance for it is hardly a solution.

(23) Sect. 21 of the Swedish Arbitration Act, 1999. See also *Sekolec*, J. /*Eliasson*, N.: The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: A comparison, in: *Heuman*, L./*Jarvin*, S. (Eds.): The Swedish Arbitration Act of 1999, Five Years On: A Critical Review of Strengths and Weaknesses, New York 2006, p. 171-250, 213-214; *Heuman*, L.: Arbitration Law of Sweden: Practice and Procedure, New York 2003, p. 251-253; *Madsen*, F.: Commercial Arbitration in Sweden, Stockholm 2006, 2nd ed, ad Sect. 21 of the Swedish Arbitration Act, p. 149-160.

(24) *Rüede*, T./*Hadenfeldt*, R.: Schweizerisches Schiedsgerichtsrecht, Zurich 1993, 2nd ed., 205; *Jolidon*, P.: Commentaire du Concordat Suisse sur l'arbitrage, Berne 1984, p. 343.

Commentators on the law of international arbitration essentially reach the same conclusion, although it is fair to mention that some do appear to have some qualms[25] which do not, however, prevent them from endorsing the general proposition that procedural agreements made in the course of an arbitration are sacrosanct[26].

The Second View: Exceptional Limitation on Party Autonomy. Other commentators take a different view, considering that "too much emphasis on the primacy of party autonomy is not in the best interest of an efficient settlement of the dispute."[27]. They go on to state[28] that it is doubtful whether the arbitral tribunal is bound by procedural agreements of the parties under all circumstances; for example, if they jointly agree on "unreasonably long deadlines or on an inappropriate taking of evidence." The most outspoken advocate of some limitations imposed on party autonomy is *Professor Andreas Bucher* in his recent commentary on Article 182 of the 1987 Act[29]. *Professor Bucher* takes the view that procedural agreements are simply a means to an end; an arbitrator may therefore exceptionally depart from an agreed point of procedure when the decisionmaking process so requires and no reasonable justification is provided by the parties to satisfy the arbitrator that their agreement on a

(25) *Schneider*, M. E., Art. 182 of the 1987 Act, in: *Honsell*, H./*Vogt*, N. P./*Schnyder*, A. K./*Berti*, S. V. (Eds.): Internationales Privatrecht, Basle 2007, 2nd ed., p. 1596 §10. This commentator accepts that procedural agreements between the parties must take into account also the rights and interests of the arbitrators, but he eventually concludes that procedural agreements made after the constitution of the arbitral tribunal do not require the arbitrators' consent; *Kaufmann-Kohler*, G./*Rigozzi*, A.: Arbitrage International. Droit et Pratique, Berne 2010, 2nd ed., p. 346 §540, who appear hesitant to take all the consequences following from their conclusion and add that well-advised parties will refrain from imposing procedures on arbitrators which the arbitrators deem inappropriate.

(26) *Lalive*, P./*Poudret*, J-F./*Reymond*, C.: Le Droit De L'arbitrage Interne et International en Suisse, Lausanne 1989, ad Art. 182 of the 1987 Act, 350; *Rüede/Hadenfeldt*, p. 199-200. See also footnotes Nos. 26 and 27.

(27) *Berger*, B./*Kellerhals*, F.: International and Domestic Arbitration in Switzerland, London 2010, p. 285 §983.

(28) *Berger/Kellerhals*, p. 285 §983 footnote 13.

(29) *Bucher*, A.: Art. 182 of the 1987 Act, *in: Bucher, A.*(Ed.): Commentaire romand. Loi sur le droit international privé. Convention de Lugano, Basle 2011, p. 1595 §9-101595 §9-10.

point of procedure is sound, the arbitral tribunal must be free to decline to perform a procedural act requested by both parties[30].

3. Arbitration Rules

Arbitration rules are very important in practice. Certain international treaties and statutes expressly acknowledge the existence of institutional arbitration[31]. Aside from that, certain treaties and statutes specifically mention institutional arbitration rules in connection with the parties' right to agree on points of procedure[32].

Arbitration rules generally restate the principle that the parties are free to agree on the procedure to be followed, but with some qualifications: by agreeing to institutional rules the parties also agree that there will be a specific institution in charge of supporting and supervising their arbitration and that institution will have the final say on whether a derogation made by parties from "its" arbitration rules is permissible or not.

The ICC Rules of Arbitration (2012). Article 19. The ICC Rules of Arbitration (2012) for example state that the proceedings shall be governed by any rules settled by the parties "where the Rules are silent," a provision which the 2012 edition has not modified from the previous 1998 edition[33]. As noted by commentators, the wording of this provision

(30) Conversely, an arbitrator may decide that a procedural step which the parties have agreed to dispense with is nevertheless necessary. Example 2b in paragraph 0 below affords an example: where the parties have agreed that a point may be dealt with summarily, an arbitrator may take a different view, especially in cases likely to involve issues of public policy. Another example is afforded by the parties' agreement to dispense with a hearing where the claimant seeks payment of a commission and the respondent defends to the action contending that the payment is improper; an arbitrator may in such case decide to convene a hearing and overrule the parties' agreement.

(31) Arts. I(1)(b) and IV(1)(a) of the European Convention (1961); Art. 2(d) and (2) of the UNCITRAL Model Law (1985/2006); Arts. 1508 and 1509 of French Decree No. 2011-48 of 13 January 2011; Sect. 4(3) of the English Arbitration Act, 1996; see also Sects. 5(3) and 6(2). See also Arts. 832 et seq. of the Italian Code of Civil Procedure (2006).

(32) Art. IV of the European Convention on International Arbitration (1961) (EUC); Art. 182 of the Swiss Federal Private International Law Act 1987; and Art. 8(A) of the Turkish International Arbitration Act of 2001.

(33) Art. 19 of the ICC Rules (2012); Art. 15(1) of the ICC Rules (1998). See e.g. *Poudret/Besson*, p. 2007, 460 §528.

is more restrictive than the actual practice of the ICC, in which procedural agreements are not regarded as inadmissible in principle[34].

The Swiss Rules of International Arbitration (2012). The parties' right to agree on procedural points is not mentioned in any general provision in the Swiss Rules of International Arbitration[35]. That is understandable if one considers that the statutory background against which the Swiss Rules were drafted is Chapter 12 of the 1987 Act and Article 182 in particular. The parties' agreement is mentioned only in special provisions, on matters such as the language of the arbitration[36].

The UNCITRAL Rules (2010). The UNCITRAL Rules are not considered to be proper institutional rules, since the parties operating under UNCITRAL rules must agree on the designating and appointing authorities within the meaning of Article 6 in order for an arbitral institution to be in charge of the arbitration. There is, in other words, no arbitral institution which has a kind of monopoly to supervise UNCITRAL arbitrations in the same way in which, say, the ICC or the Arbitration Court of the Swiss Chambers are called upon to supervise an ICC or a Swiss Rules arbitration, respectively. This is also the reason for which party autonomy has had a pre-eminent role in the UNCITRAL Arbitration Rules: the parties are entitled to modify the UNCITRAL Rules as they deem fit[37].

Conclusion on Party Autonomy. Whereas international treaties are concerned with the very principle of party autonomy as to procedure, national laws are also concerned with the manner in which party autonomy as to procedure is to be constrained. After the arbitral tribunal

(34) Art. 19 of the ICC Rules (2012); Art. 15(1) of the ICC Rules (1998). See e.g. *Poudret/Besson*, 2007, p. 460 §528. The ICC International Court of Arbitration's practice is to the effect that only a departure from provisions in the ICC Rules which are regarded fundamental would not be accepted; to give one trite example, if the parties were to agree that no terms of reference are necessary, the Court would not accept that derogation and would ask the parties to decide whether they agree to proceed in accordance with the ICC Rules or then opt out.

(35) See the general provision in Art. 15 of the Swiss Rules of International Arbitration (2012).

(36) Art. 17 of the Swiss Rules of International Arbitration (2012).

(37) Art. 1(1) UNCITRAL Rules (2010). See *Patocchi*, P. M. /*Niedermaier*, T.: UNCITRAL Schiedsgerichtsordnung, in: *Schütze*, R. A. (Ed.): Institutionelle Schiedsgerichtsbarkeit. Kommentar, Cologne 2011, 2nd ed., p. 713-867, ad Art. 1 UNCITRAL Rules, p. 730 §20-25.

has been constituted, the parties are deemed to have surrendered at least some of their autonomy to the arbitrators; how this general thought will take shape in each arbitration will depend in particular on the arbitrator's powers under the *lex arbitri* and the arbitration rules selected by the parties. Whether the requirements of the sound administration of justice are sufficiently important to constitute a limitation on party autonomy in international arbitration is the topic with which the following sections of this paper will attempt to deal.

III. THE ARBITRATOR'S DUTY TO ACT AS A DILIGENT CASE MANAGER

The arbitrator's duty to act as a diligent case manager is not set out in any international treaty and the sources to be considered are the national legislation and the arbitration rules.

1. The Arbitrator's Duty to Act as a Diligent Case Manager in National Legislation

General Principles vs. Specific Rules. The first distinction one should draw is that between general principles and specific provisions.

General Principles. Common wisdom has had it until some thirty years ago that arbitration was inexpensive, quick and confidential. There have been some judicial decisions saying that arbitration was a procedure to be conducted with reasonable despatch (I will leave confidentiality aside for present purposes), but that was a descriptive more than a prescriptive proposition, a statement which was not made when any remedial action had to be taken to ensure that arbitration would in fact remain quick. Therefore, those judicial statements[38] have hardly had any significant consequence in practice.

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(38) In Switzerland due despatch is traditionally regarded as one of the purposes of arbitration and in recalling that purpose the courts have stated that the parties were bound by the rules of good faith to abstain from any kind of conduct which could unduly delay the conduct of an arbitration, see the decisions in S. v. G. SA, BGE/ATF 111 Ia 259, 262, November 8, 1985 (obiter), El Nasr Export Import & Co v. Anglo French Steel Corp. SA, BGE/ATF 109 Ia 81, 83, February 18, 1983, and Edok SA et al. v. Hydromechaniki Sàrl and Eupalinos SA, BGE/ATF 108 Ia 197, 201, May 10, 1982; cantonal case law: ASA Bull. 1995, p. 235, 242-243. Avoiding unnecessary delay in the proceedings is the same as having an obligation of despatch and there is therefore in Switzerland a duty on the parties which is akin to that imposed by Sect. 40(1) of the English Arbitration Act, 1996 (*Mustill*, M. J./*Boyd*, S. C.: Commercial Arbitration.

The English Arbitration Act 1996. Common wisdom being insufficient to ensure that arbitral proceedings should be conducted with due despatch, legislation stepped in and it all started in England, where the codification of the law of arbitration followed a significant reform of the administration of civil justice in which senior judges were able to set new ideas in motion; considerations of procedural efficiency were put on the legislative agenda and finally onto the statute book, but those general developments are beyond the scope of this paper.

The Arbitrator's Duty to Avoid Unnecessary Cost and Delay. In the English Arbitration Act 1996, Parliament put forth the principle that arbitration is to be conducted "without unnecessary expense or delay" upfront in Section 1(a), and it is interesting to note that the principle of party autonomy follows in Section 1(b). Then the main provision with respect to the arbitrator's duty to avoid delay and unnecessary costs is in Section 33 which reads as follows:

Section 33. General duty of the tribunal.

1 The Tribunal shall-

a. act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

b. adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined.

2 The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

This provision is important in more than one respect. Firstly, it sets out a "general duty" and it is thus a "vital and central provision"[39] in

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2001 Companion Volume to the Second Edition, London 2001, p. 33 is therefore to be supplemented in this respect). This principle was resorted to by the Swiss courts and arbitrators sitting in Switzerland in connection with the rules on stay of proceedings; aside from the case in which there is an agreed request for a stay, where the scales are even, then an arbitrator should in principle decline a stay of proceedings.

(39) *Harris*, B./*Planterose*, R./*Tecks*, J.: The Arbitration Act 1996. A Commentary, Oxford 2007, 4th ed., p. 166 §33B.

that the duty in question does not arise simply as a matter of contract, but it is a statutory duty binding on any arbitrators sitting in an arbitration governed by the Arbitration Act[40]. The English Parliament did not confine itself to stating that such duty was general, which means that it is to be borne in mind and be discharged throughout the arbitration proceedings[41]. The provision spells that out in its second sub-section, stating that the tribunal must comply with such duty ("shall" comply), and it singles out the main occasions on which arbitrators must discharge that duty: the provisions specifically mentions the arbitrator's decisions on matters of procedure, and those on matters of evidence, and it ends by recalling that arbitrators are bound to discharge that duty whenever they exercise any other power conferred on them.

Secondly, Section 4 of the English Arbitration Act 1996, [Mandatory and non-mandatory provisions] states in its first sub-section that "the mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary." Schedule 1 lists Section 33 among the mandatory provisions of Part I[42]. Any agreements falling short of the principles in Section 33 are void and arbitrators can legitimately refuse to adopt them[43]. Sections 33 and 40 are clear and unambiguous and Section 4(1) of the Arbitration Act states that mandatory provisions such as Sections 33 and 40 shall have effect "notwithstanding any agreement to the contrary" and therefore the duty imposed on arbitrators by Section 33 cannot therefore be varied by agreement[44].

The object of the arbitrator's duty is first of all to devise "procedures suitable to the circumstances of the case." Commentators point out that this provision requires procedures that are flexible and adjusted to the specific features of the dispute to be adjudicated, and set patterns are to be avoided[45].

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(40) *Mustill/Boyd*, 305-306; *Sutton*, D. J./*Gill*, J./*Gearing*, M.: Russel on Arbitration, London 2007, 23rd ed., p. 194 §5-032.

(41) *Mustill/Boyd*, p. 307.

(42) *Mustill/Boyd*, p. 38-39, 178-179; *Sutton/Gill/Gearing*, p. 194 §5-032.

(43) *Merkin*, R.: Arbitration Act 1996, London 2000, p. 80-81 referring to the DAC Report.

(44) *Mustill/Boyd*, p. 306.

(45) *Mustill/Boyd*, p. 32 and the reference to *Lalive*, P.: Towards a Decline of International Arbitration?, Arbitration 1999, p. 251-254, 253, in footnote 1; *Harris/Planterose/Tecks*, p. 167 §33E.

Avoiding unnecessary cost and delay is the overriding objective. Arbitrators must be able to organise proceedings sensibly and "it is now absolutely clear that it is unnecessary for the arbitrator to follow 'court' procedures slavishly or at all"[46]. It has been held that an arbitrator breached his general duty by failing to rectify procedural failings and in particular to deal with the production of "prolix and diffuse pleadings"[47].

The Parties' Duty of Expedition. Section 40 of the English Arbitration Act 1996, is the other side of the coin in that it sets out the duty of the parties "to do all things necessary for the proper and expeditious conduct of the arbitral proceedings." This is a mandatory provision according to Section 4(1) and Schedule 1[48] so it gives rise to a statutory duty[49].

The Debate in England. It is debated as a matter of English law what the practical effect of Sections 33 and 40 of the Arbitration Act will be in practice since Section 34 of the Arbitration Act leaves it to the parties to agree on "all procedural and evidential matters."

Mustill and Boyd have emphasised that these provisions have great significance in that the parties may be unfamiliar with the idea that the effect of Sections 33 and 40 is "to constrain their free will" and the idea that "it is for them to set the tempo as they think fit" cannot be reconciled with the new provisions of the Arbitration Act[50]. If a procedure cannot be agreed between the parties and the arbitrators, then the arbitrators must decide[51]. However, Parliament gave "primacy to the freedom of the parties to agree how their disputes are to be resolved over the need to obtain the fair resolution of disputes without unnecessary delay or expense;"[52] English commentators therefore consider that "arbitration tribunals were not -intentionally- given the power to override the will of the parties as that would have meant a fundamental departure from existing law and the internationally accepted principle of party

(46) *Harris/Planterose/Tecks,* p. 168 §33E.
(47) *Harris/Planterose/Tecks*, p. 168 §33E.
(48) *Mustill/Boyd*, p. 317.
(49) *Mustill/Boyd,* p. 316.
(50) *Mustill/Boyd*, p. 36.
(51) *Tackaberry*, J./*Marriott*, A.: Bernstein's Handbook of Arbitration and Dispute Resolution Practice, London 2003, 4th ed., vol. 1, p. 181 §2-471.
(52) *Mustill/Boyd*, p. 307-308.

autonomy"[53]. The view expressed by English commentators[54] that a conflict between the arbitrator's general duty and party autonomy is to be solved by the arbitrator's attempt to persuade the parties not to insist on their procedural agreement is wise and understandable, but at the end of the day an arbitrator must decide how to proceed if the parties insist on an unreasonable agreement on a point of procedure; rare as such an occurrence may be, one day the issue will arise in a case. Resignation is regarded by certain commentators as a solution in such a case[55]; however, in the present writer's view, resignation is never really a solution, especially for the parties.

A civil law lawyer would, more likely than not, take the view that provisions intended to give rise to general duties on parties and arbitrators, such as Sections 33 and 40 of the English Arbitration Act 1996, should be regarded as *leges speciales* in relation to the general principle of party autonomy as to procedure, particularly where such provisions are clear and unambiguous and where they are stated in such a way so that they can only regarded as having been intended to prevail over private agreements. It remains to be seen how the uneasy relationship between Sections 33 and 40 on the one hand and Section 34 on the other will be solved by arbitrators sitting in England and the English courts.

The French Law. French law has recently introduced a duty on the parties and the arbitrators to proceed with due despatch and loyalty[56]. The provision applies to international arbitration under Article 1506(3) of Decree No. 2011-48 of 13 January 2011, but it is not mandatory as the parties may agree otherwise.

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(53) *Veeder*, V. V.: Whose Arbitration is It Anyway_The Parties' or the Arbitration Tribunal's? An Interesting Question? in: *Newman*, L. W./*Hill*, R. D. (Eds.): The Leading Arbitrators' Guide to International Arbitration, New York 2008, 2nd ed., p. 337-357, 341-342; *Williamson*, H.: When "Could" Becomes "Should". Exercising Your Powers as Arbitrators, Arbitration 1998, p. 275-284, 276; *Harris/Planterose/Tecks*, p. 169 §33H; *Sutton/Gill/Gearing*, p. 206 §5-056.

(54) *Harris/Planterose/Tecks,* p. 169 §33H.

(55) *Harris/Planterose/Tecks*, p. 169 §33H.

(56) Art. 1464, 3rd sub-section, of Decree No. 2011-48 of 13 January 2011.

2. The Arbitrator's Duty to Act as a Diligent Case Manager in the Arbitration Rules

The ICC Rules (2012) and (1998). The ICC Rules of Arbitration are the set of rules which have had the most significant contribution so far towards raising awareness that time and costs should be kept in check as far as reasonably possible. Terms of reference will be left aside in this paper, as it is doubtful in the present writer's view that they may be regarded as a tool conducive to expedition at all[57].

The Provisional Timetable. In 1998 the ICC Rules imposed a duty on arbitrators to provide a provisional timetable for the arbitration in consultation with the parties to be filed with the ICC. That was a first significant contribution to ensuring that arbitrators, parties and counsel alike are aware of the importance of the timeline in any arbitration[58].

Report from the ICC Commission on Arbitration Titled "Techniques for Controlling Time and Costs in Arbitration" (2007). In 2007, a Report on Controlling Time and Costs followed, highlighting that there had been an increase in costs caused by "unnecessarily long and complicated proceedings with unfocused requests for disclosure of documents and unnecessary witness and expert evidence" and because "counsel from different legal backgrounds use procedures familiar to them in a manner that leads to needless duplication." The ICC emphasised that arbitrators should do their best to keep time in check and help the parties streamline the presentation of their case, and be proactive, if necessary, in this respect. The *Techniques* sought to assist the arbitrators and the parties to make an early choice as to the specific procedural rules suitable for their

(57) When the ICC decided to maintain the requirement of terms of reference for the 1988 edition and criticism was voiced especially in England with respect to terms of reference, the reason given to explain the decision to hold on to terms of reference was that this was a useful tool in order to ensure that arbitrators could come to grips with the case at the initial stage of the arbitration.

Then in a Report from the ICC Commission on Arbitration entitled "Techniques for Controlling Time and Costs in Arbitration" (2007), the ICC suggested that arbitrators should consider whether it was appropriate for them to draft the summary of the claims or whether it should assist if such summary was provided by each party, see §24.

(58) Art. 18(4) ICC Rules (1998) and Art. 24(2) ICC Rules (2012). *Patocchi*, P. M./*Brentano*, H. F.: The Provisional Timetable in International Arbitration, in: *Aksen*, G./*Böckstiegel*, K. H./*Mustill*, M. J./*Patocchi*, P. M./*Whitesell*, A. M. (Eds.): Global Reflections on International Law, Commerce and Dispute Resolution—Liber Amicorum Robert Briner, Paris 2005, p. 575-599.

case and to ensure that the arbitral tribunal would proactively manage the arbitral proceedings as from the outset of the case. The *Techniques* lay emphasis on the advantages often achieved in practice with a case management (or procedural) conference.

The ICC Rules of Arbitration (2012). The Case Management Conference. The ICC Rules of Arbitration (2012) take one step further and make a case management conference a requirement (the arbitral tribunal "shall" convene a case management conference to consult the parties on procedural measures that may be adopted in accordance with Art. 22 of the ICC Rules).[59] The consultation of the parties, which was a requirement under the 1998 ICC Rules with respect to the provisional timetable, has now been extended to the specific procedural rules to be adopted during or after the first case management conference. The measures adopted may include the case management techniques described in Appendix IV (which sets out some case management techniques but expressly refers to the *Techniques*).

The Conduct of the Arbitration and Case Management. Article 22 of the ICC Rules (2012) reads as follows:

Article 22. Conduct of the Arbitration

3 The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

4 In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

5 Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration any may take measures for protecting trade secrets and confidential information.

6 In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

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(59) Art. 24(1) ICC Rules (2012).

7 The parties undertake to comply with any order made by the arbitral tribunal.

The first, second, fourth and fifth sub-sections of Article 22 of the ICC Rules (2012) are important for present purposes. This provision calls for a number of observations which may be summarised as follows.

Firstly, it is slightly unusual to find the most fundamental principle of a provision set out in the fourth sub-section of it; it is obvious that the principles set out in Article 22(4) of the ICC Rules, namely fairness in the procedure, arbitral impartiality and the parties' right to present their case, are all rooted in mandatory principles in national law. They fall to be properly regarded as the core of Article 22 of the ICC Rules (2012). It is unclear why the drafters of the ICC Rules departed from the general principle of drafting whereby the more general and important principles are stated first, followed by the more specific and possibly less important ones. After all, the ICC Rules are not applied only by arbitration specialists.

Secondly, one then finds the duty to proceed in an expeditious and cost-effective manner having regard to the complexity and the value of the dispute set out in the very first sub-section of Article 22. The duty to which Article 22(1) gives rise as a matter of contract is both on the arbitrators and the parties. This sub-section uses the language of "shall." The reader's first impression is therefore that this is a "mandatory" provision devised to give rise to contractual duties in addition to any duties as may exist under the applicable law and admonish the parties (and the arbitrators) as to such duties, which should in turn enable the arbitrators to perform their own duty of expedition, even in the face of uncooperative conduct on the part of either or both parties if such were to be the case.

However, Article 22(2) then entirely drops the language of "shall": in the performance of its case management duty the arbitral tribunal "may" adopt the measures it considers appropriate, provided, however, that they are "not contrary to any agreement of the parties." Article 22(2) of the ICC Rules (2012) is thus effectively giving the last word to the parties with respect to the arbitrator's case management powers. This will be so even in those cases in which the parties or their

counsel agree on procedural arrangements which an arbitrator would not have suggested, left to his own devices in the course of the arbitration.

Only the clout and moral authority of an arbitrator (or then mandatory provisions of the *lex arbitri* or less liberal provisions in the specific procedural rules adopted by the arbitrators) may eventually tip the balance in favour of sound case management in the face of an unreasonable point of procedure agreed upon between the parties. Considering Article 22 of the ICC Rules of Arbitration (2012) as a whole, which suffers from exactly the same ambiguity affecting the relationship between Sections 33 and 40 with Section 34 of the English Arbitration Act 1996, one may wonder whether this is not about the mountain having laboured and brought forth just a molehill

Article 22(1) may perhaps give an arbitrator some leverage to persuade the parties to give up a procedural agreement which does not make provision for the conduct of the arbitration which is fair, expeditious and cost-effective, but then, again, what Article 22(1) appears to give, Article 22(2) appears to effectively take away.

In the present writer's view, the belief that the arbitrator's case management duty may be elevated to an effective, let alone a mandatory, principle, without the slightest price being paid in terms of party autonomy is unrealistic. The general view expressed by English commentators, that experienced arbitrators will know how to deal with unreasonable agreements, may be an answer when the arbitration takes place in England and is presided over by a charismatic English lawyer, but when arbitration rules such as the ICC Rules are to be applied in a variety of jurisdictions, including those in which there is a very different arbitral culture and possibly a less deferential attitude to arbitrators, this may not be the answer.

The Swiss Rules of International Arbitration (2004, 2012). The Swiss Rules are based on the UNCITRAL Rules of Arbitration (1976) which the Swiss Chambers of Commerce amended in order to carry out the degree of adaptation required for the UNCITRAL Rules to be suited to institutional arbitration administered by one institution and for the UNCITRAL Rules to be updated: some thirty years is a very long time indeed in the world of arbitration.

There are two features in the Swiss Rules interesting for present purposes: the provisional timetable and the expedited procedure.

The Provisional Timetable (Art. 15(3)). Article 15(3) of the Swiss Rules requires a provisional timetable prepared by the arbitrator in consultation with the parties at an early stage of the proceedings. The Secretariat must be provided a copy for information.

The Expedited Procedure (Art. 42)[60]. An expedited procedure takes place under the Swiss Rules in two cases: *(i)* where the parties so agree (Art. 42(1)) and *(ii)* where the Swiss Rules (*viz*. Art. 42(2)) so provide. In both cases a number of principles apply, the most important of which are as follows:

· the parties are entitled to file *only one comprehensive submission* on the merits (Statement of Claim, Statement of Defence and Statement of Defence to the Counterclaim, if any); and

· there shall be *only one hearing* for (expert) witness evidence and oral argument; and

· the award shall be made *within 6 months* of the date when the file was transmitted to the arbitrator;

· the award shall state the reasons on which it is based in summary form.

The case of expedited procedure covered by Article 42(2) is that in which the aggregate amount in dispute (claim, counterclaim and set-off defence) does not exceed the amount of CHF 1 million. The Arbitration Court has discretion to decide that the expedited procedure does not apply in such case, taking into account all relevant circumstances. Where the arbitration agreement provides for three arbitrators, the Secretariat

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(60) An expedited procedure existed in the arbitration rules of the Geneva Chamber of Commerce even before the Swiss Rules of International Arbitration were adopted, see *Tschanz*, P-Y.: The Chamber of Commerce and Industry of Geneva's Arbitration Rules and their Expedited Procedure, Journal of International Arbitration 4/1993, p. 51-57.

See as to the Swiss Rules of International Arbitration *Scherer*, M.: Acceleration of Arbitration Proceedings–The Swiss Way: The Expedited Procedure under the Swiss Rules of International Arbitration, SchiedsVZ 2005, 229-237; *Geisinger*, E.: The Expedited Procedure under the Swiss Rules of International Arbitration, in: ASA Special Series No. 22, New York 2004, p. 67-86.

shall invite the parties nevertheless to agree on a sole arbitrator; if the parties do not so agree, then the three arbitrators' hourly rate is not below the rate set out in Article 2.8 of Appendix B (namely CHF 350 per arbitrator).

It is worthwhile mentioning that the six-month time limit in which an award is to be made has been complied with in the vast majority of cases since the Swiss Rules of International Arbitration have come into effect.

The UNCITRAL Rules of Arbitration (2010). The UNCITRAL Rules (2010) filled in the gaps with the old 1976 version and now provide in Article 17(3) that the arbitrator shall establish a provisional timetable as soon as practicable[61].

Conclusion as to the Arbitrator's Duty to Act as a Diligent Case Manager. Apart from English law where it is based on mandatory provisions, the arbitrator's duty to act as a diligent case manager is not firmly rooted in any provision of national laws. The importance of arbitration rules is therefore immediately apparent: where arbitration rules empower the arbitrator to conduct the arbitration as he deems fit, such power is more clearly established. In this respect, the Swiss Rules and the UNCITRAL Rules appear to exemplify different approaches in the wide spectrum of solutions existing in arbitral practice, the ICC Rules lying somewhere in the middle: party autonomy is not mentioned in the Swiss Rules, whereas it is paramount in Article 1 of the UNCITRAL Rules. The ICC Rules mention party autonomy as well as the arbitrator's duty to act as a diligent case manager. But, again, one should beware of the black-letter rules in the systems under consideration for it should be borne in mind that the words used by these provisions are just one criterion to determine the true extent of party autonomy, the identity of the arbitrators being often the paramount factor in practice[62]. Only time will tell whether this difference in the institutional provisions under consideration will produce distinguishable results in the quest for the

(61) See *Patocchi*, P. M.: UNCITRAL Arbitration Rules–What Is New after the First Revision, in: Python & Peter (Eds.), L'éclectique juridique. Recueil d'articles en l'honneur de Jacques Python, Geneva 2011, p. 256-301.

(62) An authoritarian tribunal under the UNCITRAL Rules may leave much less room to party autonomy than a more liberal tribunal under the Swiss Rules.

right balance between procedural efficiency and party autonomy; doubt is permitted in this respect[63].

IV. CONFLICTS BETWEEN AGREED POINTS OF PROCEDURE AND GOOD CASE MANAGEMENT

1. A Few Examples of a Conflict between Agreements as to Procedure and the Arbitrator's Duty to Proceed as a Diligent Case Manager

Example No. 1a: Provisional Timetable Agreed upon between the Parties. Before the case management conference takes place, the parties may agree on a leisurely timeline considering what appears to be the complexity of the factual and legal issues; the evidential hearing would accordingly take place some three years after the case management conference. The Arbitral Tribunal is inclined to accept the various stages set out in the agreed provisional timetable, but it is disinclined to follow the timeline and the various time limits agreed upon.

Example No. 1b: Agreed Duration of the Evidential Hearing. The parties before or during the first case management conference agree that the hearing should last from 3 to 4 weeks. The explanation given by the parties during the case management conference is that the matter involves several dozen claims arising out of a construction project. The tribunal is disinclined to accept from the outset that the hearing should last 3 or 4 weeks.

Example No. 2a: Parties' Agreement to Refuse a Bifurcation of the Proceedings Suggested by the Sole Arbitrator. The parties to a consolidated arbitration comprising three original arbitrations have a dispute relating to three similar building contracts, each concerning the building of one stretch of the same road. The claimant is the contractor, the respondent is the owner of the road; the respondent contends that all claims are barred by limitation under the applicable law. The sole arbitrator suggests that the issue of limitation should be decided as a preliminary issue prior to the merits as the contractor's claims for extra costs raise complex issues both of liability and *quantum*. At some point in the proceedings both parties expressly agree that there should be no

(63) See the comments by *Blackaby*, N./*Partasides*, C./*Redfern*, A./*Hunter*, M.: Redfern & Hunter on International Arbitration, Oxford 2009, p. 369 §6.22.

bifurcation and no preliminary award with respect to the issue of limitation.

Example No. 2b: Agreed Bifurcation of the Proceedings Combined with a Short Timetable. The parties to a joint venture agreement are in dispute as to the breach of that agreement, the *quantum* of damages and the termination of the same agreement. The dispute involves allegations of fraud, conspiracy to defraud and corruption. Prior to the case management conference the parties agree that the tribunal should declare that the joint venture agreement has come to an end as of a certain date and that this should be done in a matter of a few months' time. The tribunal is disinclined to proceed on this basis.

Example No. 3: When the Tribunal Proposes to Appoint an Expert, the Parties Agree that no Expert Should Be Appointed. Two years after a two-week evidential hearing, the tribunal suggests appointing an expert to determine certain issues, which are not mentioned in the tribunal's communication to the parties. Thereupon, the parties agree that no expert should be appointed and the tribunal should decide on the basis of the evidence on the record.

Example No. 4: Interim Relief Sought by Each Party in a Milan Arbitration. The parties to a supply and licensing agreement relating to a pharmaceutical product are in dispute as to whether their agreement has come to an end. One party contends that the agreement has come to an end and the other should therefore hand back the marketing authorisation for the product; an interim order is sought to that effect. The other party contends that the agreement is valid and binding and it is therefore entitled to get the supply of product under the terms of the agreement; an interim order is sought to that effect. Both parties agree that the arbitrator is to give interim relief. However, Italian law forbids arbitrators from granting interim relief.

Example No. 5: Agreement to File Post-Hearing Briefs in Two Simultaneous Rounds in a Milan Arbitration. The parties agree at the hearing that they will file post-hearing briefs in simultaneous rounds, one main post-hearing brief, and then a shorter rebuttal brief. The Tribunal is not inclined to accept two rounds.

2. Criteria for a Solution

Before suggestions and possible solutions are considered, two preliminary points should be made at this juncture.

The first point is that crystallised, clear-cut conflicts between parties and arbitrators on a point of procedure are rare in practice. When such a conflict arises, a reasonable compromise solution is often found after a careful discussion. Discussions between parties and arbitrators are important at the beginning of the arbitration; they would take place before and during the case management conference, but then may be taken up anew during the arbitration if need be.

In the absence of a compromise, both parties may decide that it is wise not to insist on a particular point which the arbitrators appear to be reluctant to accept. Alternatively, one party may withdraw its agreement to a point of procedure having realised that the tribunal is not pleased with such agreement. Arbitrators may, conversely, agree to proceed in accordance with some agreed procedure and keep their disagreement or displeasure to themselves, for instance when the parties want a certain measure which the arbitrators regard as superfluous; the arbitrators may eventually accept such a measure whenever it does no harm.

The second point is that solutions are difficult to generalise. Each party, each contract and each case is different; each tribunal is different; the procedural context and the cultural context vary from case to case. Arbitrators must consider and deal with such variety because this is an intrinsic element of fairness. Some of the suggestions which follow may work in some contexts and not in others.

First Suggestion: Procedure Should Be Discussed with the Parties in Detail as Often as Necessary. The case management conference (Art. 24 ICC Rules (2012); Art. 15(3) Swiss Rules (2012) and Art. 17(2) UNCITRAL Rules (2010)) is the first tool that significantly reduces the risk of an open conflict between an agreed procedure and the arbitrator's view of what is fair and expedient. This is so especially where the parties, counsel and arbitrators meet in person. The specific procedural rules and the provisional timetable which will emerge from such exchange of views between the parties and the arbitrators will represent a significant common ground. Often enough, those specific procedural rules will be contained in a Procedural Order No. 1. It may even be possible for the

tribunal to issue such Order as an Order by Consent. If those specific procedural rules are comprehensive, the parties will have less room for agreeing on different procedures later, especially if the specific procedural rules were agreed upon with the arbitral tribunal. If the parties nevertheless agree on some procedural points, it may well be that the spirit, if not the letter, of their agreement may be in conflict with the specific procedural rules and/or the provisional timetable. Case management conferences should be repeated whenever appropriate. Unreasonable procedural agreements may come about where the parties and the arbitrators have not discussed the procedure to be followed in an adequate manner, although the causes of unreasonable agreements on points of procedure are manifold.

Second Suggestion: Agreed Point of Procedure Should Be Probed by the Arbitrator. Procedural agreements between the parties should be probed, *viz*. subjected to a detailed critical examination by the arbitrator in an open discussion with the parties as to the meaning of the agreement, the matters covered by it and the overall implications of such agreement for each party and the tribunal. It is for the tribunal to find whether there is agreement on a point of procedure at all, whether the agreement is comprehensive on all relevant points, whether both parties understand all points of the agreement in the same way.

Not infrequently, an agreement on one point requires a particular solution of another related point. In order for the agreement to make sense, the parties will then have to agree not on just one, but two or several points, and the tribunal may then ask the parties whether their agreement covers all such points. For instance, in an arbitration involving technical questions, the parties may agree that the witnesses may give evidence without having signed and filed witness statements. This may in turn mean that it is the lawyers acting for the parties who should be in charge of the examination of the witnesses, since the arbitrators could be in charge of the examination provided they had witness statements. Agreeing to waive witness statements would mean in such a case that the lawyers would have to be ready to examine and cross-examine the witnesses themselves. The very existence of a procedural agreement may therefore depend on whether both parties agree on both points, namely that there should be no witness statements *and* that the witnesses will be first examined and cross-examined by counsel rather than the arbitrators.

Not infrequently again, when a procedural agreement is probed in detail, both parties or at least one party may realise that the arbitral tribunal is showing little enthusiasm for an agreed point of procedure that was not previously discussed with the arbitrators. The arbitrator's views may then be sought by the parties or either party and occasionally the original agreed point of procedure may be withdrawn.

Third Suggestion: The Reasons for the Tribunal's Reluctance to Follow an Agreed Point of Procedure Should Be Explained. If a tribunal is disinclined to go along with an agreed point of procedure, it would be helpful to explain the reasons for the tribunal's reluctance rather than flatly reject the parties' agreement. In example No. 1a, an arbitral tribunal may say "we feel that x years to get to a hearing is too much time and before we accept such agreed timetable, we wish to know whether such timeline is justified by any special considerations of which the tribunal should be aware, if such considerations may be disclosed." In example No. 1b, the tribunal may say "you have now agreed to have 3 or 4 weeks hearing; we are not, however, in a position to accept or refuse before we have full submissions and witness statements, so we will pencil in 3 weeks and we will revert to you in due course." An arbitrator will generally find it easier to persuade the parties that the time agreed upon between them for the hearing is excessive after he or she has read the submissions and the witness statements (if any), rather than at the very beginning of the arbitration when little is known about the very case and the evidential requirements of each party.

Fourth Suggestion: The Tribunal Should Suggest Alternatives. If an arbitral tribunal is reluctant to follow an agreed point of procedure, suggesting alternatives is a method which can often pave the way towards a solution agreeable both to the parties and the tribunal. A situation as in example No. 1a, namely the reluctance by a tribunal to accept what appears to be an unduly generous timeline, is often solved by an open discussion to which the tribunal can make a positive contribution by suggesting alternatives. This is the case with respect to most matters relating to a provisional timetable, including for instance the duration of an evidential hearing. If the parties want three weeks for the hearing because the matter is allegedly complex, the arbitrator may make a counterproposal and say that "all the technical aspects which we need to be familiar with in general terms should be dealt with in the first round of

submissions and then we have a first two-day hearing in order to ensure that the main evidential hearing, which will take place later, can be effectively streamlined." If the parties want three weeks for the hearing because they say there are many claims to be decided, then the arbitrator may for instance say "please tell me how many claims need expert or witness evidence and which do not, or please identify the claims you regard as small or less important and consider alternative methods (for instance a decision based only on documents for the claims which are small according to an agreed definition; small claims under a certain amount can for instance be awarded in the proportion to which the main claims were awarded in order to save time and money)."

If the procedural agreement made by the parties cannot be implemented because it is contrary to the mandatory rules of the *lex arbitri* (as in example No. 4) and the parties cannot suggest or agree on an alternative, the arbitrator may suggest one; where the *lex arbitri* deprives arbitrators of any jurisdiction and power to order interim relief in any shape or form, the arbitrator may still issue a formal recommendation which has all the formal features of an award except the title and the operative part, or, alternatively, the parties may be amenable to agreeing to a fast-track timetable in order for a final decision to be made, which might under certain circumstances do away with the need for interim relief. That is sometimes done with respect to certain categories of disputes (*e.g.* sports disputes, disputes in certain pharmaceutical matters).

Fifth Suggestion: The Tribunal Should Carefully Consider Whether to Reject an Agreed Procedure and for Which Reasons. I started this paper by saying that clear-cut and open conflicts between parties and arbitrators are a rare occurrence; infrequent and exceptional as they may be, such conflicts do nevertheless arise from time to time and one should therefore assume for present purposes that the arbitrator will have to deal with such a conflict and that the arbitrator considers to disregard, or depart from, an agreed point of procedure rather than resigning. This situation calls for the examination of three distinct, yet related issues, namely *(i)* whether the arbitrator has the power to depart from an agreed point of procedure at all, *(ii)* whether departing from an agreed point of procedure could jeopardise the award at the place of arbitration, and,

finally, *(iii)* whether the recognition or the enforcement of the award may be finally refused in the country in which it is sought.

The Arbitrator's Power to Override an Agreed Point of Procedure under the Lex Arbitri. The first point to be considered is whether the arbitrator has the power to disregard an agreed point of procedure under the applicable law and arbitration rules. The difficult case is that of a procedural agreement between the parties *(i)* which does not contravene mandatory provisions of the *lex arbitri* (for if such is the case, the parties' procedural agreement is inoperative, see example No. 4 above) but *(ii)* which is made after the arbitral tribunal is constituted.

In certain systems of law, a procedural agreement made after the constitution of the arbitral tribunal is not necessarily binding on the tribunal. Such is the case in Italian law (see paragraph 0 above) and Swedish law (see paragraph 0 above). Italian law provides that the arbitrators are to follow the procedural agreements of the parties have made in writing before their appointment. Swedish law provides that arbitrators shall proceed in accordance with the points of procedure determined by the parties unless something prevents the arbitrators from doing so.

In other systems of law, the pre-eminent role of party autonomy has been doubted by respected commentators. That is the case in Switzerland, where experts of procedure, international law and arbitration have recently voiced the opinion that, in exceptional circumstances, slavish obedience to party autonomy has no foundation as a matter of Swiss law[64] (see paragraph 0 above). In the present writer's view, this opinion is correct as a matter of Swiss law. The fact that Article 182(1) of the 1987 Act does not contain any express words to impose any limitations on party autonomy as to procedure does not mean that anything goes, that no limitations whatsoever exist regardless of the circumstances an arbitrator is dealing with. All rules of law admit of some exception and it would be very difficult indeed to see why party autonomy as to procedure should be immune from any exceptions and be regarded as a sacred cow.

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(64) *Berger/Kellerhals*, p. 285 §983; *Bucher*, p. 1595 §9-10; see also *Kaufmann-Kohler*, G.: Qui contrôle l'arbitrage? Autonomie des parties, pouvoir des arbitres et principe d'efficacité, in: Liber Amicorum Claude Reymond, Paris 2004, p. 153-165, 164-165.

One must therefore go back to the fundamental justification for party autonomy as to procedure in the law of arbitration[65] - party autonomy grew at a time when there was no developed law of procedure for arbitration. The rationale of party autonomy was that the parties and the arbitrators should be free from the formalities of domestic court procedures, that the adjudication of international disputes could take place in accordance with agreed provisions and possibly tailor-made provisions devised to take into account the specific features of a given dispute or the requirements of a given industry. Party autonomy grew and developed to permit the adoption of appropriate procedures; it rests on the presumption that agreed procedures are reasonable.

That presumption is not irrebuttable. It does not follow from the principle of party autonomy that the parties are entitled to impose agreed procedures on arbitrators which are unreasonable or repugnant.

Arbitrators departing from an agreed procedure should explain the reasons for which such procedure cannot be followed, but should do so as soon as reasonably possible.

Having said this, it is of course difficult to encapsulate in a general formula which procedural agreements are not binding on an arbitrator. Professor Bucher points to agreements on a point of procedure which are useless or moot, or manifestly devoid of any legitimate interest or unduly burdensome on the tribunal. The question as to whether these formulae are comprehensive or even helpful may be left open in the present writer's view, for if one accepts that arbitrators are entitled to depart from procedural agreements made by the parties only in very exceptional cases, devising a general formula to describe those cases may be as difficult as it is superfluous at the end of the day.

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(65) The rationale for party autonomy in arbitral procedure emerged slowly from learned opinion especially from the French-speaking jurisdictions. Whereas courts and commentators in the 1950s rested their analysis of party autonomy in arbitration on the principle of party autonomy for international contracts (see in particular. *Klein*, F-E.: Considérations Sur L'arbitrage En Droit International Privé, Basle 1955, p. 212 §119, others suggested that party autonomy with respect to arbitral procedure was rooted in the need to enable the parties to agree on principles of procedure which were not those of a national system of law (see in particular *Goldman*, p. 349-483, 359; *Fouchard*, p. 322 §500). The whole debate around party autonomy as to arbitral procedure was influenced by the idea that the law of arbitration in a number of jurisdictions contained gaps and/or utterly anachronistic provisions (*Fouchard*, p. 318 §495, 336 §516). See more recently *Born*, p. 82-84.

The arbitrator's exceptional power to overrule an agreement as to procedure made by the parties need not be based on the arbitrator's duty to conduct the arbitration as a good case manager. The arbitrator's duty to conduct the case as a good case manager will mostly result in a procedural step being omitted or disregarded in spite of the parties' agreement or request to the contrary. However, an arbitrator may also decide to take a procedural step which both parties agree to forego; an arbitrator may convene a hearing and take evidence with respect to facts on which a finding must be made as a matter of public policy even where the parties regard such a hearing as superfluous.

Finally, an arbitrator should not go against the law in a country where it is clear that he or she is bound by a procedural agreement of the parties irrespective of whether such agreement is reasonable or not.

Is the Overruling by the Arbitrator of an Agreed Point of Procedure a Ground upon which an Award May Be Set Aside? Assuming an arbitrator is entitled to depart from an agreed procedure under the *lex arbitri*, one would have to determine whether such departure is a ground upon which the award may be set aside. That is not the case in Switzerland, according to a consistent line of decisions by the Swiss Federal Supreme Court.[66] An award may be set aside if the tribunal failed to grant the parties equal treatment or breached the right of a party to present his case before the tribunal. Short of that, a breach by an arbitrator of a provision contained in arbitration rules is *per se* irrelevant. The position would seem to be the same in Italy (unless the parties specifically agreed that a failure by the arbitrators to abide by their

(66) U. v. Spouse G., BGE/ATF 117 II 346, 347-348, July 1, 1991; F. S.p.A. and M. S.p.A. v. M. and arbitral tribunal, BGE/ATF 119 II 386, 388-389, September 7, 1993; Technoimportexport AG v. House of Trade and Contracting Company W.L.L. and IHK arbitral tribunal, decision by the Swiss Federal Supreme Court No. 4P.176/1996, paragraph 2, March 24, 1997, published in Mealey's International Arbitration Report Vol. 12, Issue No. 9, 1997, H-1–H-10; F. and U. v. W. Inc. and arbitral tribunal, decision by the Swiss Federal Supreme Court of December 30, 1994, paragraph 1, published in ASA Bulletin 1995, p. 217-226; Türkiye Elektrik Kurumu v. Osuuskunta METEX Andelslag, decision by the Swiss Federal Supreme Court of August 17, 1994, paragraph 3, published in ASA Bulletin 1995, p. 198-204; X. AG v. Y., decision by the Swiss Federal Supreme Court No. 4P.23/2006, paragraph 4.3, March 27, 2006, published in ASA Bulletin 2007, p. 528-536; X. v. Club Y., decision by the Swiss Federal Supreme Court No. 4A_600/2008, paragraph 4.2.1.3, February 20, 2009, translated in the English language in the Swiss International Arbitration Law Reports, 3 Swiss Int'l Arb. L. Rep. 91-112 (2009); *Bucher*, p. 1595-1596 §10-12.

procedural agreements is a ground for challenge, Art. 829(1)(9) of the Italian Code of Civil Procedure) and in Sweden. The position may be less clear in France.

In Model Law jurisdictions particular circumspection is required, since Article 34(2)(iv) of the UNCITRAL Model Law provides that an award may be set aside if the procedure was not in accordance with the agreement of the parties. In Turkey, Article 15(A)(1)(f) of the International Arbitration Act has the same effect.

Is the Overruling by the Arbitrator of an Agreed Point of Procedure a Ground upon which the Recognition or the Enforcement of an Award Will Be Denied? The wheel has now turned full circle and one is back to Article V(1)(d) of the NYC. One must then consider how the courts in the country where enforcement of the award is likely to be sought will approach, interpret and apply this provision. If an award is likely to be enforced in a country with a limited pro-enforcement bias, then the arbitrator may wish to think twice before overruling an agreed point of procedure.

V. CONCLUSION

Party autonomy has been the golden rule of procedure for the better part of the last century; it still is today. Most if not all parties and lawyers are reasonable[67]. The vast majority of sole arbitrators and presiding arbitrators are reasonable and impartial; they have the experience and the moral authority to ensure that even those parties who have unreasonable procedural temptations will in the end behave reasonably.

Party autonomy is subject to exceptions like any rule of law. When agreed points of procedure are manifestly unreasonable, an arbitrator is not, and should not be, bound by them. The arbitrator's power to reject such agreements is one to be exercised most sparingly, in exceptional circumstances and by promptly giving reasons, but then it must be exercised when it is right for the arbitrator to do so.

The courts should be supportive. The move towards greater fairness and efficiency in arbitration proceedings cannot be implemented without

(67) See *Williamson*, H.: When 'Could' Becomes 'Should'. Exercising your powers as arbitrators, Arbitration 1998, p. 275-284.

paying a modest price in terms of party autonomy. Long after being acknowledged as a general principle for the determination of the proper law of an international contract in the conflict of laws, party autonomy has in the end been made subject to certain limitations with respect to certain categories of contract. Time has now come for party autonomy as to arbitral procedure to be subject to some limitations in the law of international arbitration lest the proclaimed objective of fairness and efficiency be reduced to an expression devoid of any real meaning.

Article 22(1) of the ICC Rules (2012) would seem to point in the right direction by emphasising the arbitrator's duty to act as a diligent case manager. However, it will need strengthening by arbitrators in their procedural orders whenever possible. Specific procedural rules agreed upon between the parties and the arbitrators at the beginning of the arbitration could, and indeed should, clearly recall that the tribunal is in charge of the timetable and may therefore refuse to extend a time limit or change the timetable without good cause. Specific procedural rules could, and perhaps should, state that procedural agreements made by the parties after the case management conference should be approved by the arbitral tribunal, approval not to be unreasonably withheld, or that the arbitrator may reject agreed points of procedure when such points are manifestly unreasonable, taking into account the need to conduct the arbitration fairly, expeditiously and without unnecessary expense.

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