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CURRENT DEVELOPMENTS

THE ARBITRATOR'S PLEDGE LAUNCHED BY THE EUROPEAN COURT OF ARBITRATION

*Mauro Rubino-Sammartano**

Arbitration, as any other human “product,” may have defects, but this is not necessarily frequent. In other words, this does not mean in the least that arbitration is by itself always defective.

It is not rare for users to complain about the arbitrator, or the arbitral institution.

Much depends, of course, on how their arbitration was conducted.

I. PARTIES' COMPLAINTS AS TO THE ARBITRATOR OR AS TO THE ARBITRAL INSTITUTION

Users who are unhappy with the results of an arbitral proceeding should sometimes blame their own case for not being sufficiently grounded, in which event they are not really entitled to complain about its consequences.

On other occasions their complaint may be justified. That may be the case if the proceedings last many years, or if a party feels that it has not been allowed to present its case or to prove it, or because the arbitrator has committed an error of law (such as the application of the wrong substantive law) or of fact.

A party may also feel – rightly or wrongly – that the arbitral institution has not properly selected the chairman of the arbitral tribunal or has not well administered the proceedings.

These complaints have already been addressed by several writers.¹

* President of the European Court of Arbitration.

I have had the privilege of reading in advance the comments made by Ema Vidak-Gojkovic, Lucy Greenwood & Michael McIlwrath, in *Puppies or Kittens? How to Better Match Arbitrators to Party Expectations*, AUSTRIAN Y.B. ON INT'L ARB. 61 (2016) and have added some of these questions to my list of questions which goes back to April 2015.

I give them credit with pleasure for that.

¹ MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION (LAW AND PRACTICE) (3d ed. 2014); Andrew I. Okekeifere, *Commercial Arbitration as the Most Effective Dispute Resolution Method – Still a Fact or Now a Myth?*, 15(4) J. INT. ARB. 4, 81 (1998); Fali Nariman, *East Meets West: Tradition, Globalization and the Future of Arbitration*, 20 ARB. INT'L 123 (2004).

II. PARTIES' COMPLAINTS AS TO THEIR COUNSEL AND AS TO HIS/HER FEES

On other occasions a party may complain about the way its counsel has argued its case. In this event, counsel's behavior, which has produced such unhappiness, may be the same as his/her behavior in court proceedings.

Even a party's possible complaint for excessive costs of the arbitral proceedings may be the same as heard with regard to court proceedings. However, this specific issue may deserve to be addressed, since the parties generally refer their dispute to arbitration because they expect arbitral proceedings to be less expensive than court proceedings.

If counsel fees in arbitral proceedings are the same as for court proceedings, this is a good reason for a party not to be happy, because cost-wise it has not produced a better result.²

High fees may be due to the complexity of the case, such as in construction disputes which frequently are not one case but a bundle of claims and counterclaims. In this event, there may be a good reason for high fees.

On other occasions, this may be due to counsel having raised many unnecessary arguments, which sometimes are doomed from the start. Critics of the attitude of counsel say that this is due to their wish to increase their fees. It is suggested that it is preferable not to accept this explanation, because this conduct would not be proper, being in breach of counsel's duty to put his/her client's interest above his own, and it is hoped that it rarely happens.

A more positive explanation for excessive fees, when due to a great number of manifestly ungrounded arguments, is the understandable wish of counsel to raise any possible argument due to an excess of pride or to the concern that the client may later complain about his/her not having raised all of them.

A great number of hopeless arguments, claims or defenses, will tend to produce other negative effects, such as on the one hand a considerable increase in the duration of the proceedings, and on the other hand absorbing too much of the attention of the arbitrator, with the result that, when he/she has to face the decisive issues, he/she may have exhausted too much energy.

A further possible reason for such costs is the excessive number of documents which are produced or indulging in too long and largely excessive discovery proceedings.

The combined result of these and possible other factors is that in some arbitral proceedings counsel fees are not only the highest item of the global costs of such proceedings, but are extremely high in and of themselves. Fees even in excess of U.S. \$10 million have been claimed and granted and in the recent *Yukos* arbitration, this was in the area of U.S. \$50 million.

Excessive fees damage even the very image of arbitration. Various ways to control them have been explored by arbitration scholars and practitioners. Let us try to contribute to that by a couple of items.

² Mauro Rubino-Sammartano, *A Continuous Search For New Horizons*, 23 AM. REV. INT'L ARB. 335 (2012).

III. THE ARBITRATOR'S PLEDGE

An Arbitrator's Pledge should perhaps be made available to the parties by potential arbitrators. The attached Arbitrator's Pledge has been approved by the European Court of Arbitration in order to protect the parties and the image of arbitration.

IV. THE ARBITRATOR'S CONDUCT OF THE PROCEEDINGS

To begin with, a pledge by the arbitrator may be of comfort to the parties, in deciding whether to refer a dispute to arbitration, when they see that the potential arbitrator has undertaken to act in a certain way – for example to bear in mind at all times that his/her fundamental task is to render justice and not to write a brilliant intellectual essay; to invite the parties to enter into a stipulation covering procedure, time and cost; to ask the parties to express what they expect from the arbitrator; to undertake to act with diligence and expedition; to devote to the proceedings all the time which they require and to ensure that the parties' right to prove their case be strictly respected.

An easy example of lack of respect of such right is provided by the frequent shortening by the arbitrator of the list of witnesses before the evidentiary hearing, at a time when he/she is very frequently not yet in a position to know how many witnesses will be necessary (which frequently may become clear only when several witnesses have already been deposed on a specific issue).

The Arbitrator's Pledge may deal also with the issue of excessive legal fees by including the arbitrator's commitment not to tax counsel's fees for an amount in excess of a given multiple of the fees of the arbitral tribunal, dividing those which will be established by the parties (or by the arbitral institution) by the number of its members. In very special cases, to be fully justified by the arbitrator, the taxation of such fees might go up to a higher multiple of the arbitrator's fees.

* * *

European Court of Arbitration Arbitrator's Pledge to the Parties

I _____, _____ (profession), born in _____, resident at _____, _____ citizen,
hereby undertake

towards any party which will appoint me as an arbitrator that, when acting as an arbitrator, I shall

- disclose any past, present or potential future professional or personal link of which I am aware with any of the parties, its stakeholders, managers, staff, any of its associated company and counsel and with my co-arbitrators;

- remain fully independent, impartial and neutral during such proceedings and for two years after the award;
- bear in mind at any time that my fundamental task is to render justice, in compliance with the applicable law and/or rules;
- request the parties not to raise useless or totally ungrounded oppositions and motions, and not to behave in a delaying or obstructive way and I shall sanction such possible behavior, such as in the costs award;
- send to the parties the attached list of questions in order that they express their expectations as to the conduct of the proceedings;
- invite the parties to enter into a stipulation covering procedure, time and costs;
- conduct the proceedings very diligently and with all due expedition and deliver the award (except in very extraordinary situations, which I will state and certify), within nine months after my appointment;
- ensure that the right of the parties
 - o to present their case,
 - o to call the relevant oral evidence,
 - o to examine and cross-examine the witnesses,
 - o as well as in respect of all relevant documentary evidence (the production of useless documents being subject to sanctions in terms of costs),be fully respected;
- to devote to the proceedings all the time which is necessary;
- to tax fees of Counsel for the victorious party (or of each party – if each of them will be ordered to bear its costs), up to a maximum of ___ times (and, in very special circumstances to be stated and certified by myself, up to ___ times), the fees which the parties have agreed or are due as to such proceedings to myself as sole arbitrator or as a member of the Arbitral Tribunal;
- to discharge personally my task as arbitrator;
- to treat in strict confidence the proceedings and anything which is said or produced in such proceedings, as well as the award;
- and respond to the Questionnaire as per attachment.

Date and place

by _____

Encl: Questionnaire

QUESTIONNAIRE TO THE ARBITRATOR**1. Priority to truth finding?**

Do you agree that truth finding must have a priority over hurried proceedings? Yes No

2. Right of the parties to present and to prove their case

Do you agree that the parties are entitled to present and prove their case? Yes No

3. Case Management

Do you agree that a calendar of the proceedings is to be prepared at the beginning of the proceedings and regularly reviewed and updated? Yes No

4. Duration of the proceedings

Do you agree that the proceedings must be dealt with expeditiously and that unless there are special reasons (to be stated) their ideal duration is 9 (maximum 15) months? Yes No

5. Raising all possible evidentiary material

Do you believe that truth finding requires that all relevant evidentiary material be raised, even if this takes more time? Yes No

6. Is there a priority of documents over oral testimony?

Do you think that oral testimony is always less important than documentary evidence? Yes No

7. Short time period between one step of the proceedings and the following one

Do you think that many months should not run from one step of the proceedings to the other? Yes No

8. Short time period between the closing of the proceedings and publishing the award

Do you agree that, in the absence of very important reasons (to be promptly stated), the award should be published not later than 60 days after the closing of the proceedings? Yes No

9. Early decision on preliminary issues or on a part of the claim which is manifestly grounded

Do you agree that preliminary matters and issues which are manifestly grounded should be decided as early as possible?

Yes No

10. Settlement Facilitation

Do you believe that the arbitrators should not go beyond inviting the parties to settle?

Yes No

11. Witnesses

Do you agree that the selection and the examination of witnesses and the cross examination of the witnesses of the other parties, is a right of each party and that the role of the Tribunal is to watch that this takes place properly?

Yes No

12. Witness preparation/coaching witness statements

Do you think that preparation/coaching of witnesses and witness statements should be authorized if one of the parties objects to it?

Yes No

13. Limiting witnesses evidence

Do you agree that the list of witnesses should not be reduced a priori, rather reserving whether or not to hear witnesses on an issue if this has been sufficiently dealt with by prior witnesses?

Yes No

14. Documents full disclosure

Do you believe it is appropriate to order unlimited disclosure of documents or a very large disclosure of entire classes of documents?

Yes No

15. Experts nominations

Do you believe that the Tribunal should consult with the parties before appointing experts and putting questions to them?

Yes No

16. Adjournment of evidentiary hearing

Do you agree that an evidentiary hearing should be adjourned (if the term for filing the award allows it) if a witness is not available unless he is not necessary?

Yes No

17. Parties' depositions

Do you agree that even the parties should be heard as witnesses (subject to taking account of their interest in the dispute)?

Yes No

18. Delegation

Do you agree that no decision and no material research on a decisive issue and no drafting of a part of the award should be delegated to the secretary to the Tribunal or to assistants? Yes No

19. Deliberations

Do you agree that the case must be decided after a full exchange of views amongst arbitrators, without any prior conclusion or drafting by any of them? Yes No

20. Dissenting Opinion

Are you disturbed by a dissenting opinion? Yes No

21. Costs

Do you believe it is appropriate for a party to recover all its reasonable costs, even if it has succeeded only on a part of its claim or only on some of its claims? Yes No

22. Costs

Do you believe that a party is entitled to receive, in case of success, the fees of the various law firms which have been involved, even if all of them were not absolutely necessary, or of a number of professionals that have been involved beyond what was necessary for presenting and proving its case? Yes No

23. Costs

Do you believe that the winning party is entitled to be paid by the loser the contingent fees which it has undertaken to pay in favor of its counsel, even when they exceed reasonable fees computed on another basis? Yes No

24. Questions to the parties

I enclose a questionnaire to the parties

(date and place)

(name)

QUESTIONNAIRE

to the parties to arbitral proceedings administered by the European Court of Arbitration (enclosed with the CEA Arbitrator's Pledge)

between _____ Claimant

and _____ Respondent

1. Do you agree not to contact, and to cause your Counsel not to contact, your nominated arbitrator in person or in writing, except officially during the proceedings with copy to the other arbitrators and to opposing counsel? Yes No
2. Do you agree to limit the number of pleadings to the Statement of the Case, the Answer, respective rebuttals and to a simultaneous After Evidentiary Pleading followed by a simultaneous Rebuttal? Yes No
3. Would you prefer to address orally the Arbitral Tribunal, rather than exchanging a Rebuttal subsequent to the After Evidentiary Pleading? Yes No
4. Do you agree to limit the number of pages of your first pleading to 40 pages and subsequently to refer very succinctly to your previous pleadings without repeating your arguments? Yes No
5. Do you agree that some hearings be held in a place and country different from the venue of the arbitral proceedings and more convenient? Yes No
6. Do you agree to hear by videoconference those witnesses who cannot travel to attend the hearing? Yes No
7. Do you accept that witnesses be contacted and prepared for their testimony? Yes No
8. Do you agree to keep (and to cause your counsel, advisors, managers employees and agents to keep) strictly confidential the file, the facts, the documents, the evidence of these arbitral proceedings and the reasons of the award? Yes No

9. Do you agree to conduct and to cause your counsel to conduct these proceedings in a manner which limits the duration of the proceedings to 9 (maximum 15) months, and to avoid the production of documents and the calling of witnesses who are unnecessary or irrelevant, restraining motion practices, avoiding delays, vexatious or repetitive conduct and in general any overlawyering and agreeing to pay to the other parties all legal costs caused by a breach of such commitment, even in event of final success in the dispute? Yes No
10. Do you undertake to promptly reimburse the other party (which has had to pay itself, in the absence of your own payment) your share of any advance requested by the European Court of Arbitration (or by its local competent Chapter, if any) for the proceedings and to recognize that the other party shall be entitled to an ex parte summary judgment, or other summary proceedings, against you for such repayment? Yes No
11. Do you agree that the arbitrators issue as soon as possible an award for the part of a claim or of a cross claim which is undisputed or manifestly grounded? Yes No
12. Do you wish that the award be signed by the last arbitrator in the city which is the venue of the proceedings? If not, where would you like the award to be made? Yes No

**MORE COMPREHENSIVE MEDIATION AND
ARBITRATION STANDARD CLAUSE**

(for Professional Users)

Any dispute between the parties relating to or arising from this contract shall be submitted to a procedure of mediation conducted by a sole mediator, who will be appointed and will proceed in accordance with the Mediation Rules of the Mediation Centre for Europe, the Mediterranean and the Middle East having its seat in Strasbourg, which Rules are in force at the date of filing of the application for mediation.

If mediation is successful the agreement signed by the Parties will constitute a settlement of the existing or threatened disputes. A party may seek enforcement through court proceedings of any obligation arising from such settlement.

In the event of the mediation proceedings not taking place or being unsuccessful, any dispute arising from said relationships between the parties shall be determined in accordance with the Arbitration Rules and the Internal Rules of the European Court of Arbitration – being part of the European Centre of Arbitration and Mediation having its seat at Strasbourg – (in force at the time the application for arbitration is filed) by a sole arbitrator appointed according to the said Rules.

The arbitration proceedings will be conducted according to the provisions of the said Rules by a sole arbitrator who will be appointed, if the dispute is domestic, by the local Chapter – if any – of the European Court of Arbitration and in the absence of a local Chapter, as well as to all non domestic disputes, by the Central Registrar competent for that area: Strasbourg for Northern and Central Europe; Milan for disputes between parties if at least one of them belongs to Southern Europe (as to France, the Department of Provence, Alpes, Côte d'Azur, les Bouches du Rhône, Var, Roussillon and Languedoc), the Mediterranean and the Middle East, Portugal, the Balkans, Romania, Bulgaria, Ukraine, the Black Sea and in general all the countries of Eastern Europe.

The parties undertake to keep, and to cause their Counsel, advisors, managers, employees and agents to keep the dispute, the facts, the documents, the evidence and the award, strictly confidential.

The parties agree to conduct and to cause their Counsel to conduct themselves in a manner which limits the duration of the proceedings to nine months, or in special cases 15 months, and to avoid the production of documents and the calling of witnesses who are clearly unnecessary or irrelevant, restraining motion practices, avoiding delays, vexatious or repetitive conduct and in general any overlawyering and accepting to pay to the other parties, even in case of final success in the dispute, all legal costs caused by a breach of such commitment.

Each party further undertakes to promptly reimburse the other parties. It shall consequently pay its share of any advance requested by the European Court of Arbitration (or by its local competent Chapter, if any) for the proceedings and recognize that the other parties shall be entitled to seek and enforce against it an ex parte summary judgment, or other summary proceedings, for such repayment.

The parties request the arbitrator to issue as soon as possible an interim award for the part of a claim or cross claim which is undisputed or manifestly grounded.

Place of Arbitration _____

Language of the proceedings _____

As to the substance of the dispute:

either the substantive law of _____ will be applied
or

The arbitrators are instructed to decide ex bono et aequo

