President's Message

Quousque tandem, Arbitrator, abutere patientia nostra?

The last President's Message of 2015 addressed IBA President David Rivkin's call for a "*new contract*" between parties and arbitrators. Among the issues that David Rivkin took up, and that have preoccupied arbitration users for some time, is the delay sometimes experienced in receiving arbitral awards. Complaints on this topic are reminiscent of Cicero's devastating *exordium ex abrupto* to his first oration against Catiline, from which the title of this President's Message borrows liberally.[1]

In a communiqué of 5 January 2016,[2] the International Court of Arbitration of the ICC announced the release of a note setting out new policies on the financial consequences for arbitral tribunals that delay without justification the submission of draft awards for scrutiny by the Court.[3] This note is in fact an updated version of the "*Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the 2012 ICC Rules of Arbitration*".

The relevant parts of the revised note are paragraphs 36 to 39, which read as follows:

> "*36. Arbitral Tribunals are* […] *expected to submit draft awards within three months after the last substantive hearing on matters to be decided in an award or the filing of the last written submissions concerning such matters (excluding cost submissions), whichever is later.*
>
> *37. Whenever the Arbitral Tribunal has conducted the arbitration expeditiously, the Court may increase the arbitrators' fees above the amount that it would otherwise have considered fixing.*

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1 Cicero's *exordium ex abrupto* (opening, for those whose hobbies do not include classics) can be translated into English thus: "*How long will you abuse our patience, Catiline?*" The substitution of "*Arbitrator*" for "*Catilina*" may scandalise some, given the degree of baseness and depravity that Cicero ascribed to the alleged ringleader of a murderous and villainous plot. Of course, the reader should not draw any such parallels.

2 http://www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/.

3 See Article 33 of the Rules of Arbitration of the ICC (the "ICC Rules"). Submission of the draft award for scrutiny by the Court under this provision must be distinguished from the rendering of the award pursuant to Article 30 of the ICC Rules, which takes place after the Court has approved the award in accordance with Article 33.

38. Where the draft award is submitted after the time referred to in paragraph 36 above, the Court may lower the fees as set out below, unless it is satisfied that the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstances, and without prejudice to any other measures that it may take, such as replacing one or more of the arbitrators:

- *If the draft award is submitted for scrutiny up to seven months after the last substantive hearing or written submissions (excluding cost submissions), whichever is later, the fees that the Court would otherwise consider fixing are reduced by 5 to 10%.*
- *If the draft award is submitted for scrutiny up to 10 months after the last substantive hearing or written submissions (excluding cost submissions), whichever is later, the fees that the Court would otherwise consider fixing are reduced by 10 to 20%.*
- *If the draft award is submitted for scrutiny more than 10 months after the last substantive hearing or written submissions (excluding cost submissions), whichever is later, the fees that the Court would otherwise consider fixing are reduced by 20% or more.*

39. In deciding on the above, the Court may also take into account any delays incurred in the submission of one or more partial awards."

Predictably, this has "created a buzz". Equally predictably, reactions are diverse and at times more of the knee-jerk variety than of the carefully considered breed. Perhaps most predictably of all, reactions of the negative sort are being expressed more *sotto voce* than *fortississimo* – no-one in his or her right mind would wish to give the impression that they are seeking licence for delay.

The aim of this President's Message is not to examine the pros and cons of the ICC's initiative. The scope is much more modest: first, to address a misperception that comes up in informal conversations held so far; second, to flag a few questions (many of which may appear naïve) that may arise in practice. The overall purpose is to provoke constructive debate on how to ensure that this initiative attains its entirely laudable goals.

A misperception of the ICC's approach?

The legal profession being rather conservative, it is not particularly receptive to change (and that is putting it mildly). However, with time, novelties achieve acceptance. The author recalls the howls of protest when the ICC first required prospective arbitrators to list the number of pending cases they were handling as arbitrator or counsel when accepting a nomination. (The

author also recalls with amusement the wry remark of one commentator, who observed that many of those who were outraged by this blatant invasion of their confidential sphere appeared to have far fewer qualms when it came to advertising their impressive caseload in professional registries and the like.) Nowadays, caseload disclosure at the nomination phase is a matter of routine (and failure to disclose a genuine ground for opprobrium).

It would appear that the ICC's recent initiative has touched the same nerve and may follow a similar trajectory.

What strikes the author most is that many of those who question whether it is realistic to expect draft arbitral awards within three months systematically recite the processes that currently prevail in the drafting of awards and conclude that these processes will often not "fit" into a period of three months.

This reaction misses the point: the idea of the ICC is not (as far as the author can tell) to create a Procrustean bed, on which one would lay current practice and hack off anything that would exceed the standard. The approach appears to be far more subtle: the underlying motivation is also – perhaps primarily – to force arbitrators to re-think their methods of deliberating and drafting awards, so as to minimise the time required for the final drafting phase. In other words, the aim is to make arbitral tribunals do things differently and more efficiently, not just faster.

Seen from this perspective, the approach is not only more subtle – it is welcome because it invites innovation. It also rewards innovation, since arbitrators who conduct matters expeditiously may see their remuneration increased.

If this approach succeeds, the ICC's policies on time limits to submit awards for scrutiny may well have gained as much acceptance as its forms on arbitrator caseload five or ten years from now.

Some (naïve?) questions

Now that this misperception has been corrected, one may wonder what, in the ICC's new policies, could possibly be open to criticism.

On the unscientific basis of informal conversations held with arbitration practitioners, the most common complaint is that the ICC *is* creating a Procrustean bed by setting arbitrary standards that fail to take into account the diversity of cases: it would appear to treat in the same way a straightforward dispute arising from a sales contract for a bulk commodity, a highly technical multi-party, multi-claim construction arbitration or an investor-State arbitration involving complex and high-stakes issues of public

interest. Sceptics also say that the ICC is losing sight of the perfectly justifiable reasons why it can take more than three months after the last substantive submission to finish drafting an award.[4] In a nutshell, the most frequently heard grumble is that the ICC is adopting a "one size fits all" approach that is disconnected from reality.

The answer to this complaint can be found in the very text of the ICC's press release and revised note. To begin with, the three months to submit the draft award for scrutiny are not an automatic "guillotine", given that the financial sanctions for arbitrators become potentially applicable only after seven months. More importantly, the Court "*may*" apply the reductions "*unless it is satisfied that the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstances*". It would appear obvious that the particularities of, for example, the highly technical multi-party, multi-claim construction arbitration referred to above would qualify as "*factors beyond the arbitrators' control*".

However, – and on this point the sceptics' fears cannot simply be ignored –, the language of the ICC's communication and of the revised note is not unambiguous. In fact, the terminology used ("*factors beyond the arbitrators' control or to exceptional circumstances*") is eerily similar to *force majeure* clauses, and this could be taken to suggest that understanding of the particularities of each given case should not be taken for granted. This uncertainty leads us to the first question, which in the author's view is perhaps the most important of all: *When and how will be Court itself become apprised of the particularities of each case?*

It is humbly submitted that the appropriate time for this is definitely not when the three-month time limit elapses or is on the verge of elapsing: this is too late for the Court to truly understand the case. Moreover, if no dialogue has taken place by then, it is likely that the arbitrators will become defensive, which in turn can only be counter-productive. Thus, the earlier the matter comes to the Court's attention, the better. Also, there must be open and honest communication between the parties, their counsel, the arbitrators, the ICC Secretariat and the Court on what would be a realistic timeframe for the submission of the draft award. Theoretically, this interaction could come when the arbitral tribunal first issues the Procedural Timetable. However, this is "theoretical" because at that stage arbitrators are unlikely to have a clear idea on the issue. More realistically, timing for the submission of the draft award is something that arbitrators should cover with the parties and their counsel as the case progresses, at the latest in the ramp-up to the main merits

[4] The author will not even attempt to make a non-exhaustive list of these possible reasons. They are well-known and need not be repeated.

hearing. This, in turn, means that arbitrators will likely be reaching out to the ICC, via the Secretariat, to engage in this necessary dialogue over the course of the proceedings, and this will certainly trigger a non-negligible additional workload for the Secretariat and the Court. Hence a second question (which is related to the first and is no less fundamental): *Has the ICC measured the additional workload that this necessary dialogue will create in the course of the proceedings and has it taken steps to process that workload and ensure the quality of this necessary dialogue?*

Other practical questions abound and what follows is merely a non-exhaustive sampling.

For arbitrators to be in a position to submit high-quality draft awards for scrutiny within the three months required by the ICC, they must do non-negligible work as the case progresses. This does not mean only writing the procedural history in a provisional draft award: it also includes drafting the parties' positions as they come in (and adapting the provisional draft award as necessary), as well as setting out in the provisional draft award the relevant contract and/or legal provisions and undisputed facts. Most importantly, this intermediate work must include regular discussions among arbitrators on substantive issues as the case unfolds. In relation to the ICC's new policy, this very welcome evolution of arbitral practice raises the following questions:

- *Is the ICC equipped – or does it plan to be equipped – to deal with arbitrators submitting intermediate drafts?* [5]
- *If a case settles, will the Court take into account intermediate work carried out at an early stage when fixing the remuneration of those arbitrators who took the trouble to do this work while the case was progressing?*[6]

Moving to a completely different subject, it can happen that delays are caused by only one arbitrator (for whatever reason, and the arbitrator in question can be the presiding arbitrator or a co-arbitrator). Similarly, it may be that one arbitrator (and this can again be the presiding arbitrator or a co-arbitrator) finds him- or herself chasing the other arbitrators to little effect. Some may say that the inefficiency of a co-arbitrator or of a presiding arbitrator is part of the ordinary risk that anyone can foresee – and should

[5] The last President's Message of 2015 included some leads on how arbitral institutions can contribute to making the drafting of awards more efficient.

[6] It is submitted that a negative answer to this question would lead to disastrous results. It would incentivise arbitrators to put off drafting until the latest moment possible, and then to rush drafting of the award in order not to fall foul of the three- or two-month time limit. No prizes to anyone who predicts that this would seriously compromise the quality of awards.

thus be deemed to have accepted – when accepting a nomination.[7] Some might even include lack of cooperation of the arbitrator appointed by the losing party among these foreseeable risks (although that thought is depressing). In such cases, it could be said, perhaps, that the risk of suffering financial consequences from the inefficiencies of others is the price of collegiality and is a part of the system. However, there can be cases in which only one or two members of the tribunal are causing delays in a manner that manifestly exceeds the level of risk that other arbitrators can be deemed to have accepted. For such extreme cases, the following questions immediately come to mind:

- *Has the ICC considered establishing thresholds as of when all members of a tribunal can no longer be expected to atone for the "sins" of one or two "offending arbitrators"?*
- *In cases where this threshold is reached, will the financial consequences of unjustified delay affect only the "offending" arbitrator(s), or the entire panel?*
- *If only the "offending" arbitrator(s) will be concerned, how does the Court intend to determine the relative degrees of responsibility for delays in a transparent manner without compromising the confidentiality of the deliberations or exposing the award to possible setting-aside?*

Finally, given the uncertainties that still surround the Court's practice in relation to reducing remuneration of arbitrators for unjustified delay in submitting draft awards for scrutiny, the following questions arise:

- *Does the ICC plan to publish a general statement on how the Court will interpret the terms "factors beyond the arbitrators' control or […] exceptional circumstances"?*
- *Does the ICC plan to give reasons for its decisions in individual cases, in particular on what satisfies (or does not satisfy) the Court that the delay is justified?*
- *If so, does the ICC plan to publish its decisions on this subject?*
- *If so, which measures does the ICC intend to take to protect anonymity (for what is truly a delicate issue)?*

[7] A comparison could be made between this risk and the risk that any person takes when accepting a nomination as presiding arbitrator that he or she will be doing much more work than the co-arbitrators and be less well remunerated in proportion to time spent. Similarly, one co-arbitrator may do significantly more work than another without this normally leading to a difference in remuneration in practice.

Outlook

An instrument that leads to awards being deliberated and drafted more efficiently and faster – without any compromise on quality – can hardly be criticised. Yet the famous (and apocryphal) cobbler's shop-window sign advertising "*inexpensive, fast, high quality – choose two*" is invariably cited in discussions on the ICC's initiative. Whether the citation is apposite – and the author is confident that it should not be – will depend on how the ICC's new policy is implemented in practice.

The questions flagged in this President's Message are merely a foretaste of the genuine practical issues that the ICC will need to address to achieve the ultimate goal of better arbitration services for users. Many of these questions are difficult. Continued and constructive dialogue is the only way to find sound answers and to ensure that this initiative is successful. What is certain is that knee-jerk criticism without any alternative proposals is a road to nowhere. ASA does not intend to tread that path.

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