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The Management Toolbox for Arbitration

A Road to Greater Efficiency

CHRISTOPH LIEBSCHER*

Given *Günther Horvath's* outstanding career in private practice, arbitration, and in the business world, I hope that he will find this topic of some interest. The few lines that follow invite you on a little intellectual journey into a new landscape; parts of it may be familiar to you. The thoughts will be limited to the area of international commercial arbitration.[1] However, they may well be of interest beyond. This look at a management toolbox in no way ignores the adversarial nature of a dispute. The road to more efficiency would benefit the parties within the legal framework of fair trial.

I. Where are we?

"Arbitration should be easier, faster, cheaper." The chorus singing this song has many members. They have been singing for quite some time.[2] Different arbitration institutions and arbitration practitioners have been listening, and have not remained idle. They replied for years using an array of legal instruments.[3] Has the chorus stopped? No. Why is this so?

Efficient procedures to keep time and costs at bay are not core legal issues. This article suggest they are largely management issues. If this is the case, it is not surprising that the legal toolbox can make a contribution, but obviously misses out on important aspects, namely management issues.

II. Where do we want to go?

First, this begs the question: What are the alternatives to international commercial arbitration? One route is to increase the use of tools to support consensual dispute resolution like mediation or early neutral evaluation. Although the potential of these techniques is not yet exhausted, they will not be able to solve all disputes. In particular, the more complex may stay around.

The other main route leads to litigation in front of state courts. It may well be that future state court procedures will develop that mimicks the characteristics of arbitration. To this day, such core procedures do not exist in any substantive manner, if at all. In conclusion, international commercial arbitration will continue to be around for quite some time. Therefore, it is worth to invest in further improvements.

III. Where is the road?

At first glance, the following quote has nothing to do with arbitration: *"People engaged in business, politics, and diplomacy – and especially the lawyers who serve them – spend most of their energies in competing, in seeking to win, and yes, in negotiating to gain an advantage. We view much of the world as adversarial, and we tend to judge ourselves and our peers on a scale that measures feistiness as we overcome obstacles put in the way by others. Those who don't display this feistiness are often perceived as 'wimps' – weak, ineffectual people who don't believe that winning is everything. It is my opinion, however, that 'wimps' who choose to use collaborative problem solving before resorting to feisty battle may often be the more effective negotiators."*[4]

The author is *Donald B. Strauss*, one of the former presidents of the American Arbitration Association.

If you see arbitration only as a fight between two or more parties with the arbitral tribunal making sure that certain rules are respected, this reference may seem out of place. If, however, you are willing to understand arbitration as a process where also opportunities for such collaboration exist, there is a new important stretch of road before you. One may even consider the arbitration process with the concepts of teamwork.[5] This is one example, which shows that new approaches beyond the legal toolbox are available.

In any case, it is worth looking at arbitration as a management process.[6] Before doing this, one caveat: For any management approach to work, the consent of the parties and their counsel is a clear requirement. It will be for the arbitral tribunal to convince them to go along.

1. What does management mean?

This is one definition: *"the conducting or supervising of something"*.[7] Obviously, not all areas of business management are of relevance here. In arbitration as in many other situations, this *"something"* means foremost *"people"*. The other management area of relevance is *"process"*. However, the process architec-

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1 To facilitate reading, *"arbitration"* refers to international commercial arbitration.

2 See e.g. *Risse*, The Future of Arbitration: A Poet's Prophecy, Journal of International Arbitration 2019, 679; *Queen Mary University of London School of International Arbitration & White & Case*, 2015 International Arbitration Survey: The Evolution of International Arbitration, http://www.arbitration.qmul.ac.uk/research/2015/ [hereinafter Survey 2015]; *Queen Mary University of London School of international arbitration & White & Case*, 2018 International Arbitration Survey: The Evolution of International Arbitration, http://www.arbitration.qmul.ac.uk/research/2018/ (both accessed 2.9.2022) [hereinafter Survey 2018]; *Blackaby/Partasides QC*, Redfern and Hunter on International Arbitration[6] (2015) marg. nos 1.123 – 1.127; *Risse*, Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings, Arbitration International 2013, 453 (453–454); *Liebscher*, Teamwork Approach in Arbitration: A New Perspective, Journal of International Arbitration 2020, 289.

3 See e.g. *Risse*, Arbitration International 2013, 453; for other examples see *Liebscher*, Journal of International Arbitration 2020, 289 (292–295 with refs in the footnotes).

4 *Strauss*, Collaborating to Understand – Without Being a 'Wimp', Negotiation Journal 1986, 155.

5 *Liebscher*, Journal of International Arbitration 2020, 289 (289–324).

6 For a business view on arbitration *Steinbrecher*, Streitbeilegung für das 21. Jahrhundert, Vortrag am 21.6.2022 bei der DIS-Frühjahrs-/Sommerveranstaltung in Frankfurt/Main.

7 https://www.merriam-webster.com/dictionary/management (accessed 2.9.2022).

ture is closely related to the people involved. Another aspect of process has become technology.[8]

Therefore, one key area of relevance is organizational psychology. In recent years, psychology in general has gained the attention of the arbitration world.[9] I would invite this exploration to go further, and assess the psychological knowledge of efficient management.

2. Who are the main actors?

Given the obvious focus on people, it is appropriate to start with the main actors in an arbitration. There is one group of actors, who should be key advocates of a management approach: in-house lawyers. However, for the huge majority of cases, disputes – and in particular arbitrations – the direct involvement of in-house lawyers is a rare occurrence. Therefore, it may not seem appropriate for them to devote time and energy to advocate change. However, if they are involved in a specific case, they should not shy away from assessing an arbitration as they would do with any other project in their business.

2.1. Parties

In nearly all arbitrations, the parties are business entities with larger companies having their own legal department. With a few exceptions, notably in the building and the engineering field, arbitrations are usually very rare events for a business undertaking, and as a result are rare for its in-house lawyers to gain experience and insights. When talking of *"parties"*, a distinction must be drawn between the parties and their counsel. Further, a "party" itself is not homogenous. In particular, in case of a dispute – especially in a commercial arbitration – two very different views of the world meet: business and legal.

To give two examples: The outlook in time and the attitude towards risk. Legal thinking focusses on the past: What have courts decided so far? What have scholars written, etc.? Business is interested about the future: Will I find customers? Will I be able to fight competition, etc.?

To a large part, legal business is about risk reduction. The ideal risk in this world is as close to 0 % as at all possible. To business, risk means oxygen, because without risk there are no opportunities. Presented with a case, lawyers will conduct an analysis of the legal issues, and on that basis come to certain conclusions. Business, in the end, is interested in the net present value of the dispute. Under a management approach, both approaches can be easily combined.[10]

2.2. Parties' Counsel

Counsel have their own role. Their role is to defend the interest of their clients. Business considerations are typically not part of this. In practice, due to resource limitations of legal departments and other reasons, there can be a tendency for the business to lean back having delegated the matter to counsel. This attitude can be detrimental. In a larger dispute, a work team with clear jobs should be established like for another project, including in-house counsel and outside members.

What counsel often underestimate are two things: That business disputes are a nuisance and the legal department's focus on the support of business. Usually, they are not prepared for disputes. This may lead to a substantial effort to prepare for the dispute, e.g. by collecting the relevant documentation.[11] To test whether there is room for improvement for cooperation between parties and their counsel, one question arises: What IT tools, such as an electronic file, are used?[12]

2.3. Arbitral Tribunal

It is proper and to be expected that arbitrators respect the legal guarantees for a fair trial. However, unjustified legal concerns, which impede efficient proceedings, have been coined *"Due Process Paranoia"*.[13] The legal framework, correctly understood, leaves ample room for the role of the arbitrators. It has been said that over time three types of arbitrators can be distinguished:[14]

- Grand Old Men (lawyers with a high reputation, not necessarily in arbitration);
- Technocrats (good experts in arbitration legal techniques); and
- Managers.

Research indicates that the third type is clearly in demand and, by contrast, still somewhat rare. The fulfilment of the job description is demanding: specialization in the law and practice of arbitration; management abilities (not least understanding and dealing with emotions [their own and those of the other participants]); and experience as an arbitrator. However, management capabilities seem to be a key quality, which customers of arbitration seek, in particular for chairpersons.[15]

What a management approach can mean, is illustrated by one example below (see 3.).

2.4. Experts

Experts can be very important actors in an arbitration. In an overwhelming number of cases, the parties will appoint experts. They have been nicknamed *"hired guns"* because it is clear that a party will select an expert to support its case, not to contradict it. Situations where the arbitral tribunal appoints an expert or an "advisor" will not be considered here because they are a very rare occurrence.

Typically, each party-appointed expert will prepare a first report, usually followed by a second report, replying to the first report of the other expert. Very often, only at the hearing, the experts meet. It may be that before the hearing, they were asked to prepare a list of agreements and disagreements. In practice, the use of such a document seems to be rather limited.

[8] See e.g. *Zimmermann*, International Arbitration 2.0: Strategies for Tech-Savy Proceedings, in *González-Bueno* (ed.), 40 under 40 International Arbitration (2021) 185.

[9] See e.g. *Cole* (ed.), The Roles of Psychology in International Arbitration (2017); *ICC*, ICC Commission Report – The Accuracy of Fact Witness Memory in International Arbitration (2020).

[10] See *Liebscher*, Journal of International Arbitration 2020, 289 (315–316, and annex 1 with further references in footnote 84).

[11] See *Steinbrecher*, Streitbeilegung, Vortrag am 21.6.2022.

[12] See *Steinbrecher*, Streitbeilegung, Vortrag am 21.6.2022.

[13] *Berger/Jensen*, Due process paranoia and the procedural judgment rule: safe harbour for procedural management decisions by international arbitrators, Arbitration International 2016, 416.

[14] *Schultz/Kovacs*, The Rise of a Third Generation of Arbitrators? 15 Years After Dezalay and Garth, Arbitration International 2012, 161 (162–163).

[15] *Schultz/Kovacs*, Arbitration International 2012, 161 (166).

It is not rare that experts behave rather like advocates. An alternative to this common procedure is described under 3. below.

2.5. Witnesses

There is hardly an arbitration without witnesses. First of all, in arbitration, most witnesses are not bystanders, unrelated to the parties. Very often, they have a (close) connection to the parties.

The three main purposes for which witnesses are called are the following:

- to provide factual information;
- to put the evidence into context; and
- to set out the big picture.

3. A management example

Below is one brief example and alternative to show a more managerial approach to expert evidence. What follows is also subject to the caveat made at the beginning of this article: For any management approach to work, the consent of the parties and their counsel is a clear requirement. The example is based on one starting proposition: Party-appointed experts have a second role, namely they are also teachers for the arbitral tribunal.[16]

Not surprisingly, a management approach to expert evidence means early involvement. As a result, the first steps in such a scenario could be the following: As early as possible, the arbitral tribunal will make sure that

- the experts are aware that they may be asked to also adopt the role of teachers of the arbitral tribunal;
- their reports shall have the same table of contents, without prejudice to the relevance of any item thereon;
- they shall deal with all assumptions of each of the experts;
- they work from the same documents and on the basis of the same information.

To achieve this, the experts will be and remain in contact throughout the arbitration. It would be good practice for the arbitral tribunal to get together with the experts, counsel and party representatives, at least online, to go through these and possible other issues shortly after the appointment of the experts. It will also be important to collect the views of the experts on their work process.

Once the first reports are in, the arbitral tribunal will review them in detail to see whether the requirements stated above are met and which clarifications, if any, they require at this stage. After the second round of expert reports, the experts may be asked to prepare a joint report on certain issues. To discuss the details and possibilities thereof would go beyond the scope of this contribution. The same is true for the management of the further steps of expert evidence.

4. How to advance?

This little contribution seeks merely to raise the prospect that there is potential for further improving arbitration: the management toolbox. Whereas many hours and great effort have been invested in refining the legal toolbox, so far, the management toolbox lies idle. This should change. However, it will require lawyers to reach outside their profession and look for partners from the management and business world to explore new territory.

There is sufficient indication that this is worth a try.[17] It requires three things from lawyers:

- to put on a different pair of glasses;
- to be willing to look at arbitration differently from how they have done so far throughout their career; and
- to accept that non-lawyers may make important contributions to the arbitration process.[18]

The next steps would be thorough research, development of practice suggestions and substantial training.

[16] One application of this proposition can be found in the "*teaching session*"; see *Berger et al*, A Teaching Session for the Efficient Management of Technical Evidence in International Arbitration, http://arbitrationblog.kluwerarbitration.com/2019/01/18/a-teaching-session-for-the-efficient-management-of-technical-evidence-in-international-arbitration/ (accessed 2.9.2022).

[17] See *Liebscher*, Journal of International Arbitration 2020, 289.

[18] See e.g. *Cole*, Roles of Psychology (2017); *ICC*, Commission Report (2020).