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# **Spare the Rod and Spoil the Party: How Procedurally Robust Should a Tribunal Be?**

By

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*Reprinted from*

*(2009) 75 Arbitration 349-359*

*Sweet & Maxwell*

**100 Avenue Road**

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**London**

**NW3 3PF**

*(Law Publishers)*

**SWEET & MAXWELL**

## Spare the Rod and Spoil the Party: How Procedurally Robust Should a Tribunal Be?

by MARK BEELEY and SARAH STOCKLEY

### 1. INTRODUCTION

At a recent meeting of arbitration professionals, academics and other interested parties in Texas the question was raised: “Is there a recent trend towards an increased ‘adversarial’ approach by parties to international arbitration?” Adversarial, in this context, was taken to mean an increased tendency by parties to avoid co-operating, to bend (or break) the rules for perceived advantage and generally to regard international arbitration no longer as a game of cricket.<sup>1</sup>

The prevalent view in the room (which was composed principally of arbitrators and arbitral counsel) was that such behaviour was unhealthy, and was no doubt on the increase. The question then turned to where the blame lay and what could be done about it. The first target was tribunals who fail to enforce the rules or timetables. One of the world’s leading arbitrators rose to his feet and dismissed the charge. “I do not allow such behaviour”, he announced. And, in fairness, he was telling the truth about his own practices. The practices of other arbitrators however (although certainly not all), are generally not so bullish and unfortunately not all arbitrators live up to the parties’ expectation. In spite of this, the enquiry moved on, with counsel (who were next in the firing line) deflecting the blame onto the expectations of clients—implying that it was the client’s fault, that their demands for every stone to be turned and for every point to be taken were to blame. On reflection, the room agreed.

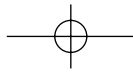
This is not the experience of the authors, whose clients frequently call upon them to explain why the party on the other side of a dispute is allowed to ignore a deadline or fail to post security for costs without sanction, and why a tight, cost-effective time schedule set down at the beginning of an arbitration now lies in tatters as a defendant engages in costly stalling. In the face of such conduct, counsel are normally reduced to relying on the comfort Redfern and Hunter attempts to offer:

“A successful party does not wish to be deprived of victory because of a procedural failure on the part of the arbitral tribunal . . . The losing party has the most to gain from having an award set aside for lack of a fair hearing. This point should be kept well in mind by parties to an arbitration (usually the claimants) who consider that the arbitral tribunal is being too generous to their opponents in allowing extensions of time and giving them a full opportunity to state their case.”<sup>2</sup>

After a while, such reassurances that the tribunal is really trying to do the party who is not behaving badly a favour by seemingly allowing the other side to get away with murder begin to ring hollow with time and experience however, and the advocates of litigation, with its

<sup>1</sup> As they say in England.

<sup>2</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet and Maxwell, 2004), para.9-48.



## SPARE THE ROD AND SPOIL THE PARTY

arsenal of “unless orders”<sup>3</sup> and summary disposal, begin to be more persuasive and appear far more attractive.

Blaming such a failure to control parties’ behaviour on the parties themselves is buck-passing of the worst kind, and a line of argument which will not endear the already battered reputation of arbitration as a “speedy and effective” dispute resolution tool<sup>4</sup> to its users. What is more, the suggestion that clients are to blame fails to reflect the reality—the reason why such behaviour is increasingly prevalent is because parties and their counsel (who have a duty to do whatever they can, within the rules, to advance their client’s position) have been allowed to try such behaviour on, and have been allowed to get away with it. While there are certainly arbitrators, such as the one mentioned above, at the very top of their profession, who do strictly enforce orders and deadlines and move proceedings along at a clip, there are equally many (perhaps less protected by their existing reputation) who do not. Not due to a laxness on their part, but perhaps due to the overriding fear that if a party is chastised, if an argument or pleading is not admitted despite a party’s failure to adhere to a pleading schedule, then the spectre of “procedural unfairness” and thus challenge to the resulting award is raised. The reality is that tribunals appear to live in fear of such a challenge not only because of their duty to attempt to render an enforceable award, but also due to the reputational damage such challenges can reap on their prospects of obtaining future arbitral appointments. This makes the decision of choosing arbitrators even more important, as an arbitrator from a common law jurisdiction, where such challenges are more frequent, may be less likely to take a robust approach in proceedings.

This article asks whether such fears are justified in light of the international approach of courts to procedural fairness challenges, and whether those involved in the quest for procedural fairness might be more robust—perhaps tribunals (with the thanks of those counsel and clients who care about the future of international arbitrations) might in future (without fear of challenge) conclude that procedural fairness does not simply mean that a party should always be allowed to act as it pleases in the presentation of its case, but that procedural fairness to both parties also means that fair deadlines and consequences clearly established in advance should be enforced.

## 2. THE RELEVANT STANDARDS

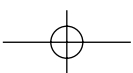
Most arbitral laws and major sets of rules put an overriding duty on the tribunal to ensure that parties have a fair opportunity to present their case, and it is this right that mischievous parties typically hide behind. A brief survey of the laws and rules suggests that the formulation of this duty is relatively uniform (at least in substance) and therefore the practice of differing jurisdictions should also be relatively uniform in considering what is allowed, and what would in reality be an unacceptable curtailment of a party.

In terms of laws, the starting point should be the UNCITRAL Model Law on International Commercial Arbitration; art.18 provides: “Each party shall be given a full opportunity of presenting its case.” Similar wording (although perhaps construed more narrowly) can be found in the Arbitration Act 1996 s.33(1): the tribunal shall:

“[A]ct fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.”

<sup>3</sup> i.e. an order requiring that, unless a party does something by a certain time, it will face a sanction, often the striking out of a claim or pleading.

<sup>4</sup> 47.5 per cent of in-house counsel surveyed by Queen Mary, University of London in 2006 cited the time arbitrations take to resolve as one of their top three disadvantages to international arbitration. See *International Arbitration: Corporate attitudes and practices* (Queen Mary, University of London, Price Waterhouse Coopers LLP, 2006).



(2009) 75 ARBITRATION 3

The US Federal Arbitration Act s.10(a)(4) phrases the test slightly differently (but in substantively the same manner) in presenting the following as a ground of vacating an award:

“[W]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy.”

Equally, looking to a civil law jurisdiction, the Swiss Private International Law Act 1987 art.182(3):

“Whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial forum.”

In terms of arbitration rules, ICC Rules art.15(2) offers a useful starting point:

“In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”

LCIA Rules art.14.1(i) has a similar formulation imposing upon a tribunal a general duty to:

“[A]ct fairly and impartially between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent.”

Similar provisions may be found in the Stockholm Chamber of Commerce Rules art.19(2); ICDR/AAA’s International Dispute Rules art.16.1 and Dubai International Arbitration Centre’s Rules art.17(2). Moving away from institutional arbitration, UNCITRAL Rules art.15(1) also requires that each party be given a “full opportunity of presenting his case”. Singapore International Arbitration Centre’s Rules art.15.2 does not make explicit reference to a party’s presentation of its case, instead focusing on the need to conduct proceedings in a “fair, expeditious [and] economical” manner.

While there is a clear universal belief that the parties should be treated fairly, and given an equal opportunity to present their case, it is noteworthy that not a single law or rule provides that a party should be afforded every opportunity to present its case, with most rules and laws choosing instead to set the bar at a “reasonable opportunity”.<sup>5</sup> This distinction is significant, for the reasons recognised by the English Departmental Advisory Committee’s (DAC) report on the draft Arbitration Bill, and in particular considering a tribunal’s power to proceed where one party fails to participate in proceedings:

“In our view, when the parties agree to arbitrate, they are agreeing that their dispute will be resolved by this means. To our minds (in the absence of express stipulations to the contrary) this does not mean that the dispute is necessarily to be decided on its substantive merits. It is in truth an agreement that it will be resolved by the application of the agreed arbitral process. If one party then fails to comply with that process, then it seems to us that it is entirely within what the parties have agreed that the tribunal can resolve the dispute on this ground.”<sup>6</sup>

<sup>5</sup> Even the “full opportunity” promised under the UNCITRAL Model Law should clearly be interpreted as something less than “every opportunity”, *Corporacion Transnacional de Inversiones SA v STET International SpA* (1999) 45 O.R. 183 (Ont. S.C.J.) affirmed (2000) 49 O.R. (3d) 414 (Ont. C.A.).

<sup>6</sup> DAC Report February 1996 para.192.



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## SPARE THE ROD AND SPOIL THE PARTY

### 3. WHAT BEHAVIOUR IS UNACCEPTABLE?

It is of course desirable that counsel should do the best for their client and ensure their clients' interests are advanced to the greatest of their ability. That being said, it is equally desirable that counsel only do so within the scope of the rules—and in this regard the role of policeman falls to the tribunal. However, in exercising that role, most tribunals will police clear breaches of the rules, but are perhaps less keen to deal with attempts to bend them. Examples of blatant breaches which tribunals universally police include *ex parte* contacts with arbitrators, interference with witnesses, bribery, forgery and other similarly wrong (and perhaps illegal) acts. Such misconduct is not the scope of the complaint in this article. Instead, the type of behaviour in question (when effectively rewarded by the tribunal by allowing it to be successful), which vexes our clients and others includes:

- repeated requests for extensions for the filing of evidence and submissions, often only made after the original procedural deadline in question has passed, and often designed to disrupt hearing schedules;
- repeated filing of unsolicited submissions, evidence and procedural motions with no regard to any established procedural schedule or without consideration of whether such applications/evidence can be fairly dealt with by the opposing party in the circumstances;
- challenges to, or requests for reconsideration of, procedural orders;
- refusal to produce key witnesses at trial (who are in all other respects available to testify), the withdrawal or submission of key statements immediately prior to trial or attempts to substitute witnesses to improve evidence or serve to bring in new evidence through the back door;
- the introduction of last minute evidence which could have been submitted in a timely fashion;
- the tactical appointment and de-selection of counsel, aimed at disrupting trial timetables (new counsel need time to prepare), excusing past conduct (“the last lot of lawyers were the badly behaved mob, don’t hold it against my trial counsel”) or creating a conflict with the tribunal (particularly in appointing, at the last minute, barristers as counsel who are at the same chambers as one member of the tribunal);
- tactical requests to bifurcate jurisdiction, merits and damages, aimed not at cost saving, but delay;
- refusal to pay advances and deposits;
- refusing to comply with orders for security for costs, yet still submitting pleadings, etc.;
- tactical and repetitive challenges to arbitrators designed to delay and disrupt proceedings rather than reflecting any genuine concern over independence;
- breaches of confidentiality;
- refusal to fully particularise cases ahead of trial, or significantly altering the basis for its case at time of trial, alternatively submitting high volumes of irrelevant evidence or otherwise failing to narrow submissions and evidence to the matters actually in dispute; and
- insisting on pursuing every possible argument and point irrespective of manifest legal or evidential deficiencies and the presence and assertion of more promising points.

These tactics are increasingly common, particularly where a defending party does not have the strength of claim it might otherwise wish. Sadly they appear often to be successful,

leading to their further use. While it may be in the best interests of that party to then take every step to delay the inevitable award, and perhaps drive the costs of the proceedings above what the claimant can afford, or hope to ever recover from the defendant, allowing such tactics to be employed is not in our view in the best long term interests of arbitration, despite the reluctance of many tribunals to clamp down on such behaviour for fear of depriving the party of an opportunity to put its case. This reluctance should be outweighed by the tribunal's duty to ensure that procedural fairness is honoured by treating both parties equally and giving them reasonable opportunity to present their cases, but at the same time guaranteeing the legitimate expectation that the arbitration will be conducted in accordance with agreed procedural rules and timetable.

All too often such behaviour continues, with tribunals reluctant to rein in the behaviour of a party who abuses the rules, often relying on the need to ensure that they are not seen to curtail a party's presentation of its case. This unfortunately has the effect of leaving the party who is attempting to seek efficiency throughout the proceedings, as the one seen to be badgering the tribunal, making repetitive requests and unnecessary noise about the conduct of the arbitration (and risking alienating the tribunal in doing so). While there is no doubt that the tribunal is aware of what is going on and will factor such behaviour into both its judgment of the reasonableness of the misbehaving party's conduct and when awarding costs, this is little comfort to the other party, who is left feeling frustrated for some time after the event.

The question is: why should the party seeking an efficient proceeding have to persistently ask for something which should happen naturally without any interference, and then feel as if it is the one in the wrong? On a practical level, the consequence of these aggravating and disruptive tactics is inevitably additional upfront legal costs and, perhaps most damaging of all, delay to the resolution of the dispute. While delay may in theory always be compensated by interest, such comfort seems cold to parties who are watching their opponents render themselves judgment proof or taking other steps to render any final award Pyrrhic.

The question must then be asked: are tribunals right to be concerned about imposing sanctions on parties for such dilatory tactics? Would the enforcement of procedural timetables, issued with due consultation and fair warning, really jeopardise the enforceability of an award? The proof of the pudding is of course in the eating, and a review of the challenge jurisprudence of several mature legal jurisdictions may well be telling in this regard.

#### 4. THE APPROACH OF THE ENGLISH COURTS

The DAC gave clear guidance as to how the requirement to give parties a reasonable opportunity to put their case was intended to be interpreted:

"In this Clause [s.33] we have provided that the tribunal shall give each party a 'reasonable opportunity' of putting his case and dealing with that of his opponent. Article 18 of the Model Law uses the expression 'full opportunity'. We prefer the word 'reasonable' because it removes any suggestion that a party is entitled to take as long as he likes, however objectively unreasonable this may be. We are sure that this was not intended by those who framed the Model Law, for it would entail that a party is entitled to an unreasonable time, which justice can hardly require. Indeed the contrary is the case, for an unreasonable time would *ex hypothesi* mean unnecessary delay and expense, things which produce injustice and would accordingly offend the first principle of [s.1]."<sup>7</sup>

This statement of intent clearly seems to reflect the thoughts of the authors. The question must then be asked—have the English courts in practice followed this direction? The Arbitration Act 1996 s.68 gives both parties the opportunity to apply to the court to challenge an award on the basis of a "serious irregularity affecting the tribunal, the proceedings or the award".

<sup>7</sup> February 1996 DAC Report, paras 164–165.



SPARE THE ROD AND SPOIL THE PARTY

It is not up to the court to provide relief where an incorrect decision on the facts or the law has been reached by the tribunal.<sup>8</sup> The purpose of s.68 is merely to provide a remedy for some sort of procedural failing. The party applying to the court to challenge the award has to prove there has been a serious irregularity which has caused or will cause substantial injustice to the applicant. The English courts' approach to intervening has been somewhat limited.<sup>9</sup> The DAC report said s.68 was intended to be:

“[O]nly available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.”<sup>10</sup>

The courts have honoured this limited use. *OAo Northern Shipping Co v Remolcadores de Marin SL (the Remmar)*<sup>11</sup> was a rare example of a successful application under s.68, where the tribunal had failed to give the claimant a reasonable opportunity (pursuant to s.33) to make submissions on an important but unargued point which the tribunal relied upon as a key part of the reasoning in its award. We do not question that this was an appropriate ground for the exercise of the s.68 powers; nor do we suggest that a party should ever be denied an opportunity to make submissions on any relevant points. Our complaint relates instead to those parties who have an opportunity to present their case, voluntarily waste it and then complain about it.

This situation was seen in the case of *Shuttari v Solicitors' Indemnity Fund*,<sup>12</sup> where Ms Shuttari was attempting to defend herself against a charge of dishonesty in handling a mortgage and purchase of residential property. Her defence turned on her mental state at the time she handled the transaction. Following a refusal of the arbitrator to allow the admission into evidence of a key medical report, she lost the case, and brought a s.68 challenge, alleging a breach of procedural fairness by being denied the opportunity to present entirely relevant evidence. Mr J. Sher Q.C. took a mature approach and noted that, during the course of the proceedings, the arbitrator until the last application had given “Ms Shuttari every latitude and every indulgence to enable her to put her case and call the evidence she wished”. Ms Shuttari had been allowed an extension of time for filing submissions; to file evidence and submissions out of time; and a further extension when she was taken unwell during the course of the oral hearing. Despite having plentiful time to seek expert evidence as to her state of health (the need for which would have been obvious to any observer from day one), she chose to make the application for its admittance only on the second day of the trial and even then did not have the report to hand. The evidence suggested that it would have taken her at least a further two months to obtain the report she was seeking. The court accordingly held that she had been given a reasonable opportunity to present her case and had failed to take advantage of it. The challenge was dismissed.

A similarly firm position was taken in *Margulead Ltd v Exide Technologies*.<sup>13</sup> In this commercial dispute the parties had exchanged full memorials of case several days before the evidential hearing. After three days of oral openings and evidence, the arbitrator announced that the fourth day would be used as follows: one hour for closing submissions by Margulead, one hour by Exide, and then a “colloquy” which could be either tripartite or bilateral.

<sup>8</sup> *Lesotho Highlands Development Authority v Impregilo SA* [2005] UKHL 43; [2005] 3 W.L.R. 129.

<sup>9</sup> Walker L.J. in *Bandwidth Shipping Corp v Intaari (A Firm) (The Magdalena Oldendorff)* [2007] EWCA Civ 998; [2008] 1 Lloyd's Rep. 7 approving Tomlinson J. in *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm); [2006] 2 Lloyd's Rep 1.

<sup>10</sup> February 1996 DAC Report, para.280.

<sup>11</sup> *OAo Northern Shipping Co v Remolcadores de Marin SL (The Remmar)* [2007] EWHC 1821 (Comm); [2007] 2 Lloyd's Rep. 302.

<sup>12</sup> *Shuttari v Solicitors' Indemnity Fund* [2004] EWHC 1537 (Ch).

<sup>13</sup> *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm); [2005] 1 Lloyd's Rep. 324.

(2009) 75 ARBITRATION 3

Neither party objected to this schedule at the time but, following Exide's closing submission, Margulead asked for a right of reply, which was denied. At the end of the colloquy, the tribunal requested further written briefs on a limited issue. Margulead challenged the award against it, alleging, amongst other grounds, a breach of procedural fairness by denying it a right of reply in closing (despite it not having objected to this procedure the day before). Coleman J. was unimpressed by this head of challenge:

"There was nothing wrong with this form of procedure, provided always that it gave each party 'a reasonable opportunity of putting his case and dealing with that of his opponent'... and represented in all the circumstances of the case a fair means for the resolution of the matters falling to be determined... The proposition that, because Margulead had the burden of proof as claimant, it would necessarily be denied a reasonable opportunity of putting its case or a fair hearing unless its counsel had the last word is not sustainable. It is not suggested that in the course of Mr Haubold's final oral submission on behalf of Exide he raised any point that was novel and had not already been covered in the pre-hearing memos or the opening submissions and which therefore had not been addressed on behalf of Margulead either orally or in writing. I can see if that had occurred there might have been some basis for the argument advanced."<sup>14</sup>

Again the focus of the court was on ensuring that the party had a reasonable opportunity to put its case, and not that it should be given every opportunity.

The same approach may be found in *O'Donoghue v Enterprise Inns Plc*,<sup>15</sup> which concerned a s.68 challenge following an arbitration over a rent review clause. In this relatively low-stakes arbitration, the parties exchanged a first round of submissions, with which Enterprise included an expert report, and O'Donoghue did not. Enterprise then proceeded to file a submission in reply, while O'Donoghue refused to, maintaining instead that he could only fairly respond by way of cross-examination at a hearing. In an attempt to progress matters, Enterprise proposed a format for such a hearing but O'Donoghue rejected it. The arbitrator again issued directions for O'Donoghue to file a submission in reply. He eventually did so, but still failed to particularise the flaws he alleged in Enterprise's expert evidence and did not adduce his own. Having fully considered the submissions and also having carried out an inspection, the arbitrator requested O'Donoghue to give detailed reasons why a hearing was necessary in the circumstances. O'Donoghue again failed to do so and the arbitrator exercised his discretion under the Arbitration Act 1996 to proceed without a hearing. The award went in Enterprise's favour and O'Donoghue challenged on the grounds inter alia of a breach of the requirements of s.33. The court dismissed the challenge, noting that the arbitrator had been conspicuously fair in giving both parties the opportunity to put their case before he reached a decision.

In *RC Pillar & Sons v Edwards*<sup>16</sup> Judge Thornton Q.C. allowed a challenge under s.68 where an arbitrator had actively failed to manage two arbitrations concerning an architecture dispute. He found that a breach of s.33 had occurred where the tribunal failed to force the parties to comply with procedural orders designed to identify the issues in dispute in a time and cost effective manner<sup>17</sup> and by failing to adopt procedures to minimise costs and delay when hearing two arbitrations, on the same facts and between the same parties at the same time (essentially, the tribunal conducted the second arbitration as if the first proceedings never existed, forcing much duplicative pleading, etc.).<sup>18</sup> This case shows that the Arbitration Act

<sup>14</sup> *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm); [2005] 1 Lloyd's Rep 324 at [29].

<sup>15</sup> *O'Donoghue v Enterprise Inns Plc* [2008] EWHC 2273 (Ch).

<sup>16</sup> *RC Pillar & Sons v Edwards* Unreported January 26, 2001 QBD (TCC).

<sup>17</sup> *RC Pillar & Sons v Edwards* Unreported January 26, 2001 QBD (TCC) at [79].

<sup>18</sup> *RC Pillar & Sons v Edwards* Unreported January 26, 2001 QBD (TCC) at [81]–[82].

## SPARE THE ROD AND SPOIL THE PARTY

1996, in the eyes of the English courts, imposes a positive duty upon tribunals to avoid and manage the type of behaviour this article complains about.

This firm line tallies well with a further aspect of the 1996 Act, the ability of an arbitrator to issue a “peremptory order” where a party has failed to comply with an order or direction (s.19). Should the party fail to comply with the time limit set out in the peremptory order for compliance, then the tribunal may impose its own sanction, picking from: directing that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; drawing such adverse inferences from the act of non-compliance as the circumstances justify; proceeding to an award on the basis of such materials as have been properly provided to it; or making such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance. As an alternative, the tribunal may request the court to enforce the peremptory order on its behalf (s.42). The tiny number of reported cases dealing with complaints as to how such orders are used and enforced is indicative of either a general recognition that the exercise of such powers does not contradict the requirements of fairness, or instead an almost absolute reluctance by tribunals to employ such orders and ensure necessary compliance. This later supposition has not been our experience however. Indeed, in the recent and seemingly the first reported case under s.42, *Emmott v Michael Wilson & Partners Ltd*,<sup>19</sup> the High Court was entirely supportive of the enforcement of peremptory orders, noting that, save where such an order should not be enforced in the interests of justice,<sup>20</sup> it was not for the court to second guess the tribunal. Although the court noted that it had the power to review all aspects of an award if a challenge has been brought, Teare J. held that its role was to be supportive of arbitration and keep judicial interference to a minimum.

A tribunal would have to act completely unfairly before the court would set the award aside. Although the applicant in *Remmar* succeeded in showing that not being given a reasonable opportunity to make submissions was a “serious irregularity”, it is a difficult argument for a party to succeed on. The English courts will support tribunals in enforcing timetable, etc. Indeed, where a party employing such delay tactics manages to obtain a favourable award, there are strong arguments that the well behaved party might apply to challenge the award under s.68, on the basis that the tribunal has failed to adopt procedures to avoid unnecessary delay or expense and provide a fair means for the resolution of the issues pursuant to s.33(1)(b), or has failed to conduct the proceedings in accordance with the procedure agreed by the parties pursuant to s.68(2)(c).

The type of situations we have experienced and centred on in this article are, according to English jurisprudence, unlikely to amount to serious irregularities and result in interference by the court. The purpose of ss.33 and 68 is to promote fairness between the parties. However, the unwillingness of tribunals to intervene only encourages the disruptive party to continue its foul play and abuse of the process. English seated tribunals should be more willing to apply pressure to parties who neglect deadlines, delay proceedings and generally cause disruption to the whole process. But does such an approach work elsewhere as well?

### 5. THE APPROACH UNDER THE MODEL LAW

Since 1988 the UNCITRAL Secretariat has established a collection of court decisions (the CLOUT<sup>21</sup> database) on the Model Law, providing a useful collection and synthesis of the approach of different jurisdictions to the interpretation of the need to allow a party the full

<sup>19</sup> *Emmott v Michael Wilson & Partners Ltd* [2009] EWHC 1 (Comm); [2009] 1 Lloyd’s Rep. 233.

<sup>20</sup> Examples may be a material change of circumstances after the award; where the tribunal has not fulfilled its duty under the 1996 Act s.33; or where the tribunal has exceeded its jurisdiction.

<sup>21</sup> “Case Law on UNCITRAL Texts” at <http://www.uncitral.org/uncitral/en/caseLaw.html> [Accessed May 28, 2009].

(2009) 75 ARBITRATION 3

opportunity to present its case. The cases deal with UNCITRAL Rules art.18 (the obligation itself), art.34(2)(a)(ii) (set aside for inability to present a case) and art.34(2)(a)(iv) (set aside for failure to follow agreed procedure). The case law on how art.18 should be interpreted is surprisingly limited but entirely supportive of a robust approach such as that employed in England.

In *Hebei Import & Export Corp v Polytek Engineering Co Ltd*<sup>22</sup> in the Hong Kong Court of Final Appeal, the respondent challenged the award on the grounds that it had been unable to properly present its case as:

“(i) [T]he chief arbitrator and experts appointed by the tribunal at the respondent’s request had inspected the equipment at the end user’s premises in the presence of the appellant’s technicians but in the absence of the respondent; (ii) it did not receive proper notice of the inspection and thus had no opportunity to attend or to brief its own experts . . . (iii) it was denied a further hearing following the inspection, though it had an opportunity to make further submissions on the expert’s report, and (iv) it was denied an opportunity to call the manufacturer.”<sup>23</sup>

The court rejected the challenge on a number of grounds including delay by the respondent in bringing its complaints. Of particular interest are Sir Anthony Mason’s conclusions as to the respondent’s behaviour and the reasons why the tribunal curtailed its right to present its case. The tribunal was quite entitled to regard the respondent as engaging in dilatory tactics, to refuse an extension of time and to deliver the award. The facts did not support the claim that the respondent was unable to present its case. They supported the view that the respondent had no relevant case to present.<sup>24</sup>

The Supreme Court of Canada considered the meaning of art.18 in *Corporacion Transnacional de Inversiones SA v STET International SpA*,<sup>25</sup> which followed an ICC arbitration hearing seated in Ontario. The losing respondent complained that it had not been allowed to present its case and had been denied equal treatment on the grounds that the tribunal failed to require the disclosure of a certain document from the claimants, had failed to stay its proceedings pending the determination of whether a settlement agreement was valid or not, had failed to suspend proceedings to attempt to secure the attendance of a witness and had continued with the hearing despite the refusal to participate (on the day of the hearing) of several of the parties. The judge at first instance, Lex J., took a harsh view of the challenge and was upheld by the appellate court. In terms of the standards upon which a challenge on the grounds of a breach of procedural fairness should be considered, Lex J. noted:

“Under the Model Law, the concepts of fairness and natural justice enunciated in art. 18 significantly overlap the issues of the inability to present one’s case and conflict with public policy set out in arts 34(2)(a)(ii) and (b)(ii). Since art. 34(2)(b)(ii) is to be interpreted to include procedural as well as substantive justice and is not to exclude the manner in which an award was arrived at, it seems to me that the grounds for challenging an award under art. 19 are the same as they are under art. 34(2)(b)(ii). Accordingly, in order to justify setting aside an award for a violation of art. 18, the conduct of the tribunal must be sufficiently serious to offend our most basic notions of morality and justice.”

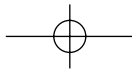
With that high hurdle established he went on:

<sup>22</sup> *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 H.K.C. 205.

<sup>23</sup> *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 H.K.C. 205, Headnote.

<sup>24</sup> *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 H.K.C. 205 at 232.

<sup>25</sup> *Corporacion Transnacional de Inversiones SA v STET International SpA* (1999) 45 O.R. 183 (Ont. S.C.J.) affirmed (2000) 49 O.R. (3d) 414 (Ont. C.A.).



## SPARE THE ROD AND SPOIL THE PARTY

“The concept of ‘fairness’ obviously entails fairness to both sides. . . it was pointed out that any decision-maker has to balance the prejudice that might result from delay with the duty to hear all material evidence. . . . In fact, [challenger] obtained disclosure. Notwithstanding its failure to follow a procedure that would have allowed it to obtain the purchase agreements in a timely manner and, if it saw fit, address objections to the documents, it was nevertheless informed of the substance of the [agreements] before the final hearing. This was a fair balancing of the considerations on both sides, which [challenger] must be taken to have accepted.

. . .

The purpose of art. 18 is to protect a party from egregious and injudicious conduct by a tribunal. It is not intended to protect a party from its own failures or strategic choices. It was [challenger] who deprived itself of the rights it now asserts were denied by the tribunal. This cannot and does not amount to a lack of opportunity to present one’s case or to be treated with equality.”

The judgments in both *Hebei Import* and *STET International* are robust and entirely consistent with the original intention of those behind the drafting of art.18 as expressed in the Report on the United Nations Commission on International Trade Law on the work of its eighteenth session (A/CN.9/264):

“The principles which [art.18(3)] states. . . make it clear that ‘full opportunity of presenting one’s case’ does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award.”<sup>26</sup>

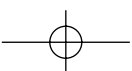
International practice in relation to the UNCITRAL Model Law therefore also seems to support entirely the concept of tribunals policing the conduct of proceedings with a firm hand. This is particularly significant given the breadth of the opportunity it affords to parties, i.e. a “full” opportunity. As noted by Derains and Schwartz,<sup>27</sup> arbitration rules such as those of the ICC deliberately afford a more restricted opportunity—a “reasonable” one. In such cases a tribunal should feel even more confident adopting a fair, but strict, enforcement of the rules and procedural orders etc.

## 6. SELF-HELP

There are of course things that parties can do to help themselves. These broadly fall into two categories: those which can be done before the dispute and those which can only be done after the dispute has arisen. The former can be built into arbitration clauses. One of the most significant choices is that of arbitral seat. If a swift arbitration award may be vital, then consider a seat which is robust enough to at least allow access to the preemptory order regime similar to that discussed above, if deadlines are not being adhered to and unnecessary delays are being caused. As to more generic steps, the following two additions to the standard arbitration clause might be considered. First, the parties should set a deadline for the award. By kicking the whole process off with an agreed deadline, the tribunal should be focused on preserving the hearing schedule and will have good reason to punish parties who engage in delay, and threaten their contractual obligation to get the job done within a certain timeframe. The time limit for issuing an award should be realistic and workable. Of course, there is no guarantee that the deadline will be met, but at least the parties are giving the tribunal a fighting chance of reining in bad behaviour. If such a step is desirable, the following clause may be of assistance. Consider however the need to ensure that a reasonable deadline is

<sup>26</sup> Report on the United Nations Commission on International Trade Law on the work of its eighteenth session (A/CN.9/264), p.125.

<sup>27</sup> Yves Derains and Eric Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd edn (The Hague: Kluwer Law International 2005), p.229.



set—an unreasonable one will have to be quickly abandoned, and as with all deadlines, if it moves once, the chance of a second slippage is higher. Equally, an unreasonable deadline might prejudice the drafting party's own ability to advance its arguments to the desired extent:

“The tribunal shall render its award within 120 days of the appointment of a chairman. This time limit may only be extended with the consent of the Parties or by the tribunal for good cause shown, provided that no award shall be invalid even if it is not rendered within the time period specified herein or not rendered within any extended period.”

Secondly, the parties can expressly provide that it will be fair and reasonable for any tribunal appointed to enforce procedural deadlines and may strike out pleadings or evidence where it is not served in compliance with such deadlines, without reasonable excuse:

“The tribunal shall, in consultation with the parties, set out a procedural timetable for the service of pleadings and evidence. A pleading or evidence served otherwise than in compliance with such timetable will be struck out by the tribunal, unless the submitting party shows good cause for the deviation and has been granted an appropriate extension by the tribunal, bearing in mind the effect such extension will have on the case timetable.”

The clauses identified above do not need to be complex in nature but they must be workable in practice. If not, further problems will arise and enforcing compliance with them will be difficult. Of course, they will have to be agreed with the other party at the time of contracting, which may present problems.

After a dispute arises, there are two simple actions a party can take: to appoint an arbitrator well known for procedural rigour, and itself at all times to comply with the tribunal's directions—hypocrisy will not help. The parties must do the relevant due diligence on any potential arbitrator. Choosing experienced counsel with knowledge of arbitration will do some of this work, as reputations and experiences of arbitrators are well known among those in the field. Unfortunately, there are no general standards or guidelines setting out the expected approach arbitrators should take when handling difficult situations. This makes it even more vital for the parties to ensure that they choose arbitrators known for their robust approach and their effective handling of similar situations previously. Unfortunately this information is generally a matter of individual experience and not currently available in any public database or the like.

A party should behave well, and in particular act in a manner which suggests that time and money are factors which matter to it and, as a result, tribunals should be more willing to take steps to address the opposite behaviour in the other party, particularly if seated in England and Wales and presented with appropriate and reasonable requests for peremptory orders.

## 7. TOUGHER LOVE IN FUTURE?

Case law both within England and outside shows that the courts, when actually asked to rule on the actions of a tribunal to limit a party's otherwise apparently absolute right to present its case in a manner of its choosing, have taken a robust and sensible approach. Indeed, the jurisprudence suggests that the courts will take a substance over form approach, asking only whether a party was given a reasonable opportunity to put its case, rather than whether it was given every opportunity. As such, it would appear that the concern of many tribunals of being seen to be acting unfairly by curtailing a misbehaving party's behaviour may well be unfounded or perhaps exaggerated. Given the danger to arbitration as a whole represented by allowing parties to abuse proceedings, it is surely time that tribunals adopted the same realistic approach as the courts seem to favour, and as a general principle acknowledge that procedural fairness does indeed mean not only setting out a timetable and process which will give both parties a reasonable opportunity to present their cases, but also ensuring that both parties then comply with that process.