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The Parties' "Double Personality" and the Role of the Arbitral Tribunal

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A foundational principle of international commercial arbitration is that of party autonomy.

Article 19(1) of the UNCITRAL Model Law reflects this and states: "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

Notwithstanding the parties' broad freedom to select the procedural rules, it is often the case that arbitration agreements are completely silent on the procedure to be followed by the arbitral tribunal.

Silence as an Implicit Expression of Party Autonomy

The parties' silence on the procedure may be interpreted in contrasting ways.

It can be argued that the parties' failure to exercise their procedural freedom in the arbitration agreement should be interpreted as a blank mandate to arbitrators on how to conduct the arbitration proceedings.

Yet, it can also be argued that parties' silence on the procedure is an implicit expression of party autonomy, bearing a very specific meaning: a reciprocal commitment – made at the time of the arbitration agreement – to a cost-efficient and effective dispute resolution (see Baron Mustill, *The History of International Commercial Arbitration – A Sketch*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 3, 31 (Lawrence W. Newman et al. ed., 3rd ed. 2014), regarding the promise and expectation that international commercial arbitration provides a quick, well informed and inexpensive dispute-resolution mechanism).

It is here suggested that arbitral tribunals should interpret the absence of any express agreement between the parties on specific procedural rules as the implicit expression of the parties' mutual intention to commit to the default and foundational values of arbitration: procedure's efficiency, speed and flexibility.

This default assumption, inherent in the choice to arbitrate, is well explained by a U.S. Federal Court: "Those who choose to resolve dispute by arbitration can expect no more than they have agreed. One choosing arbitration should not expect the full panoply of procedural and substantive protections offered by a court of law. In short, by agreeing to arbitrate, a party 'trades the

procedures and opportunity for review of the courtroom for the [perceived] simplicity, informality, and expedition of arbitration.'" (see Card v. Stratton Oakmont, Inc., 933 F. Supp. 806 (D. Minn.1996)).

Ex-Ante v. Ex-Post Parties' Procedural Expectations

One aspect that deserves to be carefully considered is that the parties' procedural expectations (and their consequent behavior) are far from consistent at different points in time.

At the time they enter into an arbitration agreement that is silent on the procedure (I will refer to this point in time as "t0"), the parties' ex-ante expectation is to receive from the arbitral tribunal a just and cost-efficient resolution of any dispute that may arise in the future.

Contrary to their ex-ante expectation, it is well known that, once a dispute arises (I will refer to this point in time as "t1"), parties tend to depart from their original pre-commitment to solving the dispute through an efficient procedure and instead they expect the arbitral tribunal to please all their ex-post procedural requests.

While at t0, parties (being in a cooperative disposition) mutually agree to defer their disputes to arbitration as a way to efficiently solve their potential disagreements, at t1 (when the disagreements materialize and the cooperative disposition vanishes) they try everything at their disposal to prevail and flood the arbitral tribunal with any sort of procedural request that might shift the case in their favor (see e.g. Queen Mary University of London and White & Case, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process", 20, for the abuse of procedural requests for document production).

Parties' Behaviors as a Problem of "Time-Inconsistent Preferences"

The parties' inconsistent behavior at t0 and at t1 may be better understood by bringing into the discourse insights from social sciences, and particularly from the field of behavioral science.

As explained by cognitive psychologists (see Daniel Kahneman, THINKING FAST AND SLOW (2011)] and behavioral economists [see Richard Thaler, MISBEHAVING: THE MAKING OF BEHAVIOURAL ECONOMICS (2015)), an individual can be thought of as consisting of two selves.

On the one side, there is a forward-looking self, who thinks about the future in a conscious and rational way. This first self (also called the "planner"), acting in a cool and reflective mood, believes that in the future he will be able to behave according to his original plan (e.g., when, after an abundant dinner on a Saturday night, we think we will have no difficulties in sticking to the plan to eat low-calories meals during the coming week).

On the other side, there is a second self that is completely selfish and that surrenders to the passions and desires of the moment. This second self (also called the "doer") does not care at all about the costs of his actions and about what is best in the long term (e.g., when Monday comes and we end up eating a lot more than we predicted the previous Saturday).

The tension between the two selves can be explained in light of the fact that individuals tend to value something that is "now" much more than something that is "later". In other words, individuals' preferences change in the "present time", which leads an individual (the "doer") to

make choices that are inconsistent with the ones the same individual (the “planner”) had predicted he or she would have made. This is known as the phenomenon of “time-inconsistent preferences”.

Just like any other individual, it is possible to argue that the parties to arbitration proceedings also experience the dynamic of having “time-inconsistent preferences”.

At the time parties enter into an arbitration agreement they behave as cool and rational “planners”, implicitly committing to an efficient and quick future dispute resolution and expecting from themselves and the arbitral tribunal to behave accordingly to this pre-commitment.

Notwithstanding these good intentions, once parties find themselves in the middle of a dispute they behave as selfish “doers”, engaging in activities that are contrary to their original pre-commitment of having a cost-effective arbitration.

In the struggle between long-term preferences (e.g., preserving the benefits of an efficient arbitration and, more in general, arbitration’s attractiveness over court litigation) and short-term preferences (e.g., prevailing in the dispute once it arises), parties tend to substantially discount the value of long-term preferences in comparison to the value they assign to short-term preferences.

Understanding parties’ time-inconsistent behavior through the lens of behavioral economics not only allows putting in a theoretical framework a much discussed and observed practical issue, but helps offering the rationale for possible solutions.

The Arbitral Tribunal as the Gatekeeper of the Procedure

Notwithstanding the major role that parties play in determining the effectiveness of arbitration proceedings, the users of international commercial arbitration often bemoan that arbitration is losing its attractiveness in comparison to court litigation.

In light of the above discussion, however, this complaint sounds paradoxical, considering that a good deal of the blame for this tendency can be placed on the very same parties and particularly on their “time-inconsistent preferences”.

In looking for a possible strategy that may help in restoring the original values and attractiveness of international commercial arbitration, it is apparent that the arbitral tribunal can and should play a fundamental role.

A well-established principle governing arbitration proceedings is that, in case parties are silent on the procedural rules, “the arbitral tribunal may … conduct the arbitration in such manner as it considers appropriate” (see Article 19(2) of the UNCITRAL Model Law).

In the absence of an agreement between the parties, it is on the arbitrators to define the scope of the procedure; they will ultimately have to determine whether to use their procedural discretion in order to preserve the parties’ ex-ante expectation for a cost-efficient arbitration.

Despite their broad discretion, it is well known that arbitrators are often reluctant to reject parties’ procedural requests (e.g., requests for production of documents), failing to adequately perform their role as the gatekeepers of an efficient procedure (see Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS, 90-91 (1994)).

Based on the behavioral economics' insights discussed above, this arbitrators' tendency translates into making systematically prevail the parties acting as selfish "doers" over the parties acting as rational "planners".

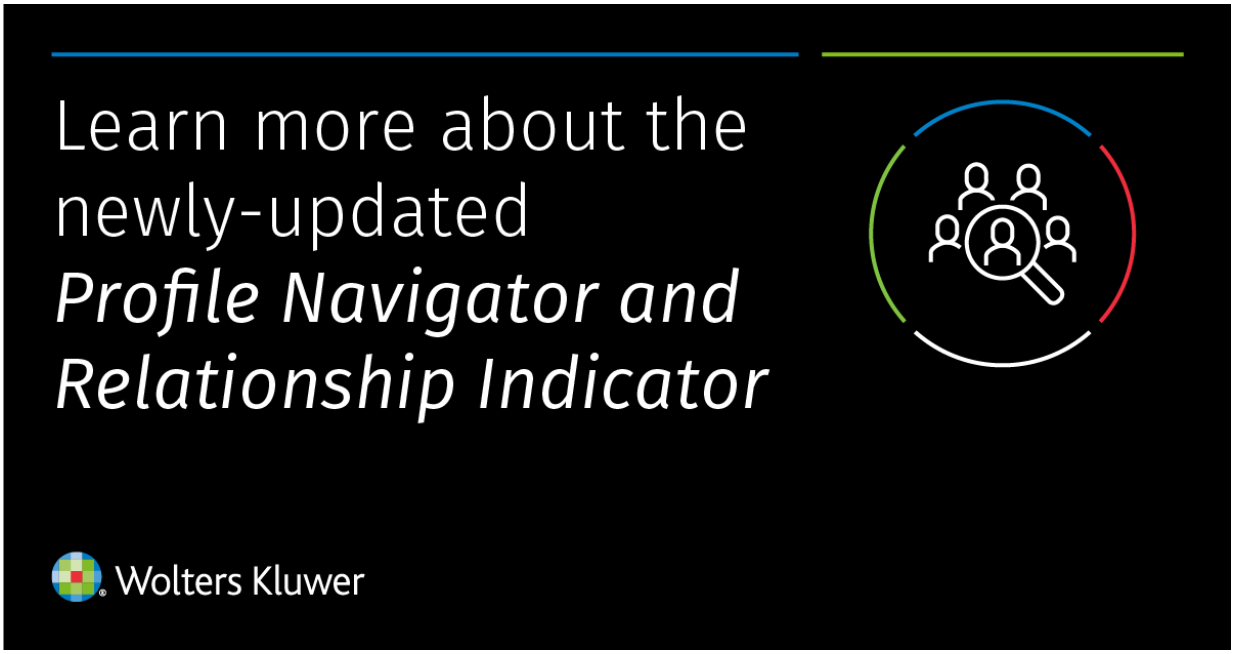
In other words, the arbitral tribunal's attitude of routinely admitting parties' procedural requests (i.e., the preferences unilaterally expressed by the parties at t1) comes at a substantial cost: sacrificing the ex-ante expectations of the parties for an efficient dispute resolution (i.e., the preferences mutually agreed and expressed by the parties a t0).

Conclusions

In the arbitral tribunal's dilemma between (i) securing parties' mutual ex-ante preferences or (ii) pleasing parties' unilateral ex-post preferences, a strong guiding – but traditionally overlooked – principle is offered by the above assumption that parties' silence on the procedure should be considered as an implicit expression of party autonomy, where the parties adhere to the default values of arbitration (speed, efficiency and flexibility).

Once assumed that an arbitration agreement that is silent on the procedure should be interpreted as an implicit expression of party autonomy, it can then be argued that the arbitral tribunal should not only be unafraid of rejecting ex-post trivial procedural requests unilaterally advanced by one of the parties, but also be compelled to protect parties' ex-ante reciprocal commitment to a cost-efficient and effective dispute resolution.

Absent any contrary agreement of the parties, ensuring speed and efficiency of arbitration proceedings requires arbitral tribunals to adequately perform their role as the gatekeepers of the procedure, and this ultimately boils down to protecting parties' rational and reflective selves (i.e., the "planners") from their selfish and often unreasonable other selves (i.e., the "doers").



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