SOME TOPICS OF ICC ARBITRATION

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Hierna volgt een weergave van enkele onderwerpen inzake de arbitrage in het algemeen en de arbitrage van de Internationale Kamer van Koophandel, die werden behandeld door Herman Verbist, counsel bij het Internationaal Arbitragehof van de IKK [1], naar aanleiding van een gastcollege op 4 maart 1993 aan de Rechtsfaculteit van de K.U.Leuven. Dit gastcollege vondt plaats in het kader van de cyclus over "International Arbitration" opgezet door Prof. Hans Van Houtte.

I. DISSENTING OPINIONS

The ICC International Court of Arbitration has been facing more and more a situation whereby members of arbitral tribunals (if constituted with three arbitrators) submit dissenting opinions separately from the draft award which the Court has to scrutinize.

Therefore the question arose what practice was to be adopted by the Court with respect to this concept of dissenting opinion which had developed within certain national legal systems, and then in particular in State Court proceedings. Particularly, in the common law system dissenting opinions play a role for the Appeal's Courts in the formation of jurisprudence.

However, the situation is different with an arbitral award, which as a matter of principle cannot be reviewed on the merits.

As the ICC itself had considered that it was not appropriate in the short or medium term for it to promote the harmonisation of legal systems and practice in connection with dissenting opinions, or to take an initiative in the international sphere to promote the development of any particular practice, the ICC Commission on International Arbitration examined a few years ago the matter of dissenting opinions.

The ICC Commission on International Arbitration, which is the expert commission of the International Chamber of Commerce dealing with arbitration matters, is a body distinct from the ICC International Court of Arbitration. It is important to note that opinions and conclusions expressed in reports of a Working-Group of the ICC Commission on International Arbitration, are those of the Working-Group. They do not amend

(1) De bemerkingen zijn die van de auteur en binden niet het Internationaal Arbitragehof.

or supersede the ICC Rules of Arbitration or bind the ICC International Court of Arbitration or its Secretariat.

In 1989 the Commission delivered a report on Dissenting and Separate Opinions. (This report has been published in the ICC International Court of Arbitration Bulletin, Vol. 1/N° 1, June 1990, 32-36).

As is set out in the report of the Working-Group of the Commission, the main disadvantages of permitting dissenting opinions are :

- they underscore the link between the arbitrator (member of the arbitral tribunal) and the party who nominates him ;
- the arbitrators no longer feel obliged to search for a unanimous decision after confronting each other's opinions ;
- a dissenting opionion may introduce a debate on the merits of the case when it comes before the ICC International Court of Arbitration ;
- if notified to the parties, the dissenting opinion may give ideas for the losing party to file a motion for the setting aside of the award rendered.

Essentially, four questions were examined by the ICC Commission with respect to dissenting and separate opinions :

A. FIRST QUESTION : SHOULD DISSENTING OPINIONS BE SCRUTINIZED BY THE ICC COURT ?

This question is related to the one as to whether or not a dissenting opinion is to be considered part of the award. The Commission held (and the Court over the years adopted this policy), that the "award" is comprised of the dipositive section and the reasons given by the majority arbitrators. This position is understandable, all the more since a dissenting opinion is certainly not necessary for the purposes of enforcement of the dispositive part of the award.

The ICC Court, when it receives a draft award together with a dissenting opinion, shall in all circumstances look at the dissenting opinion, notwithstanding the fact that it does not scrutinize it in the sense that it does not have to approve it. When it reads the dissenting opinion of a minority arbitrator, the Court shall primarily verify whether or not there are any "points of substance" that should be drawn to the attention of the majority arbitrators. Thus, the dissenting opinions can indicate weaknesses in the reasoning of the award, which may lead the Court not to approve the draft majority award and to invite the majority to reconsider their position.

B SECOND QUESTION: UNTIL WHERE CAN AN ARBITRATOR SUBMIT A DISSENTING OPINION?

The commission proposed and the Court followed the proposal that dissenting opinions can only be submitted until the time when the draft majority award is submitted, and that it is the duty of the chairman of the arbitral tribunal to fix time-limits for any member of the arbitral tribunal to transmit his dissenting opinion.

This is the only solution to allow that the Court looks at the dissenting opinion together with the draft majority award and to avoid a situation where an arbitrator would delay the scrutiny process on the basis of an announcement that he shall make a dissenting opinion.

C. THIRD QUESTION: WHETHER OR NOT THE MAJORITY ARBITRATORS SHOULD HAVE AN OPPORTUNITY TO SEE THE OPINION OF THE DISSENTING ARBITRATOR BEFORE FINALISING THE MAJORITY AWARD?

It may not be considered essential, since the dissenting arbitrator will presumably have made his views clear - with his reasons - during the deliberations of the tribunal.

However, it may nevertheless be desirable as the dissenting arbitrator may highlight important substantive points which have not been fully appreciated by the majority arbitrators.

The ICC Commission therefore proposed that the majority arbitrators should see first the dissenting opinion as written down before they finalize the draft award. The ICC Court followed this proposal.

It therefore pertains to the chairman of the arbitral tribunal to take the necessary measures so that the dissenting opinion is seen by the majority arbitrators prior to the submission of the draft award for scrutiny to the Court.

D. FOURTH QUESTION: CAN OR SHOULD THE DISSENTING OPINION BE COMMUNICATED TO THE PARTIES?

The ICC Commission was concerned that the communication of the dissenting opinion might encourage the parties to challenge more frequently awards or that the validity of the award might, in certain legal systems, might be affected as a result of the communication of the dissenting opinion to the parties.

The Commission therefore recommended that it is sensible to communicate the dissenting opinion (also as the Court had not the power

to prevent the dissenting arbitrator from doing it himself), while suggesting however that the Court would not do so in case the communication of a dissenting opinion is prohibited under a national law.

The Court's policy is that dissenting opinions shall only be communicated to the parties, in case the majority arbitrators authorize the Secretariat to do so. Thus the arbitrators must verify whether or not the communication of the dissenting opinion to the parties may jeopardize the validity of the award.

II. INTERIM AND PARTIAL AWARDS

Pursuant to Art. 21 of the ICC Arbitration Rules, "before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the Court...".

In the various arbitrations that the ICC Court of Arbitration has administered and continues to administer there is a growing number of cases in which arbitrators make :

- interim awards
- partial awards
- interlocutory awards
- interim measures
- conservatory measures
- procedural orders

It is therefore important to have a clear understanding of the scope of Article 21 of the Rules, and to determine what type of decisions must take the form of an award and be scrutinized by the Court before they can be rendered and what type of measures or decisions would not fall within that scope.

As the ICC had some questions on the matter, it installed a Working-Group of experts within the framework of its Commission on International Arbitration in order to examine the questions. (This report has been published in the ICC International Court of Arbitration Bulletin, Vol. 1/N° 2, December 1990, 26-30). It is important to note, once more, that opinions and conclusions expressed in said report are those of the Working-Group. They do not amend or supersede the ICC Rules of Arbitration or bind the ICC International Court of Arbitration or its Secretariat.

Essentially, four questions were examined by the ICC Commission with respect to dissenting and separate opinions :

A. FIRST QUESTION: FOR WHAT REASONS CAN IT BE USEFUL THAT THE ARBITRAL TRIBUNAL TAKES AN INTERIM DECISION?

- A party may wish to have an interim finality on a specific issue: e.g. where there is a jurisdiction issue, one of the parties may wish to have a positive decision from the arbitral tribunal in the form of an award for the purposes of recognition under the New York Convention, thus creating a bar to parallel proceedings in National Courts.

- In a country which has adopted the UNCITRAL model law, such decision on jurisdiction would be appealable (Art. 16), and parties may therefore wish to have a decision on jurisdiction in the form of an interim award so that the appellate procedure will not have to wait until the end of the arbitration.

- A definitive determination of some (but not all) of the claims may enable a deserving party to collect some money before the final award deals with all of the remaining issues in dispute;

- A determination of a particular issue (e.g. liability) may either avoid the need for, or at least simplify, the remaining stages of the arbitration.

- The arbitrator may wish to make an interim award in order to invoke a sense of finality on a particular issue. With an interim award he could create a decision which operates as 'res judicata' between the parties.

In this respect it ought to be kept in mind that, pursuant to Article 24 of the ICC Arbitration Rules, every award (including an interim award) is definitive with respect to the issue determined.

B. SECOND QUESTION: WHAT TYPE OF DECISIONS SHOULD TAKE THE FORM OF AN AWARD?

1. Prejudicial questions, including decisions relating to jurisdiction and to the determination of the applicable law?

The Commission indicated that, since such decisions are intended to be final and can normally be challenged before national courts, it is desirable that they should be reasoned and drawn up in the form of an award.

This corresponds to the present practice of the ICC Court that, regardless of any agreement of the parties, decisions on jurisdiction and the applicable law should be made in the form of an award to be scrutinized pursuant to Article 21 of the Rules, whenever they are made.

2. Interim measures of protection ?

Interim measures of protection are, by definition, not intended to be final and irreversible. Also, as such decisions generally are not rendered with detailed reasons, the scrutiny process of the Court shall not constitute a meaningful contribution. Moreover, the scrutiny process may sometimes render the remedy of the interim measure ineffective.

It shall therefore be up to the arbitrator to determine whether he deems appropriate to submit the order for interim measures to the ICC Court for scrutiny prior to its being rendered. The arbitrator's determination in this regard may depend on the relevant laws of the country in which the order shall be enforced, as in some countries an order may be enforceable only if it has taken the form of an award.

3. Procedural orders ?

Procedural orders are rendered by the arbitral tribunal in the course of an arbitration in order to instruct the matter and, generally, with a view of obtaining evidence from the parties. Not all procedural orders are reasoned.

Procedural orders are often modified by the arbitral tribunal later on, in light of subsequent events.

The scrutiny process of the ICC Court shall not constitute a meaningful contribution for procedural orders and moreover may considerably delay the measures that the tribunal intends to take. Therefore it is not necessary that procedural orders take the form of an award.

It is to be noted that, in the event the arbitral tribunal calls "procedural order" a decision which in facts disposes of part of the issues, it must be made in the form of an award, which is to be scrutinized by the Court.

4. Any decision on substantive issues must take the form of an award.

C. THIRD QUESTION; WHAT DISADVANTAGES ARE THERE WITH THE RENDERING OF PARTIAL OR INTERIM AWARDS :

Parties and arbitrators should be aware that not in all circumstances or not in all cases it is useful to make a partial award on particular issues, notwithstanding what has been set out under (a) above.

- If a partial or interim award is rendered, a party may wish to challenge it in the local courts. The consequence thereof shall be that years

of time may be consumed before the arbitration case proceeds again and before the final award is rendered, since in many, if not most cases, the arbitral tribunal will decide to suspend the arbitration while awaiting the final decision of the national court on the partial or interim award.

- If an arbitrator renders several interim awards in a case, which is not excluded, he will spend more time and effort than in producing one final award. The case will then suffer more delay.

D. FOURTH QUESTION: WHEN IS IT APPROPRIATE TO MAKE AN INTERIM AWARD?

When all parties request the arbitrator to render a partial or interim award, the arbitrator shall be bound by such request. Also, when both parties refuse the rendering of a partial award, the arbitrator shall be obliged to respect the agreement of the parties.

In a case where only one party asks for a partial or interim award, however, the arbitrator shall have to determine whether he deems appropriate to make such award. The ICC Commission suggested that the arbitrator only makes a partial or interim award if it is in the interest of an effective and efficient conduct of the arbitration. He shall thereby take into consideration all factors that may be in favour or against as set out hereabove.

III. FAST-TRACK ARBITRATION

Parties that are concerned with the rapidity of resolving the dispute and that may have complained in the past of the time it can take before they receive the final award, should know that they can tighten the time-schedules which are set by the ICC Arbitration Rules, if they really wish to go fast.

Whereas generally under the ICC Rules, an arbitral tribunal disposes of 2 months in order to establish the Terms of Reference (which time-limit can be extended by the Court upon a request from the arbitral tribunal or upon its own initiative pursuant to Article 13 al. 2), and 6 months to render the award (which time-limit also can be extended by the Court pursuant to Article 18 al. 2), the parties are in a position to agree, either in the clause or at the time the dispute arises, to go much faster and to set a time-limit for the rendering of the award.

The parties should however be aware that the ICC Court shall not be bound by any such agreement. The agreement should therefore permit extensions by the Court if necessary.

The type of dispute may sometimes require an urgent response or an urgent decision from an arbitral tribunal, (e.g. annual redeterminations of prices in long-term contracts), and parties sometimes may wish to avoid any possible delay that a procedure may incur.

With respect to the administrative decisions necessary for the setting in motion of and the conduct of the arbitration, the ICC Arbitration Rules provide the possibility that, pursuant to Art. 1.3, the Chairman of the Court shall have the power to take alone urgent decisions on behalf of the Court. Art. 1.3 of the Rules provides that this shall be done only in urgent matters, and provides that any such decision shall be reported to the Court at its next session.

Recently (in Winter 1991-1992) the ICC Court was seized with two cases, in which the parties had provided for a specific, accelerated arbitration procedure. Pursuant to an amendment to the arbitration clause, they had agreed that the award was to be rendered by a fixed date within essentially two months of the introduction of the Request for Arbitration.

The consequence of such clause was that, if the arbitration failed to provide an award within this time-limit, the parties were left with seeking their remedies in the State Courts.

However, the parties respected the time-limit, which they had agreed to extend with 9 days. In that time period, the Secretariat notified the Request for Arbitration and awaited the response from defendant within the 30 days time-limit set by the Rules. As soon as defendant's Answer was received, the Secretariat accelerated the procedure of constitution of the arbitral tribunal, requesting payment of the advance on costs and transmission of the file to the arbitrators. All these administrative steps occurred in just a couple of days. It then took a week for the arbitral tribunal to establish the Terms of Reference. Within two days following their receipt by the Secretariat, the Chairman of the ICC Court took note of these Terms of Reference, and as the parties had meanwhile satisfied the full advance on costs, the document could become operative without delay.

Two days later, i.e. on January 2, the arbitral tribunal held its hearing and 36 hours later the Secretariat received the draft award for scrutiny. Three days thereafter the Court scrutinized and approved the award, and the day following the approval the award was notified.

Thus, the award was notified one day before the time-limit agreed between the parties had elapsed.

More details on the "fast track" arbitration that the ICCCourt handled in the Winter of 1991-1992, its procedure as well as the comments of the parties and the arbitrators that were involved in the case, can be read in the ICC International Court of Arbitration Bulletin, Vol. 3/N° 2, November 1992, 4-19).

IV. PRE-ARBITRAL REFEREE PROCEDURE

("le référé pré-arbitral")

On January 1, 1990 the International Chamber of Commerce presented an innovation to the international business and legal community by offering the possibility of an ICC Pre-arbitral Referee procedure.

This Procedure is laid down in a specific set of Rules which came in force on that date. These Rules are designed in order to meet a specific need: that of having recourse at very short notice to a third person - "the Referee" - who is empowered to order provisional measures needed as a matter of urgency, before a court or an arbitral tribunal is seized on the merits.

The measures which are ordered are binding until the Referee or the competent jurisdiction (court or arbitral tribunal) has decided otherwise.

These Rules may be resorted to only on the basis of a written agreement between the parties to that effect. It is important to note that they may play a complementary role with other ICC procedures:

* **The ICC International Center for Expertise Rules**:

These Rules offer a method of quickly identifying, before the evidence is obliterated, whether technical problems in fact exist and, if so, their causes.

* **The ICC Rules for Optional Conciliation**:

The Rules offer the possibility of appointing a conciliator, who shall attempt to propose terms of settlement to the parties

* **The ICC Arbitration Rules**

A. CHARACTERISTICS OF THE PRE-ARBITRAL REFEREE PROCEDURE:

- Short notice: the defendant who is notified directly by claimant with a request for the appointment of a Referee shall dispose of 8 days to file its response (Article 3.4 of the Rules).

- The Referee is appointed by the President of the ICC International Court of Arbitration, shortly upon the expiration of the 8 days time-limit given to defendant to file its Answer.The parties have the liberty to choose the Referee by agreement either before or after the filing of a Request by the claimant.

- The Referee disposes of 30 days in order to deliver his order (Article 6 of the Rules). This order shall be notified to the parties by the Secretariat, provided that it has received the full amount of the advance on costs fixed by the Secretariat.

- The procedure is conducted in an adversarial way. The defendant party shall be given the opportunity to file its comments, to produce documents.

- Before rendering his order the Referee can instruct the matter as his deems fit: investigations, interim measures, expertise.

- The decision of the Referee shall be motivated. The Referee may make the carrying out of his order subject to such conditions as he thinks fit, including that a party shall commence proceedings before the competent jurisdiction within a certain time-limit; or, that the party in whose favour the order is made shall provide an adequate secrurity (e.g. the production of guarantees).

B. WHAT ARE THE POWERS OF THE REFEREE?

Pursuant to Art. 2(1) of the Rules

- he can order any conservatory measure or any measure of restoration that is urgently necessary to prevent either immediate damage or irreparable loss and so to safeguard any of the rights or property of one of the parties;

- he can order a party to make to any other party or to any other person any payment which ought to be made;

- he can order a party to take any step which ought to be taken according to the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;

- he can order any measures necessary to preserve a establish evidence.

C. WHEN SHALL THE REFEREE BE CALLED UPON?

By its nature this shall be done prior to judicial or arbitral proceedings on the merits of the dispute are filed. It shall typically occur at a time when an urgent decision is required. Generally this shall be when a problem has arisen within the contractual relationship between the parties.

Unless parties agree otherwise in writing, a Referee shall not act as arbitrator in any subsequent procedure between these parties or other connected cases (Article 2.1 of the Rules).

D. DIFFERENCE WITH EXPERTISE:

If a party calls upon the ICC Court for International Expertise, an expert shall be appointed with the purpose of establishing certain facts, supervising certain works or making certain recommendations, in the presence of the parties. His recommendations shall have no definitive and no binding effect towards the parties.

Unlike the expert, the pre-arbitral Referee, whose appointment is made on the basis of a contractual clause, shall have the power to make binding orders, notwithstanding the fact that they shall have a provisional aspect.