President's Message

Transfer of ownership: from the parties' respective cases to the Case decided by the tribunal

In an arbitration each party presents its case and the tribunal decides the difference[1] between them which has given rise to the dispute. What makes the situation interesting is that there are at least two cases out of which the tribunal must form its own, "the Case" to be decided. It is of critical importance that the tribunal, when building the Case, takes full account of the parties' respective cases and that each of the parties recognises its own case in the tribunal's Case.

At some stage in this process a party to the arbitration must indeed abandon the ownership of its case, and trust that the tribunal will take responsibility for it and give it the proper weight when it merges the parties' cases, integrating them into the Case. When considering how the parties' cases are transferred and transformed into the Case it is useful to bear in mind the manner in which all three are constructed and the complexities that occur in this construction.

In preparing their case, counsel collect documents, technical information and other elements. Together with information, as well as direct and indirect personal accounts from various individuals within and outside the client's organisation (presented as "the facts of the case"), and with advice from experts, counsel construct a case which more or less closely reflects the perceptions emerging from the party and its organisation. It must also be integrated into a set of norms which determines the finality of the case, namely the relief requested. This construction takes place on both sides of the dispute. Despite a common starting point the two cases often differ considerably from each other.

The tribunal receives the "facts" from each party, the evidence on which they rely in support of the arguments by which the parties seek to justify the requested relief. The tribunal may simply choose one or the other of these cases and decide the dispute accordingly. But that would be most unsatisfactory. What should, and normally does, happen is that the tribunal analyses each of the cases and its components, deconstructs them and builds a new construction, resembling more or less closely that of the parties and places it in a new framework. The Case so constructed is not just an

[1] Occasionally, especially in public international law, the term "difference" is used as synonymous with dispute.

amalgamation of the parties' respective cases; it is a new creation: the tribunal may situate the "facts" of the Case in a legal framework which differs from that of either party, as highlighted by the discussion about *jura novit curia*. It may also view the factual information in a manner that differs from the view which either of the parties had.

Such transfer and appropriation can hardly be effective and satisfactory without verification and reassurance by the parties. In other words, the tribunal must ensure, through contact with the parties, that it has correctly understood their cases, the factual explanations, the arguments and what it is that they seek from the tribunal. Such understanding is not self-evident even among people of the same culture and speaking the same language. It is complex and difficult when it occurs across cultural and language barriers. The communication that must be sought in this process can be seen as another facet of the interactivity between the parties and the tribunal that is often the subject of discussion, including in this column, as a desirable objective in the conduct of an arbitration.

Verification and reassurance requires that the tribunal tests its understanding with the parties. The ICC Arbitration Rules have a very useful feature in this regard: the Terms of Reference. These must contain a "summary of the parties' respective claims and of the relief sought by each party" ("*prétentions des parties*" and "*Vorbringen der Parteien*"); usually they set out in a more or less succinct form the case of each party. Since the Terms of Reference must be drawn up by the tribunal, one would expect that it is the tribunal which summarises in its own words and "in the light of [the parties] most recent submissions" what it has understood of the parties' respective cases. The parties then should have the opportunity to verify the tribunal's understanding and to correct the summaries before they sign the Terms of Reference.

Unfortunately, it has now become frequent practice for tribunals to avoid the effort of drawing up this part of the Terms of Reference, and thus evade this early challenge to their understanding of the dispute. Instead they invite the parties each to prepare a summary of their claims and relief sought, and insert it in the final version of the Terms of Reference.

It may, of course, be said that the parties are better placed to draft their own case; and that the solution avoids the tribunal making mistakes when expressing the parties' cases in its own words. But the exercise is of no use to the parties since they have set out their case already in "their most recent submissions". As for the Tribunal it is precisely by making mistakes and having them corrected that it is assisted in understanding the parties' cases.

In addition and equally important, the exercise provides the tribunal with an opportunity of confronting the parties' cases to its own concepts and already then to the Case into which they will have to merge. The tribunal should, and is likely to, be very prudent at this early stage, reserving the possibility for an evolution of the parties' cases during the course of the proceedings. However, by commencing the dialogue already then, it lays the grounds for the parties ultimately recognising their own cases and finding them properly taken into account in the Case constructed by the Tribunal.

The arbitrators' failure to face their task when drawing up ICC Terms of Reference appears symptomatic for a modern trend in arbitration, namely that of arbitral tribunals shunning away from any opportunity to have their understanding of the parties' cases tested by the parties. This trend finds another expression in those awards which reproduce at length, and verbatim, the parties' arguments, perhaps for fear of misrepresenting them when expressing them in the tribunal's own words. Indeed, it is increasingly frequent for arbitral tribunals to request that the parties' submissions be delivered in Word format so that they can be copied and pasted into the award. In such awards one typically finds the parties' cases set out in great detail but often hardly any trace of the tribunal's own effort to appropriate them and construct the Case of its own.

The same tribunals will, during the proceedings, avoid revealing their understanding of the parties' cases. Misunderstandings may then come to light in procedural directions or in the questions posed by the tribunal at the hearings. The latter can come as a surprise or even as a shock for counsel, but on reflection one is usually most grateful for these misunderstandings to come up at the hearing, at a time when there remains an opportunity to correct them, rather than reading the award, when it is too late.

Arbitrators do not have the benefit of a court of appeals behind them when they get it wrong. There are practically no means for correction when the Case they decide does not adequately reflect the parties' cases. The process of transferring ownership and the construction of the Case which the tribunal decides thus deserves full attention from both arbitrators and counsel, who should not hesitate to prompt the tribunal in this direction.

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