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The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?

Valentina Faienza (International Council for Commercial Arbitration) · Tuesday, May 6th, 2014

The very nature of international arbitration entails parties, arbitrators and any other participant in the arbitral proceedings generally being of different nationalities and speaking different languages. Therefore, the language in which the proceedings will be held becomes of great importance for the characteristic purpose of arbitration itself: the consensual resolution of disputes. Nevertheless, the procedural language is often looked at as a secondary question, to the extent that parties may choose one without the due consideration or even waive their right to determine it in the arbitration agreement. The choice of the (proper) procedural language in the arbitration agreement can instead have a significant role in the efficiency of the proceedings.

First of all, the certainty as to the procedural language, at the stage of the initiation of the proceedings, will positively reflect on the very first steps of the arbitration, such as the first communications (between parties, future arbitrators, arbitral institution…) and the early decisions of parties and arbitrators.

In the first case, the communications will most likely be made in the language indicated in the arbitration agreement. In the second case, parties will choose their representatives and arbitrators will decide whether to accept the appointment based also on their knowledge of the procedural language. On the contrary, where it is not indicated in the arbitration agreement, the first communications could be made in different languages (e.g. each party in its language, which would be highly unpractical) and parties' and arbitrators' decisions would be inappropriate (i.e. parties would have to change their representatives and arbitrators would have to resign because they are not familiar with the language of the proceedings, which they did not know at the moment of their decision). Additionally, where parties and arbitrators are not willing to review these decisions, this would result in arbitral proceedings mainly conducted through translation and interpretation, which would definitely affect both costs and duration of the arbitration. Equally, the issues related to the choice of language by the arbitral tribunal (which generally has the competence to do so, in the absence of the agreement of the parties) would not arise.

One of the most problematic issues regards the prerequisite of the tribunal's competence itself: the absence of the agreement of the parties. When is the choice of the parties absent? Is an "implicit agreement" of the parties, a sort of *facta concludentia* (i.e. the use of the same language for the contract, the arbitration agreement, the correspondence etc.), allowed? Arbitration rules generally do not provide a specific form (e.g. written or explicit) for the choice of the parties; therefore, a positive answer to this question could be possible. However, a sort of *kompetenz-kompetenz* rule is

applicable: the arbitral tribunal is not only entitled to determine the language, but also to verify the existence and the extent of the agreement concerning this choice. But what is the level of discretion of the arbitral tribunal? Any uncertainty of the arbitral tribunal on the existence of the tacit choice could lead the latter to consider it absent and therefore to decide on the language of the proceedings. And what if the arbitral tribunal, despite the "hints" given by this behavior of the parties, chooses a different language? In this case, could one or both parties argue that the tribunal lacked competence, because there was an implicit agreement on the language among them? This question also poses a problem with regard to the procedural impasse arising from the circumstance of the parties contesting a procedural decision of the tribunal during the proceedings.

All of the aforementioned issues would not arise where parties choose the language in the arbitration agreement. Moreover, one could argue that parties not choosing the procedural language can be considered in logical contrast with their decision to go to arbitration, either if they did not choose it because they could not reach an agreement or because they did not care to. In the first case, where arbitration represents a consensual method of solving disputes and parties cannot even agree on the procedural language, this is instead a negative sign as for their attitude during the future proceedings. In the second case, where one of the characteristics of arbitration is the autonomy of the parties also with regard to procedural choices and parties do not take a decision as to the procedural language, they are not exploiting the main advantage of arbitration.

As mentioned above, not only parties should choose the language, but also they should choose it with due consideration. The choice of the "wrong" language may imply the need to resort to translation and interpretation for most of the conduct of the proceedings. Translation and interpretation, on one hand affect the costs and the duration of the proceedings and, on the other, may not be very accurate.

It could be argued that it is very hard to imagine a party choosing a procedural language that s/he does not speak, but this circumstance is more common that one could expect. Here is a practical example: Company A is based in Italy and its parent Company B is based in the US. Company A signs a contract with Company C (also based in Italy) containing an arbitration agreement which provides Milan as the seat of the arbitration. In choosing the language of the proceedings, Company A is required by the parent Company B to choose the English language. Company C agrees, not giving the due consideration to the matter. This will result in arbitral proceedings held in Italy between two companies based in Italy conducted in English language, with conspicuous amounts of money and time spent in translation and interpretation.

To conclude, in a mechanism of consensual resolution of international disputes, as international arbitration is, language cannot (and should not) be looked at as a secondary matter. As it has been demonstrated, language can potentially affect the proceedings in many circumstances, leading in most cases to an inefficient arbitration.

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