Kluwer Arbitration Blog

A Report on the Delos Paris Inaugural Event (April 2018) – Powers of the Arbitrator: How Far is too Far?

Marine Koenig (Delos) · Tuesday, May 28th, 2019

As the recent launch of the Prague Rules and the discussions at the Paris Arbitration Week 2019 and London International Disputes Week 2019 have shown, discussions around time and cost efficiency in arbitration remain a key concern of users and the arbitration community. This article accordingly reports on the launch event held by Delos Dispute Resolution at the Paris Arbitration Week 2018, as part of its Inaugural Events Series. Delos is an innovative Paris-based arbitration institution established in 2014 to respond to the needs of business globally in terms of time and cost efficiency in arbitration proceedings.

Hafez Virjee, President of Delos, shared some thoughts about Delos (Part I), and guest speakers Professor Pierre Mayer and Professor Maxi Scherer – both members of Delos's Board of Advisors – explored the limits to arbitrators' exercise of their powers and questioned "How far is too far?" with a particular focus on *inherent powers*. Inherent powers can be defined as those powers that are not expressly granted to arbitrators, but which they need to enjoy in order to ensure the fulfilment of their function of adjudicating disputes. The powers, which are not expressly granted (or only rarely), are of two kinds: inquisitorial powers (Part II) and the power to sanction the parties' conduct (Part III).

Part I – Why and How Delos Distinguishes Itself from Existing Options?

In 2006, a survey of the Queen Mary University of London emphasized the main disadvantages of International Arbitration, ranking first and second the expenses and duration of the proceedings. Ten years later, in 2015, in another survey of the same institution, issues of time and cost efficiency ranked as the top four worst characteristics of international arbitrations.

Although these problems have long been identified in the arbitration community, the responses have been inadequate. The main solutions developed to address those costs and time/efficiency issues have been by way of exception. Thus, most arbitral institutions have set monetary thresholds for the application of their expedited rules, which sit side-by-side with their standard arbitration rules.

Yet, a more efficient market would benefit the users, the law firms, and the arbitrators. For the users, it would mean time and cost savings along with more predictability of these variables at the outset of the proceedings. For law firms, a pipeline of shorter cases with the same demands in terms of quality would involve more work and therefore generate more revenue, while spreading

risk. As for arbitrators, the demands of shorter cases would justify increased compensation in larger disputes while soliciting a larger pool of arbitrators at any given time.

Delos has addressed the above in a multi-faceted manner. The institution offers administered arbitration pursuant to a single set of Rules, which were first released in early 2014. It also sets a time-limit for arbitrators to submit their draft award to the institution, which may be an interim, partial or final award. It empowers the arbitrators rather than sanction them – this was further explored by Professor Pierre Mayer and Professor Maxi Scherer in their panel comments.[1] Further, Delos's approach considers the full life of the contract rather than the arbitral proceeding only, including key issues that may arise at the contract-making stage and the needs of parties in long-term relationships. In sum, Delos offers the significant gain of time and costs compared to existing solutions.

Part II – The inquisitorial powers of the arbitrator – Professor Pierre Mayer[2]

Some arbitrators consider that there are prerogatives they must enjoy in order to carry out their mission, even if such are not stated anywhere, for example, to be able to ask for a more detailed explanation of the facts, or to point to a clause in a contract that no party has mentioned but which the arbitrators feel might have some relevance, or to suggest an alternative legal ground which has not been invoked. Are these inquisitorial powers the arbitrators' inherent powers?

There is no straightforward answer. First, it depends on one's conception of the power of arbitrators. Inherent powers are those which arbitrators must enjoy in order to fulfil their mission, but what is their mission? Secondly, even assuming that they enjoy some inquisitorial powers, one has to define the limits to these powers.

With regard to the arbitrator's mission, this may be considered with the adversarial lens or the inquisitorial one. Within the choice between these two opposing conceptions of the adjudication of disputes lies the notion of judicial truth.

As Professor Mayer explained,

> "[o]*ne view is that the judicial truth is the result of a kind of game between the parties and/or their counsel, in which much depends on the skills of counsel. If Counsel for one party has missed something essential, it means that the party has made a bad choice, and justice commands that it lose.*"[3]

Professor Mayer continues:

> "[a]*nother view is that the truth, even judicial, should bear as much resemblance as possible with the actual truth. This entails that the judge has the right, and even the duty, to intervene when he or she thinks that the parties have missed something, or have organized the proceedings in an inefficient way*."[4]

Considering both conceptions, Professor Mayer considers that "*in international arbitration, it is*

generally accepted, and even expected, that arbitrators enjoy at least some power of initiative,"[5] and if such is the starting point, then the limits of such powers remain to be identified.

Many practitioners refer to the duty of impartiality as a first limitation to the powers of arbitrators. There is another that is less frequently mentioned, namely the *principe dispositif*.

The duty of impartiality would, according to many, limit the power of an arbitrator more than it limits the power of a judge – it would prevent the arbitrator from helping a party, as this would be to the detriment of the other party. In Professor Mayer's opinion, "*provided that arbitrators give an opportunity to both parties to react to their suggestions, they should be free to explore the avenues which they think would lead them to a better understanding of the case*."[6] In so doing, the intention of the arbitrator is not to help a party, but to find the truth, and if that truth is in favor of one party, that does not mean that the arbitrator is being partial. Indeed, isn't the arbitrator who abstains from asking a crucial question, by fear of appearing partial, favoring instead the other party who is going to win, because the question was not asked?

Turning to what is called in French the *principe dispositif*, this is a more serious limit than impartiality. The correct translation in English would be, "*the principle of parties' disposition*," meaning that "*the subject-matter of the dispute is defined by the parties, and only by the parties*."[7] Professor Mayer described his surprise when he learnt that this principle did not exist in American law and that, to the contrary, rule 54 c of the Federal Code of Civil Procedure provides that "*every other final judgment should grant the relief to which each party is entitled even if the party has not demanded that relief in its pleadings*." Even more surprisingly, the same rule is stated in almost identical terms in the Civil Procedure Rules applicable in England & Wales.

Should an arbitrator exercise the same power? Professor Mayer stated that he would not because that would be *ultra petita*.

The distinction between what is permitted and not permitted is not an easy one. Professor Mayer stated that the distinction is between *what* and *how*. *How* to resolve the dispute as it has been defined by the parties is an issue in respect of which the arbitrators can exercise certain powers. *What* the dispute consists of is within the exclusive domain of the parties.

Professor Mayer concluded by considering the implications of public policy for determining the scope of arbitrators' power. He noted that, when public policies are involved, the arbitrator's powers are not only those *available* for a correct adjudication of the dispute, there are also those *needed* in order to perform another duty of the arbitrator, *i.e.* to render an award that will not be in violation of public policy.

III – The power to sanction the parties – Professor Maxi Scherer

Professor Scherer noted at the outset that it is quite striking, when thinking about the powers of arbitrators, that one finds oneself struggling with what should be an obvious topic: There is a lack of clear-cut solutions regarding the power of arbitrators to sanction parties' conduct.

> To illustrate the sort of behavior at issue, Professor Scherer referred to a list compiled by Professor Catherine Rogers:

> "[…]'*convincing' an arbitrator to go home rather than to attend the deliberations, death threats, wiretapping opposing counsel's meeting room, hiding damaging documents that were ordered to be disclosed, raising fourteen challenges to a single arbitral tribunal…*"[8)]

While Professor Scherer had not personally experienced such party misconduct, she noted that there is much debate in the arbitration community about how one should deal with it, *i.e.* whether, and to what extent, the tribunal has the power to sanction such misconducts. If there are voices in favor of broad powers of the arbitral tribunal to sanction the parties, others tend to think that it is not for the tribunal to police these types of situations.

In order to offer some answers on the sources of arbitrators' power to sanction party misconduct, Professor Scherer defined the targeted misconduct and analyzed the types of sanctions used to address them.

To start, Professor Scherer referred to the attempts that had been made to establish a common definition of guerilla tactics and inappropriate behaviors, and to categorize and distinguish them.

The first distinction can be drawn between the conduct of the parties and the conduct of their representatives. Most of the misconducts listed by Professor Catherine Rogers are those of the parties, but one can also imagine situations where counsel is doing something unethical without the parties even knowing (such *ex parte* communications with the arbitrators or destroying documents).

That distinction is delicate, because of the agency relationship between the parties and their legal representative; namely, what the legal representative does is generally deemed to be done as instructed by the parties.

The second distinction focuses on the intention behind the misconducts. On the one hand, some of these behaviors try to undermine the efficiency of the arbitral process, the proceedings themselves, which can be called procedural misconducts. On the other hand, some try to affect the outcome of the proceeding, *i.e.* the decision. Those are the substantive misconducts.

Possible sanctions range from a simple reprimand or caution to the parties' representative being excluded, reporting misconduct to the local bar authorities, or apportioning the costs. Some such sanctions are levied against the parties' legal representatives. Others, however, directly sanction the parties.

The simplest situation is when there is an express power of the arbitrator to sanction those behaviors. This is the case of the IBA Guidelines on Party Representation in International Arbitration (2013). There is also an express power in the LCIA Arbitration Rules (2014), which include an Annex with "*General Guidelines for the Parties' Legal Representatives*." Other arbitral institutions have similar rules providing for arbitrator discretion in assessing and sanctioning party conduct. For instance, Article 27(1)(l) of the SIAC Arbitration Rules (2016) states that if a party fails or refuses to comply with the rules or an arbitral tribunal's order, direction, or partial award, or to attend a meeting or hearing, then the tribunal has the power to "*impose such sanctions as the Tribunal deems appropriate in relation to such failure or refusal*."

Outside of the above instances, *i.e.* where there is no provision granting relevant express powers to

the arbitral tribunal, the distinction between procedural and substantive misconducts appears to be helpful in determining the sources of arbitrators' power to sanction party misconduct.

To conclude, the best way to deal with procedural misconduct is to use robust case management in the first place. For instance, if there are repeated problems of document production requests, the tribunal might swiftly refuse these requests. As noted by Professor Lucy Reed: "[s]*anctions are a last resort, and ultimately a* ***poor*** *resort because sanctions cannot retroactively correct the harm done to the proceedings*."[9] As for the rather exceptional circumstances where substantive misconducts occur, they are best dealt with through the use of arbitrators' inherent powers, and these inherent powers should only be used when there is no other way of dealing with a situation.

References

?1 See, further, Pierre Mayer, *The arbitrator's Initiative: Its Foundation and Its Limits*, Chapter 1, ASA Special Series No. 45, *The Arbitrators' Initiative: When, Why and How Should It Be Used?* (Juris, 2016); Maxi Scherer, *Inherent Powers to Sanction Party Conduct*, Chapter 4, Diego P. Fernandez Arroyo (ed.), *Inherent Powers of Arbitrators* (Juris, 2018).

?2 Pierre Mayer, *The arbitrator's Initiative: Its Foundation and Its Limits*, Chapter 1, ASA Special Series No. 45, *The Arbitrators' Initiative: When, Why and How Should It Be Used?* 3 (Juris, 2016).

?3, ?4 ibid.

?5 ibid., p. 4.

?6, ?7 ibid., p. 5.

?8 Catherine Rogers, *Chapter 5: Guerrilla Tactics and Ethical Regulation*, *in* Guerilla Tactics in International Arbitration 313 (Günter Horvath and Stephan Wilske eds., 2013). *cited in* Maxi Scherer, *Inherent Powers to Sanction Party Conduct*, Chapter 4, Diego P. Fernandez Arroyo (ed.), *Inherent Powers of Arbitrators* 1 (Juris, 2018).

?9 Lucy Reed, Chapter 2: Sanctions Available for Arbitrators to Curtail Guerilla Tactics, *in* Guerilla Tactics in International Arbitration 93, 99 (Günther Horvath and Stephan Wilske eds., 2013) (emphasis added) *cited in* Maxi Scherer, *Inherent Powers to Sanction Party Conduct*, Chapter 4, Diego P. Fernandez Arroyo (ed.), *Inherent Powers of Arbitrators* 9 (Juris, 2018).

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