Kluwer Arbitration Blog

Case Management in Arbitration: A View from Poland

Maciej Zachariasiewicz (Akademia Leona Ko?mi?skiego) and Michal Kocur (Kocur & Partners) · Tuesday, November 5th, 2019

Essential Role of Effective Case Management in Arbitration

Throughout the second half of the 20th century, arbitration has become a dominant and preferred method for resolving international disputes. Its advantages are widely known. This being said, international arbitration suffers nowadays from increasing costs and duration of the proceedings. It is less efficient than it promises. Many business people express dissatisfaction. Efforts are thus made by the arbitration community to improve the existing rules and practices in order to tackle these inconveniences.[1)]

Management of the arbitral proceedings lays at the very center of the arbitration's current difficulties. The issue, although immensely relevant for the whole arbitration world, has its specific Polish dimension. Many of the practices and techniques well settled in international arbitration (*e.g.* case management conferences, written witness statements, party-appointed experts) only gradually gain prominence in Polish practice. Whilst the world seems concerned with working out new instruments, which will render pursuit of claims in arbitration more effective (*e.g.* expedited procedures, emergency arbitrators), or with fine tuning the existing measures,[2)] the Polish arbitral practice strives to implement instruments long known on the international level. Thus, in so far as the main challenge for international arbitration seems to be counteracting further judicialization of arbitration and restraining the surging arbitration costs, the task before Polish arbitration community is different. Namely, it is to remodel the practices of case management towards best international practices, and in particular to overcome tendencies transposed from litigation before Polish common courts.

The Study on the Polish Arbitral Practice

With the above in mind, a study was conducted by Kocur & Partners and Kozminski University in Warsaw that took aim at the management of arbitral proceedings in Poland. The goal of the survey was to determine what rules, techniques, and practices are used in Poland, and how they are viewed by arbitration practitioners. The survey was conducted at the turn of 2018 and 2019. Our respondents answered multiple-choice questions in an online questionnaire sent to arbitration practitioners, *i.e.* counsels and arbitrators. In all, 108 arbitration practitioners took part in the survey. The answers of the "counsels" and "arbitrators" were contrasted, with some interesting

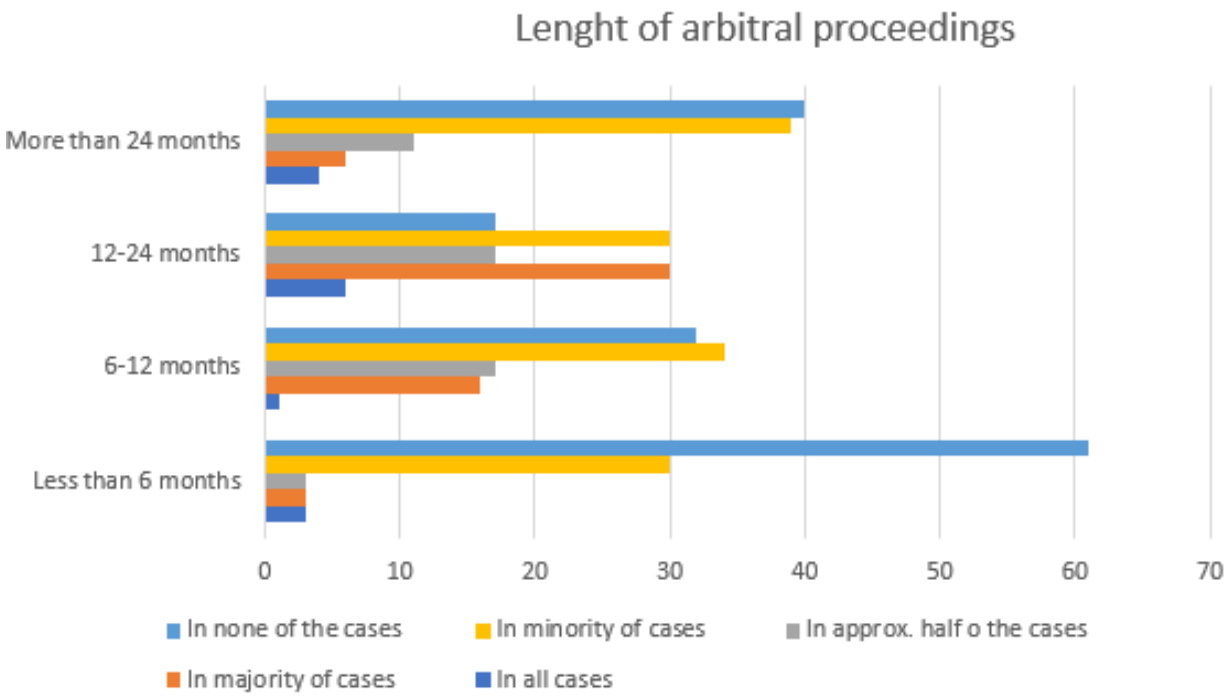
effects.

The study focused on a number of procedural issues that are relevant to the efficacy of dispute resolution. The questions posed to arbitration practitioners related both to their actual experiences ("how things are"), as well as to their opinions about preferred practices relating to case management ("how things should be"). The following issues were covered by the study:

- duration of proceedings;
- case management conferences;
- first procedural orders and timetables of proceedings;
- arbitrators' competences with respect to active management of the proceedings;
- length of the written submissions;
- expert reports;
- written witness statements and the examination of witness at the hearing;
- organization of the hearings within the proceedings;
- document production;
- financial incentives for arbitrators to timely render an award;
- financial sanctions for parties employing dilatory tactics.

Length of Arbitration Proceedings and the Reasons for Delays

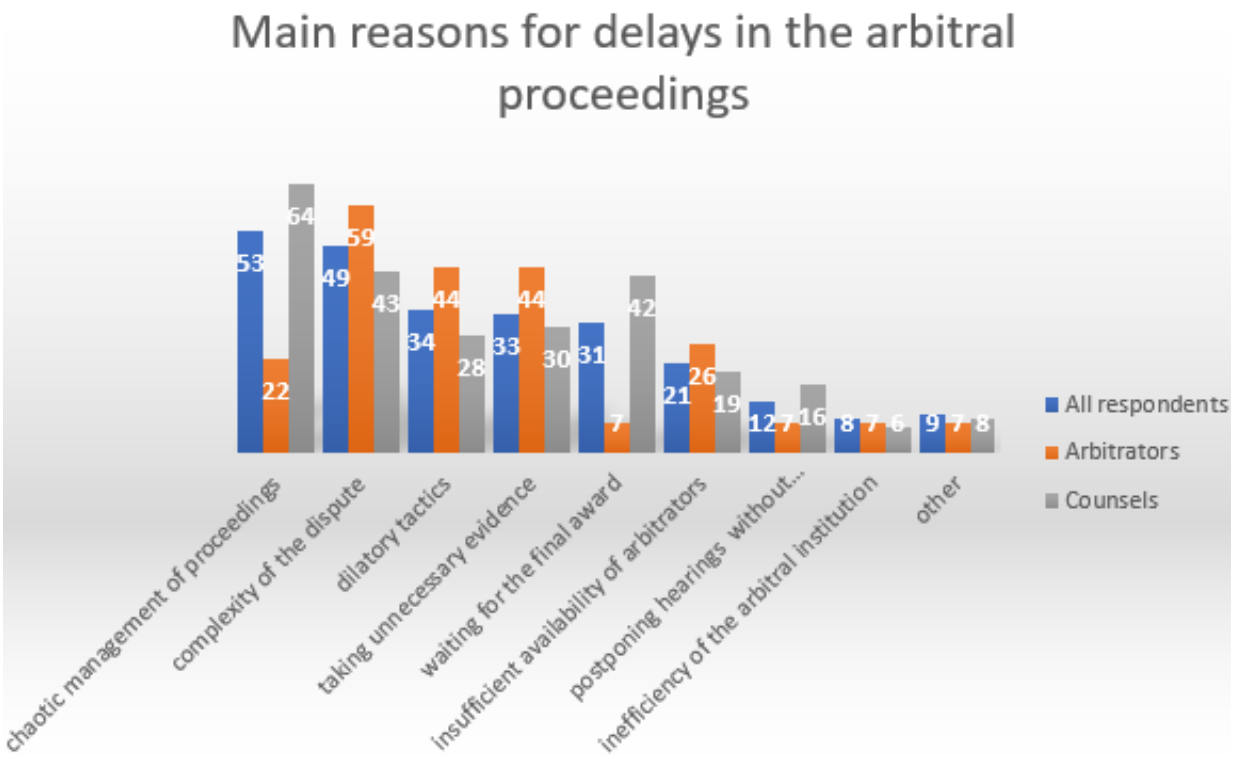
The participants of the survey were first asked about the length of the arbitration proceedings they had participated in. According to participant's experiences proceedings most often last between 12-24 months (30% of respondents indicated that this was the duration in majority of cases they dealt with), followed by 6-12 months (16% of respondents have chosen the answer "in majority of cases"). On the other hand, arbitrations in Poland seldom last longer than 24 months. Yet, they also rarely finish in a period shorter than 6 months.



Source: 2019 Polish Arbitration Survey. Case Management in Arbitration, p. 9.

The users' experiences seem to be confirmed by the data from Polish arbitration courts. The average duration of the proceedings before the Court of Arbitration at the Polish Chamber of Commerce was 448 days in 2018, 385 days in 2017, and 413 days in 2016 (counted from the day when the request for arbitration is filed until the award). The cases before the Lewiatan Arbitration Court were, on the other hand, decided more quickly. It took on average only 3,6 months in 2017 and 5,1 month in 2016 to decide the case (although this was counted from the moment when the arbitral tribunal is constituted). However, because the Court at the Polish Chamber of Commerce decides much more cases, its relative impact on the experience of the users is proportionally greater.

More importantly, we sought to find out what – in the eyes of the respondents – are the main reasons for delays in proceedings. The most frequently chosen answer was the chaotic management of arbitration proceedings (53% of answers), followed by the complexity of the dispute (49%), dilatory tactics (34%), taking unnecessary evidence (33%), waiting for the final award after the proceedings have been completed (31%), insufficient availability of arbitrators (21%), postponing hearings without justified reasons (12%), and the inefficiency of the arbitral institution administering the dispute (8%), with some respondents pointing to difficulties with choosing experts and obtaining their reports timely.



Source: 2019 Polish Arbitration Survey. Case Management in Arbitration, pp. 10-11.

When it comes to reasons for delays there are interesting differences between answers given by arbitrators and counsels. For example, while only 22% of arbitrators consider the chaotic organization of proceedings important, 64% of the counsels underlined that this precisely was the main cause of delays. In that context, it comes as a surprise that 44% of the arbitrators consider the taking of unnecessary evidence as an important cause of delays, while only 30% of counsels pointed to that answer. This may suggest that arbitrators, although generally consider that they are responsible for the management of arbitral proceedings (and not pointing to their own mismanagement), do not feel they are responsible for the active control of taking evidence through a critical examination of the parties' requests.

When a party provides evidence which seems unnecessary to resolve the case, the arbitrators may find themselves in a difficult position. In deciding whether to take the evidence they must balance the need to expeditiously head towards the final award with the parties' right to fully present their case. That the given evidence is irrelevant for the case might not be clear until it is actually taken and analyzed by the tribunal. Consequently, arbitrators may be inclined to think that the admission of almost all evidence is necessary to safeguard due process and to rely on the parties' in that they best know what evidence should be taken. Moreover, not only arbitrators have an obligation to make sure that parties are treated fairly, but also that the proceedings appear to be fair in the eyes of the reasonable third party (*e.g.*, the court called upon to decide any challenge to the award).

Yearning for "Stronger" Arbitrators

On the other hand, yearning for "stronger" arbitrators seem to be on the tide in international arbitration. A "stronger" arbitrator is one who is not overly constrained by the due process paranoia, who manages the case actively and is ready to identify the contingent issues and take difficult decisions early in the proceedings.[3)] The most far-reaching of the recent initiatives are the recently adopted Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018), which encourage this attitude, even suggesting that the arbitral tribunal is entitled to take "*a proactive role in establishing the facts of the case which it considers relevant for the resolution of the dispute*" (Article 3(1)). While this might be a step too far, a general longing for more active arbitrators is often heard.[4)]

This seems to be confirmed also by findings of the survey. Although only 22% of the users agreed with the proposition that arbitrators should always seek to identify key issues to resolve the dispute, and in the absence of the parties' activity, should seek to clarify the issues by conducting evidentiary proceedings themselves, as much as 71% of the Polish users contended that arbitrators should be active, although not to the extent that they should conduct evidentiary proceedings at their own initiative. Conversely, only 6% of the respondents felt that the arbitrators should be mere observers of the parties' actions during the proceedings.

That the Polish users prefer active arbitrators with strong procedural powers results also from their answers to some of the specific questions posed in the survey. 59% of respondents said that if the witness summoned to the hearing failed to appear, the arbitrators should disregard the evidence from such witness. 36% of respondents took a more flexible stance that the arbitrators may disregard such evidence, but only for important reasons.

Users seem also to prefer strong arbitrators' powers when it comes to limiting the length of the written submissions and sanctioning dilatory tactics. With respect to the first issue, although majority (56%) of those who took part in the survey believe that arbitrators should only limit the length of the written submission when the parties have consented to it, as much as 24% believe that such restrictions should be applied in each case irrespective of parties' consent and only 11% that there must never be limits in that regard. Interestingly, it was arbitrators who more often (23%) than counsels (8%) indicated that the length of the written submissions should never be limited. This might come as a surprise given that it is the parties' right to fully present its case which is at stake and that it is usually suggested on international fora that parties should agree on such restrictions.[5)] The results of our survey seem to suggest that the counsels are more keen to self-limit

their chances to fully present their case than it would be necessary according to the arbitrators.

Finally, Polish users want arbitrators to sanction unethical behavior of the parties and their counsels that results in prolonging the proceedings. Majority of respondents believe that such behavior should always be sanctioned by arbitrators and affect the decision on costs (54%). A minority (39%) choose a more moderate proposition, that this can only be done if the arbitrators have warned the parties in advance. Only 4% contended that arbitrators may apply cost sanctions only if the parties have actually agreed to this. Polish users thus accept more leeway in sanctioning parties that what is usually suggested in international arbitral practice.[6)]

Can Procedural Effectiveness Be Restored in Arbitration?

Much ink has been spilt in the recent years about the effectiveness of arbitration. Voices are heard that arbitration does not live up to its promise of being expedient, inexpensive and informal method of dispute resolution. Many are nostalgic about the good, old times when arbitration was exactly that (or is now perceived as such). Although the judicialization of arbitration may be its natural development resulting from its growth as a predominant method of settling international, often complex and large scale, business disputes, efforts aimed at increasing its usefulness for users are always worth pursuing. The survey on the case management in arbitration, although focused on Polish practices, aspires to make a modest contribution in that regard.

References

?1 This includes in particular guidelines and rules prepared by various international organizations such as Arbitration Committee of IBA, ICCA, UNCITRAL, the Chartered Institute of Arbitrators or international arbitration courts.

?2 *See e.g.* J. Risse, Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings, Arbitration International, Vol. 29, No. 3, p. 453 et seq.

?3 *See e.g.* Compendium of arbitration practice – IBA Arb40 Subcommittee (2017), p. 6, which note that "earlier engagement from the tribunal is essential".

?4 K.P. Berger, O. Jensen, Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators, Arb. Int'l, vol. 32, 2016, s. 416; ICC Techniques for Controlling Time and Costs in Arbitration (2012), para 13.

?5 *See*, for example, ICC Techniques for Controlling Time and Costs in Arbitration (2018), para 47.

?6 Where a dominant view seems to be that the parties must at least be warned that their unethical behavior may affect the decision on costs. *See* Compendium of arbitration practice – IBA Arb40 Subcommittee (2017), p. 11, 26; IBA Guidelines on Party Representation in International Arbitration (2013) – Guideline 26.

This entry was posted on Tuesday, November 5th, 2019 at 11:00 am and is filed under Arbitration, Arbitration Institutions and Rules, Arbitration Proceedings, Case Management, Efficiency, International arbitration, Poland
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.