Summaries and Issues in the ICC Terms of Reference: The Right Level of Case Management

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What are Terms of Reference in the ICC Rules of Arbitration, and what are they for?

Article 23(1) of the 2017 ICC Rules provides

> "As soon as it has received the file [of a new dispute] from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference".

These include such basic details as the parties' names and contact details. But more substantively, Articles 23(1) (c) and (d) require:

> "a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims" …

and

> "unless the arbitral tribunal considers it inappropriate, a list of issues to be determined" …

Finally, the Terms of Reference include such further details as the source of the tribunal's power to decide *ex aequo et bono*, where relevant. But it is the substantive elements listed above – the summary of claims and list of issues – that concern us here.

Note that the tribunal drafts the Terms of Reference. The parties may sign their approval, and in any event the ICC gives its own *imprimatur*. It is, on its face, a reversal of party autonomy, or at least an outsourcing of autonomy by the parties' own choice to incorporate the ICC Rules. The rules are there to keep things moving. If the parties do not keep things moving, the ICC will step in.

This is not a novelty; it was present at the creation of the ICC Rules in 1923.[fn]It existed at least as early as the 1927 Rules. Article 14(d) stated: “When the arbitrators or arbitrator have or has been appointed, the Court of Arbitration shall draw up a form of submission to arbitration which shall contain … Terms of reference, statement of the case, indication of the points at issue to be determined …” Appropriately, that requirement is now incumbent on the tribunal, not the ICC.[/fn] French law of the interwar period only permitted referral of *current* disputes to arbitration (a condition then common, and still preserved in certain Latin American jurisdictions). Terms of Reference allowed parties to construe arbitration agreements for future disputes as *compromis* for current disputes, in order to appease a requirement of French law.

So much for its historical origins; what of its current utility? The relative size of the Rules may give the impression that the ICC imposes more administrative layers on, and permits less party autonomy in, arbitrations under its auspices. Between Terms of Reference and institutional scrutiny of awards, the ICC seems to reserve to itself a role in proceedings so unlike the polite distance of most arbitral institutions. Yet, a brief examination of some of the more useful case management habits of common law courts offers useful comparisons with this hallmark of ICC arbitration. Civil law jurisdictions would doubtless offer equally useful analogies, but I speak from the experience of working in a common law court. Some of these insights may present a retrospective justification for this residually French aspect of ICC arbitral procedure.

Common Law Perspectives

Working in an Australian State Supreme Court, I witnessed several measures which the court took – not heavy-handedly, but with the parties’ managed cooperation – to improve the process of litigation.

First, the Court invited parties to prepare a list of issues agreed between the parties. Ideally, this was a series of “yes” or “no” questions that followed in a logical sequence. This was a proved strategy for forcing parties to reasonably agree on issues, and even abandon those legal arguments that deserve no consideration at trial, let alone at judgment. And because the questions aligned in a logical sequence, they revealed what did *not* need answers, depending on the answers to prior questions.

A second step – sometimes decisive – was to instruct the parties to attend a judicial mediation immediately after opening submissions on the first day of trial. This was the peak moment of the parties’ self-consciousness: they had been forced to state their case clearly, and their arguments crystallised in open court. The strength of the jurisprudence behind them was on fuller display than when the claim was first drawn, and each party had a proper grasp of the factual matrix, and the legal analysis that the other side would apply to it.

The common feature of these processes is that they force parties to perspicuously and exhaustively state the nature and measure of their case. This, in turn, is intended to make the parties apply an honest introspection to their own positions in fact and law. What is our legal argument? Does it apply to the facts? Are we even able to adequately prove these facts? This introspection, in turn again, is intended to ensure either that the parties take one more chance to mediate or otherwise settle their dispute; or if that is still not possible, that they proceed with efficiency and certitude.

Whatever latitude the oratory of barristers may seem to enjoy, common law courts generally discourage parties from raising substantive arguments in oral hearings that were not already foreshadowed in the statement of claim, just as a party in ICC arbitration can only do so at the tribunal’s (usually hesitant) discretion under Article 23(4). The twin function of this reluctance is to keep the curial or arbitral process in manageable bounds, and to avoid surprises.

Case Management, Whether You Like It or Not

The ICC Terms of Reference also keep order in the arbitration, and do so early enough to stop problems before they branch out and multiply (much like the procedural steps recommended in a recent Guide for In-House Counsel, also drafted by the ICC). In this respect they are similar to the common law procedural habits just described, i.e. they are not identical processes, but they achieve an identical purpose. They allow the tribunal to state matters clearly, and the parties' cases reach that peak point at which they may either settle or progress efficiently. But there is one salutary difference: The Terms of Reference set reasonable parameters around the parties without compromising procedural flexibility, which is what makes international arbitration attractive . Used properly, the Terms of Reference may do for arbitration what the most prudent judicial supervision does for common law litigation. After all, Article 21 of the ICC Rules explicitly preserves the parties' right to determine the arbitral procedure.

Moreover, arbitral awards need every measure available to them to be made impermeable to future challenge and thus to uphold the enforceability regime on which international arbitration so depends. If the arbitration agreement turns out to have been insufficiently clear on what the scope of the tribunal's jurisdiction should be, the Terms of Reference can set these down with the benefit of hindsight, since they would be drafted with respect to the case at hand and not just to disputes generally arising out of the contract.

Thus the arbitrators' own account of the issues – as hopefully agreed by the parties – will leave a more detailed description of the tribunal's scope on the face of the record. This virtually eliminates a dissatisfied party's ability to resist enforcement of an award by speciously invoking the New York Convention Article V(1)(c) prohibition on decisions dealing with "a difference not contemplated by or not falling within the terms of the submission to arbitration". The Terms of Reference preserve the advantages of a general arbitration agreement, but further endow it with the advantages of a *compromis* in which those "terms of submission" are articulated in greater detail than any agreement to arbitrate future disputes.

Conclusion

But why *ICC* Terms of Reference? Why not choose other rules that let the parties draw up their own lists of issues? The mistake is to confuse helpful regulation with unhelpful straitjacketing. The former may indeed rescue an arbitration from delays, *volte-faces* and challenges, which less detailed rulebooks may inadvertently encourage. The latter might arise if the tribunal misunderstands the issues at stake: but that would indicate a bigger problem with the tribunal, for which the ICC Rules can hardly be blamed.

We could even say that the most elastic arbitral rules – those that entrust crucial aspects of procedure and management to sensible agreement between the parties – are benefits that have to be earned by probity and experience. Where parties have long experience and an established relationship, they can be more readily trusted to resolve disputes by the avowedly flexible UNCITRAL Rules, or even by ad hoc arbitration. But where the parties are new to each other's business and their aptitude at resolving disputes is untested, they may come to appreciate the more visible guiding hand of the ICC, like that of a commercial judge described above.