

Teamwork Approach in Arbitration: A New Perspective

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Attempts to increase the efficiency of case management in arbitration have been around for some time. They were mainly focused on the design and use of certain procedural rules and tools. It is beneficial that this work was undertaken, but it seems to reach its limits to improve case management. More recently, the arbitration community has started to discover the wealth of psychological knowledge to better understand and manage certain aspects of the arbitration process. However, this curiosity was limited to specific issues, such as psychology of witness evidence or of decision taking. This article proposes to take a bird's eye view based on organizational psychology and management science and asks the question: Can the established knowledge about successful teamwork be applied to arbitration? The article reviews, if such a holistic teamwork approach leads to avenues for improving the efficiency of case management in arbitration. The answer is clearly affirmative. To view the interactions between the arbitral tribunal, the parties (It is common to speak about 'party'. However, most of the time a 'party' is rather a complex organization, usually being a team consisting of at least two sub-teams, the in-house team involved in the arbitration and the team of the external counsels. In order to facilitate reading, the article subscribes to the colloquial use of 'party', except where the difference between the two sub-teams is pointed out.) and other participants in the arbitration as teamwork provides new perspectives and can lead to new attitudes as well as to new tools for managing cases. Arbitrations guided by a teamwork approach promise to be more efficient, involve parties and arbitral tribunals more intensely – and to be more enriching for the participants.

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1 INTRODUCTION

In international commercial arbitration the topics 'reduction of time and cost' and 'efficient case management' are far from being a novelty.¹

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'Thoughts are powerful; only a few people are aware of this.' (Old Rabbinic wisdom.)

¹ See e.g. Jörg Risse, *The Future of Arbitration: A Poet's Prophecy*, 36 J. Int'l Arb. 679 (2019); 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] (accessed 20 Feb. 2020); 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/> (accessed 20 Feb. 2020) [hereinafter Survey 2018].

This article will not explore to which degree the worries about time and cost in arbitration and about efficient case management are justified. It suffices that the customers of arbitration feel that there are issues.

The article considers international commercial arbitration; however, the considerations may well also apply in international investment arbitration and in domestic arbitration.

The purpose of this article is to see whether the concept of teamwork² can provide useful guidance and inspiration for further development of efficient case management in arbitration. It may well be that some arbitrators have already used some tools described herein. Still, what is missing is a clear and coherent framework which will allow to develop and refine tools for efficient case management as part of a comprehensive approach. The most important element, however, is not a collection of tools, but the necessary underlying attitude of the arbitrators.³

Neil Kaplan's statement: 'It may seem a trite observation but we have to start with more case management by the tribunal itself. I say trite because we have been talking about this for years and no substantial improvement has been made'⁴ contains more than just a grain of truth. This article is, in the end, dedicated to suggesting a possible answer to the question why 'no substantial improvement has been made' and to showing a way forward to change this situation.

This article invites the reader to go on an intellectual journey: What happens if one considers the triangular arbitration process with the spectacles of management sciences in the area of teamwork, without denying the adversarial relationship between the parties?

Donald B. Strauss, one of the former presidents of the American Arbitration Association, starts his article 'Collaborating to Understand – Without Being a "Wimp"',⁵ as follows:

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.

² See e.g. Stephen P. Robbins & Timothy A. Judge, *Organizational Behavior, Global Edition* (18th ed., Ch. 10, Pearson 2019); Carl E. Larson & Frank M. J. LaFasto, *Teamwork What Must Go Right/What Can Go Wrong* (Sage 1989); Michael A. West, *Effective Teamwork Practical Lessons from Organizational Research* (BPS Blackwell 2012); Charles J. Pellerin, *How NASA Builds Teams Part IV* (John Wiley and Sons 2009).

³ See *infra* 5.1.

⁴ Neil Kaplan, *Winter of Discontent*, 34 J. Int'l Arb. 373, 377 (2017).

⁵ Donald B. Strauss, *Collaborating to Understand – Without Being a 'Wimp'*, 2 Negot. J. 155 (1986).

Although Strauss speaks about negotiation and not arbitration, the question is whether a similar statement could be made in arbitration.

To avoid any misunderstanding: clearly, arbitration is an adversarial process. Nothing in this article seeks to deny this or water it down. Further, everything that will be considered in this article is said within the clear legal framework applicable to international commercial arbitration and the standards that safeguard the process and its outcome, the award or, as the case maybe, the settlement.

And still, it cannot be ignored that international commercial arbitration is a tool for international business and not an end in itself. This alone justifies looking at the topic through the eyes of business and in particular teamwork, whilst being fully aware of the framework, which is legal. As will be demonstrated, a teamwork approach works well within the existing legal framework and there will be no need for any change of rules, guidelines or soft law.

Before the topic is developed, it is worth mentioning that, recently, the arbitration community has opened the doors to the science of psychology.⁶ However, the encounters were rather limited to individual issues and did not look at arbitration proceedings as a whole. In addition, the arbitration world does not seem to have encountered organizational psychology and management science. They offer a wealth of knowledge and research which is worth reviewing to see what they hold in store for the improvement of the organization ‘arbitration proceedings’.

Teamwork is one example for this possible enrichment of arbitration. The journey that is about to begin looks at arbitration with fresh eyes. It takes the following route: after looking at current case management approaches, teamwork principles will be introduced. In a next step their relevance for the arbitration setting will be explored, concluding with examples for a practical application of a teamwork approach.

2 CURRENT APPROACHES TO CASE MANAGEMENT

2.1 TYPES OF ARBITRATORS

It has been proposed that three generations of arbitrators can be distinguished.⁷ The first generation is described as arbitrators who are recognized for their virtues, who have typically risen to the top of their domestic legal profession without necessarily having done so in arbitration (‘Grand Old Men’). The second generation is described as good technical experts in arbitration (‘Technocrats’). This

⁶ See e.g. *The Roles of Psychology in International Arbitration* (Tony Cole ed., Wolters Kluwer 2017) [hereinafter *Roles of Psychology*]; ICC Task Force on Maximizing the Probative Value of Witness Evidence, forthcoming in spring 2020.

⁷ Ren Kuttner, *The Arbitrator as Leader and Facilitator*, in *The Roles of Psychology in International Arbitration* 95, 98 (Tony Cole ed., Wolters Kluwer 2017) with further references.

generation focuses very much on the legal details of arbitration, reflecting the fact that arbitration has evolved. The current approaches to case management described below under 2.2 are driven mainly by this second generation.

The third generation⁸ is proposed to be: 'Managers'. Based on research it has been proposed that today parties look for management capabilities in arbitrators, such as organizational skills, quick identification of legal and non-legal issues, reading and dealing with underlying emotions. This research shows that three qualities of arbitrators are most important: specialization in the law and practice of arbitration; management abilities; experience as arbitrator. However, management capabilities seem to be the overriding quality which customers of arbitration search for in arbitrators today.⁹ One may add that it is a fair assumption of a party that the person who is willing to sit as arbitrator has the necessary technical knowledge. Therefore, this is not a quality which is decisive, but understandably assumed. The differentiating criteria may be more and more the management capability.

This third generation does not shed the qualities of the second generation, but rather adds another layer, the management layer. Therefore, management experience and knowledge must be combined with legal experience and knowledge.

2.2 CURRENT INSTRUMENTS

Different types of instruments have been developed to increase the efficiency of arbitration proceedings. To borrow from the distinction set out above under 2.1, they could be said to be 'second generation' tools. They are not driven by a managerial approach to the arbitration process but drafted from the point of view of lawyers experienced in arbitration.

To react to the concerns that arbitration proceedings take too long, a number of rules for expedited proceedings have been introduced, such as by: AAA,¹⁰ CIETAC,¹¹ DIS,¹² HKIAC,¹³ ICC,¹⁴ ICDR,¹⁵ SCC,¹⁶ SIAC,¹⁷ Swiss Rules,¹⁸ VIAC,¹⁹ WIPO.²⁰

⁸ Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? 15 Years After Dezalay and Garth*, 28 Arb. Int'l 161, 170–171 (2012).

⁹ Schultz & Kovacs, *supra* n. 8, at 161, 166.

¹⁰ AAA Commercial Arbitration Rules, Expedited Procedures, ss. E-1-E-10.

¹¹ CIETAC Arbitration Rules, Ch. IV Summary Procedure.

¹² DIS Arbitration Rules, Annex 4 (Expedited Proceedings).

¹³ HKIAC Administered Arbitration Rules, Art. 41, Expedited Procedure.

¹⁴ ICC Arbitration Rules, Art. 30, Expedited Procedure.

¹⁵ ICDR International Arbitration Rules, Expedited Procedures, ss. E-1-E-10.

¹⁶ SCC Rules for Expedited Arbitrations.

¹⁷ SIAC Arbitration Rules, Rule 5, Expedited Procedure.

¹⁸ Swiss Rules of International Arbitration, Art. 42, Expedited Procedure.

¹⁹ VIAC Arbitration Rules, Art. 45(9).

²⁰ WIPO Expedited Arbitration Rules.

Article 45(9) the VIAC Rules of Arbitration ('Vienna Rules') will serve as an illustrative example:

(9) The arbitration shall be administered in such a manner that the arbitral tribunal can render a final award within six months after the transmission of the file. Unless the arbitral tribunal determines otherwise, the following provisions shall apply:

9.1 After the submission of the Statement of Claim and the Answer to the Statement of Claim, the parties will exchange only one further written submission.

9.2 The parties shall make all factual arguments in their written submissions and all written evidence shall be attached to the written submissions.

9.3 To the extent requested by a party or deemed necessary by the arbitral tribunal, the arbitral tribunal shall hold a single oral hearing, in which all evidence will be taken and all legal issues addressed.

9.4 No written submissions shall be filed after the oral hearing

Further, over the years, a number of soft law instruments²¹ have come into existence²² which deal with case management issues.²³

In addition to rules for expediting proceedings and soft law instruments, specific tools have been suggested by practitioners to increase the efficiency of arbitrations, such as:

- Redfern Schedule²⁴;
- Sachs Protocol²⁵;
- Kaplan Early Opening (Mid-Term Conference²⁶ or Early Opening²⁷);
- Reed Retreat.²⁸

²¹ See e.g. IBA Rules on the Taking of Evidence in International Arbitration Rules; Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules'); ICC Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives; Report of the ICC Commission on Arbitration and ADR Task Force on Techniques for Controlling Time and Costs in Arbitration; ICC Arbitration Commission Report on Managing E-Document Production; 2016 UNCITRAL Notes on Organizing Arbitral Proceedings; CIETAC Guidelines on Evidence; CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration; CIArb Protocol for E-Disclosure in Arbitration; CIArb International Arbitration Practice Guideline Managing Arbitrations and Procedural Orders; CIArb for Witness Conferencing in International Arbitration; IBA Compendium of Arbitration Practice.

²² On soft law in general see e.g. Alexis Mourre, *About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* 239 (Patricia Shaughnessy & Sherlin Tung eds, Wolters Kluwer 2017) [hereinafter *Liber Amicorum Pierre A. Karrer*].

²³ For legal writing on case management issues see e.g. the majority of the contributions in *The Leading Arbitrators' Guide to International Arbitration* (3d ed., Lawrence W. Newman & Richard D. Hill eds, Juris 2014) [hereinafter *Leading Arbitrators Guide*].

²⁴ See Sam Luttrell & Peter Harris, *Reinventing the Redfern*, 33 J. Int'l Arb. 353 (2016).

²⁵ Klaus Sachs & Nils Schmidt-Ahrendts, *Protocol on Expert Teaming: A New Approach to Expert Evidence*, in *Arbitration Advocacy in Changing Times* 135 (ICCA Congress Series, Vol. 15, Albert Jan Van den Berg ed., Kluwer Law International ICCA & Kluwer Law International 2011).

²⁶ Kaplan, *supra* n. 4, at 373, 380.

²⁷ Neil Kaplan, *The Use of Experts in International Arbitration*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* 187, 190–191 (Patricia Shaughnessy & Sherlin Tung eds, Wolters Kluwer 2017).

²⁸ Lucy Reed, *The Kaplan Lecture 2012 Arbitral Decision-Making: Art, Science or Sport?*, www.arbitration-icca.org/media/1/13581569903770/reed_tribunal_decision-making.pdf (accessed 20 Feb. 2020).

Nothing is wrong with these rules, soft law instruments and tools, quite to the contrary, they are useful. Why then enquire further? Quite a few of these have been around for some time. If they were the panacea for the concerns about the efficiency of arbitration proceedings, it is difficult to see why the discontent continues.²⁹

Since 2006, the School of International Arbitration of the Queen Mary University of London conducts an annual survey among the users of arbitration. It is interesting to compare the attitudes concerning cost, time, and efficiency of international arbitration in 2015 with those in the most recent study in 2018, as both surveys asked the same question: 'What are the three worst characteristics of international arbitration?'³⁰

The situation with respect to the most important items is the following:

- (High) costs maintain first place (2015: 68%, 2018: 67%).
- Lack of effective sanctions during the arbitral process continues to rank second (2015: 46%, 2018: 45%).
- Lack of speed stays in fourth place (2015: 36%, 2018: 34%).
- Finally, lack of insight into arbitrators' efficiency remains among the top five (2015: 39%, 2018: 30%).

As the 2018 survey sums up³¹: 'Due process paranoia'³² continues to be one of the main issues that users believe is preventing arbitral proceedings from being more efficient. Respondents also believe that an increased use of technology would lead to more efficiency in the conduct of arbitration proceedings.³³

Not that much has changed, has it?³⁴

Implementation of additional rules and guidelines may not really have helped a lot to increase the efficiency of arbitration proceedings. This is not to say that they are without merit. However, they did not solve the actual practical issues.

To some degree, this is not astonishing. Looking at the process from a business point of view, legal instruments are just one element, but most certainly not the only or the most important way to improve efficiency whilst safeguarding the principles of fair proceedings. It seems that the legal toolbox is quite exhausted and a new perspective is needed to advance efficiency in arbitration.

²⁹ See Survey 2018, *supra* n. 1; Kaplan, *supra* n. 4.

³⁰ The detailed comparison of the answers is found in Annex 2 *infra*.

³¹ Survey 2018, *supra* n. 1.

³² 'Due process paranoia' is covered *supra* under 5.3.

³³ Issues of technology are not within the scope of this article (see e.g. Maxi Scherer, *International Arbitration 3.0 – How Artificial Intelligence Will Change Dispute Resolution*, in *Austrian Yearbook of International Arbitration* 503 (Christian Klausegger & Peter Klein et al. eds, C.H. Beck 2019)); ICC Commission Report Information Technology in International Arbitration, [iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/](https://www.iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/) (accessed 20 Feb. 2020).

³⁴ Michal Kaczmarczyk & Joanna Lam, *Sociology of Commercial Arbitration: Tools for the New Times*, 36 J. Int'l Arb. 693, 700–701 (2019) with further references.

A teamwork approach is an interesting candidate for continuing the road to improving arbitration proceedings further. This avenue may also be a way to bridge what has been described as ‘the tension between increased formalization of the arbitral process (the judicialization trend) and the observable interest of the stakeholders in informal and flexible dispute resolution tracks’.

3 PRINCIPLES OF SUCCESSFUL TEAMWORK

This chapter will first introduce the key elements of ‘teamwork’ and then investigate whether these elements can be found in an arbitration setting.

The increased focus on teamwork in the management of organizations is a reflection of a shift in leadership principles. They move from an authoritarian concept of leadership to more ‘democratic’ values. Increasingly, the focus is on bringing the resources within the organization to work for the goals.³⁵

This improved use of the resources of individual persons by cooperating well in a team setting is one of the reasons why different forms of teamwork are widespread in many types of businesses. The increased complexity and speed of change of the environment businesses operate in fosters teamwork even more.

3.1 NOTION OF ‘TEAM’

In the broad sense, ‘[t]eamwork is generally understood as the willingness of a group of people to work together to achieve a common aim’.³⁶ As shown below, different definitions of teams can be found in management science. As well be seen from the following examples they are based on similar core notions.

West³⁷ defines ‘teams’ as:

- groups of people embedded in organizations;
- performing tasks that contribute to achieving the organization’s goals;
- sharing overall work objectives;
- having the necessary authority, autonomy and resources to achieve these objectives;
- their work significantly affecting others within or outside the organization.

³⁵ See Kuttner, *supra* n. 7, at 95, 105–107 with further references.

³⁶ See www.google.com/search?q=teamwork+definition+oxford+english+dictionary&oq=teamwork+oxford+english+dictionary&aqs=chrome.1.69i57j0l3.7850j0j8&sourceid=chrome&ie=UTF-8 (accessed 20 Feb. 2020).

³⁷ West, *supra* n. 2, at 27.

According to West, team members are dependent on each other in the performance of their work to a significant degree. They are recognized as a group, work closely interdependently and supportively to achieve the team's goals. They have well-defined and unique roles:

- (1) Larson and LaFasto³⁸ propose three elements:
 - (a) A team has two or more people.
 - (b) It has a specific performance objective or recognizable goal to be obtained.
- (2) Coordination of activity among the members of the team is required for the attainment of the team goal or objective.

Robbins and Judge³⁹ distinguish work groups and work teams as follows:

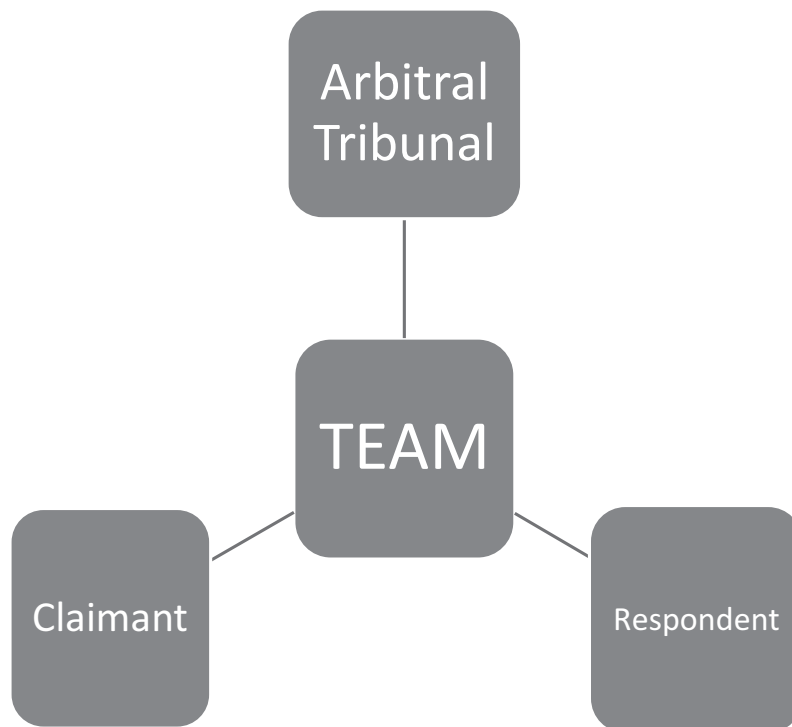
- Work teams are special work groups.
- Work groups have two or more individuals, who are interdependent, interacting primarily to share information, to make decisions and to help each group member perform within his or her area of responsibility.
- A work team, on the other hand, generates positive synergy through coordination. The individual efforts result in a level of performance greater than the sum of the individual efforts.

The arbitration setting fits nearly all of the criteria of any of these definitions. Below under 3.2 this article will explore in some detail to which extent the success factors of teamwork apply in arbitration. At first, a micro-level view of the interactions between the different participants may have difficulties in recognizing a common goal. However, as outlined below under 3.2.4, there clearly is a common goal: the settlement of the dispute, usually by an award, in fair and efficient proceedings.

The basic structure of an arbitration setting presents itself as shown in Figure 1.

³⁸ Larson & LaFasto, *supra* n. 2, at 19.

³⁹ Robbins & Judge, *supra* n. 2, at 357.

Figure 1 Structure of an Arbitration

This article is focused on the role of the arbitral tribunal in this ‘main team’ consisting of three main actors: arbitral tribunal, claimant, respondent. This does not mean that it would not be worth investigating the role of other actors, such as experts, and the workings of the sub-teams, such as the parties.⁴⁰

3.2 ELEMENTS OF TEAMWORK

As the interactions between the arbitral tribunal and the parties can be qualified as teamwork in many respects, in the following the elements of successful teamwork will be considered and to which extent they apply or can apply in arbitration.

⁴⁰ See it is common to speak about ‘party’. However, most of the time a ‘party’ is rather a complex organization, usually being a team consisting of at least two sub-teams, the in-house team involved in the arbitration and the team of the external counsels. In order to facilitate reading, the article subscribes to the colloquial use of ‘party’, except where the difference between the two sub-teams is pointed out.

Robbins and Judge⁴¹ list the following elements of team effectiveness bundled in three groups.⁴²

Context

- Adequate resources
- Leadership and structure
- Climate of trust
- Performance evaluation and reward systems

Composition

- Abilities of members
- Personality
- Allocating roles
- Diversity
- Cultural differences
- Size of teams
- Member preferences

Process

- Common purpose
- Specific goals
- Team efficacy
- Team identity
- Team cohesion
- Mental models
- Conflict levels
- Social loafing (avoided if it is clear what the individual and the joint responsibilities are).

The question is whether these criteria of efficiency apply to arbitration proceedings at all and, if so, to which extent. To keep this article within reasonable page limits, a selection is made of the issues this contribution touches on.

Of the first group, this article will not deal with the last item ('Performance evaluation and reward systems'). This does not imply that reward systems, e.g. in the form of fee systems, may not have an impact on the efficiency of an arbitration.

The second group, the composition of the team, is largely beyond the control of the participants, with the possible exception of the selection of the members of

⁴¹ Robbins & Judge, *supra* n. 2, at 363.

⁴² For other criteria or elements of efficiency see e.g. Larson & LaFasto, *supra* n. 2, at 8; West, *supra* n. 2, at 3–38.

the arbitral tribunal. A discussion of this aspect under the angle of teamwork is not part of the scope of this article.

However, as a general remark, the aspects listed in the second group are of relevance for the arbitral tribunal and the other participants to evaluate the teamwork potential of the assembled group. Important issues are, for example, diversity, cultural differences, understanding of roles.

Finally, of the third group, the last item will not be covered in this article ('Social loafing') as this should not be an issue coming up in arbitration except, in rare cases, within the sub-team 'arbitrators', if the workload is not shared fairly.

The following cannot be any comprehensive discussion of these different remaining elements; it is intended to indicate that the teamwork perspective is a valuable way to look at arbitration which merits to be researched further.

3.2[a] *Adequate Resources*

The most important resource for efficient arbitration proceedings is time. Arbitrators, external team and in-house team must set aside sufficient time to swiftly proceed with the arbitration. This is sometimes easier said than done. Usually, members of all three groups have other professional engagements in parallel to the arbitration.

However, due to its leadership role, the arbitral tribunal has to motivate the other team members to dedicate the necessary resources to a swift timetable. In being transparent about its own timetable (e.g. for deliberations), the arbitral tribunal has a fair chance to streamline the timetable for the arbitration proceedings.⁴³

Efficient usage of resources requires proper planning of the arbitration. Amongst others, this requires breaking down complexity.⁴⁴ This ensures that only the resources that are absolutely necessary are used and that there is no work dedicated to issues which turn out not to be decisive even in the eyes of both parties.

3.2[b] *Leadership and Structure*

As outlined above under 3.1, arbitration is a multi-team situation. Obviously, the arbitral tribunal has a crucial role as manager of the arbitration.

⁴³ See *infra* 5.4.3 and 5.4.4.

⁴⁴ See *infra* 5.4.5 and 5.4.6.

However, today, not all arbitral tribunals may fully realize the large leadership potential which is naturally put into their hands by the structure of an arbitration and their role as decision-takers.

Five bases of power for leadership can be distinguished⁴⁵:

- three forms of formal power: coercive power, reward power, legitimate power;
- two forms of personal power: expert power, referent power.

These five bases of power concern the following⁴⁶:

- Coercive power: ‘depends on the [other team members’] fear of negative results from failing to comply’.
- Reward power: ‘people comply ... because it produces ... benefits’.
- Legitimate power: ‘represents the formal authority to control and use organizational resources based on the person’s structural position in the organization’.
- Expert power: ‘is influence wielded as a result of expertise, special skills, or knowledge’.
- Referent power: ‘is based on identification with the leader who has desirable resources or personal traits’.

By the nature of the arbitration process, arbitral tribunals benefit in any case from formal bases of power. Within the limits of procedural agreements of the parties and of mandatory procedural law, the arbitral tribunal has wide discretion how to structure the process⁴⁷ and the arbitral tribunal is the body who decides the dispute.

The other two bases of power depend very much on the arbitrator. The combination of being a credible team leader, an expert in arbitration and, last but not least, a well-rounded mature reflective human being, will expand the basis of power substantially. In the most perfect of all possible worlds,⁴⁸ the individual would also have hands on business experience and, as the case may be, at least basic knowledge and a keen interest in the scientific and technical world.

⁴⁵ Developed by John P. R. French, J. P. R. J. P. R. Jr. & Bertram Raven, *The Bases of Social Power*, in *Studies in Social Power* (Dorwin Cartwright ed., University of Michigan Press 1959); for a recent overview see Robbins & Judge, *supra* n. 2, at 390–392; for a cross-cultural perspective, see e.g. Srilalitha Sagi, *The Concept of Power in Decision Making Process: A Cross Cultural Perspective*, 9 Int’l J. Mgmt. & Soc. Sci. Res. Rev. 160 (2015) with further references.

⁴⁶ The following quotes are from Robbins & Judge *supra* n. 2, at 390–392.

⁴⁷ See *infra* 4.3.

⁴⁸ Gottfried Wilhelm Leibniz, *Die Theodizee* 50–53 (Suhrkamp 1996) (‘le plus parfait de tous les mondes possibles’, ‘die vollkommenste aller möglichen Welten’).

In a nutshell, what does it mean to be a good team leader in arbitration; quite a lot, such as:

- being conscious of oneself (thoughts, feelings, bodily sensations, expectations, assumptions) and suppressing one's ego⁴⁹;
- being attentive to the others and noticing what actually happens, not focussing on what is expected or assumed⁵⁰;
- recognizing and revealing feelings⁵¹;
- being clear, consistent and transparent and acting in a foreseeable way.

3.2[c] *Climate of Trust*

Trust is a key element of success for teamwork. The members must trust the leader and each other.

If the participants in the arbitration come from similar backgrounds, usually, there will be an element of underlying professional trust. The larger the diversity, the more important the role of the arbitral tribunal will be to foster understanding, which is an important basis of trust. The key is communication, allowing the parties to express their expectations and assumptions, how they themselves and the other members of the team will act.

To earn the trust as leaders of the arbitration process, as stated above under 3.2.2, the arbitral tribunal must be clear, transparent and act in a foreseeable way; 'surprises' are a potent poison to kill trust.

What is the measuring stick for 'surprise'? When trying to understand the expectations of a party, it is not the horizon of the members of the arbitral tribunal which is relevant, but the possible expectations of each party, and the members of the sub-teams constituting a party.

An obvious way for the arbitral tribunal to find out about the expectations of the parties is to ask them questions and not to make assumptions. The type of answers one gets depends on the type of questions one asks. It may make a big difference asking a party what it wants compared to asking it what it expects. Usually, the second question leads to much more useful information to foster a climate of trust. The first question can easily give the ensuing discussion a confrontational flavour, whereas the second shows an interest in the other person.

⁴⁹ Larson & LaFasto, *supra* n. 2, at 127–128.

⁵⁰ West, *supra* n. 2, at 72; Michael Bunting, *The Mindful Leader: 7 Practices for Transforming Your Leadership, Your Organization and Your Life* xviii (John Wiley & Sons 2016).

⁵¹ West, *supra* n. 2, at 74.

3.2[d] *Common Purpose*

A common purpose is essential for teamwork. Considering the adversarial element in arbitration proceedings, a first reaction could be to deny a common purpose in an arbitration setting.

Such a view would be myopic. In principle, both parties will have an interest in efficiently managed proceedings, both parties want the resolution of the dispute, with the exception of a situation where one of the parties pursues guerrilla tactics.⁵² However, these situations are quite rare. Further, starting with a teamwork approach, which necessitates the identification of commitment to a common purpose, will reveal that such tactics are at play at a very early stage of the arbitration proceedings. This allows an arbitral tribunal to adjust its management behaviour accordingly.

The fact that each of the parties, obviously, strives to achieve a different outcome does not water down the commonalities as described hereafter.

At first, it may well be that the fairness of the arbitration proceedings is not one of the goals of a party. All the party may seem to want is to win fast. However, upon proper advice, the party will realize that the fairness of the proceedings is a necessary condition for having a chance to achieve this goal of winning fast.

If the arbitration proceedings did not meet the legal requirements of procedural fairness, the award may be challenged at the seat of the arbitration or its recognition and enforcement may be refused in any country of this world. Lawyers may say, well, this is nothing surprising that we want to have fair and efficient proceedings. This is enshrined in the number of legal rules.⁵³ However, in a team approach the fact that such principles are written is a useful start, but far from the finishing line. What matters is that the group of concrete persons involved in the arbitration proceedings subscribe to the goals. This cannot be just done by admonitions coming from the arbitral tribunal. It is necessary to obtain the parties' explicit commitment.

This common purpose is then the basis for defining specific goals.

3.2[e] *Specific Goals*

Specific goals make the process foreseeable and facilitate the communication. In arbitration proceedings, one important set of specific goals is found in the timetable of the arbitration. Here again, it is important to obtain the explicit commitment of

⁵² See contributions in *Guerrilla Tactics in International Arbitration* (Günther Horvath & Stephan Wilske eds, Wolters Kluwer 2013) [hereinafter *Guerrilla Tactics*].

⁵³ See *infra* 4.1.

the parties, on the one hand, and to have an arbitral tribunal, on the other hand, who leaves no doubt that it will stick to the specific goals established for the arbitration, not least the timetable.

Another specific goal is to define which concrete facts are disputed between the parties and, therefore, need to be proven under the different legal scenarios advanced by them.

3.2[f] *Team Efficacy*

Teams are efficient if their members have the confidence that they can achieve their goals. This requires management input. Usually, every lawyer is convinced that she or he can do a very good job in representing the client. This is a good starting point, but not the end of the story. It is important for the arbitral tribunal to start from this professional conviction, ensuring that the participants involved in the arbitration form a common view of the procedure. It is important to get the explicit commitment of the parties, to summarize the common views and again to obtain the confirmation that the formulation of the common views is met with consensus. The more a person is explicitly involved in such a process, the higher the probability of compliance.

3.2[g] *Team Identity*

There is still a long way to go from the usual ‘thank you’ of the arbitral tribunal ‘to the parties for their efficient work’ at the end of the hearing, to a detailed management of team identity focused on the reality, in particular the contributions of each member of the team, at any moment.

The latter means: ‘[B]y recognising individuals’ specific skills and abilities, as well as creating a climate of respect and inclusion, leaders and members can foster positive team identity and improve team outcomes’.⁵⁴

An important management task for the arbitral tribunal is to recognize when and spell out concretely how the parties have contributed to efficiency.

3.2[h] *Team Cohesion*

Team cohesion means that the members are emotionally attached to each other and understand that they contribute to a common success. The higher the team cohesion, the higher are the chances that the team will deliver a good performance.⁵⁵

⁵⁴ Robbins & Judge, *supra* n. 2, at 372 with further references in n. 66.

⁵⁵ *Ibid.*, at 372.

The starting point is not to be sceptical but to ask: what is the potential to achieve this as successfully as possible and what is my best contribution to this? To give very simple examples: the arbitral tribunal could ask for and study detailed *curriculae vitae* (CVs) of all members of the teams so that they can relate to them in a personal way; small talk goes a long way towards improving cohesion; having lunch together in a nice ambience contributes.

These are just a few small examples to show that there is considerable room for manoeuvre for an arbitral tribunal that is willing to exercise true leadership. Also, the influence of the environment is not to be underestimated as further detailed below under 5.2.

3.2[i] *Mental Models*

Whereas goals are about what needs to be done, mental models are about the how to do it.⁵⁶ The more coherent these mental models are, the more efficiently the team will work. The secret, again, is communication. The type and extent will depend on the homogeneity of the participants of the arbitration proceedings.

In arbitration, there is usually one mental model shared by arbitrators and counsels, the mental model of the lawyer. However, there can be differentiations. They may come from, for example, domestic rules or customs existing in litigations before the domestic state courts.

In any case, irrespective of domestic particularities, the mental model 'lawyer' is characterized by a substantial degree of formality. Of course, this depends very much on the individual personality of a team member. Still, having the element of formality in mind, the arbitral tribunal should not increase it, but rather defuse it. When talking about 'formality', what is meant is the style of communication and the way to see the world. What is not put in any doubt by the above suggestion is the full respect of the legal framework.

Looking further, there are also other mental models which have an impact, such as business mental models or, in case of experts, the mental models of their area of work.

3.2[j] *Conflict Levels*

'Conflict has a complex relationship with team performance, and it's not necessarily bad'.⁵⁷ First of all, the essential element of conflict in arbitration is no reason not to look at teamwork as an inspiration.

⁵⁶ *Ibid.*, at 372–373 with further references in nn. 71–75.

⁵⁷ *Ibid.*, at 373.

Second, to manage efficiently, the arbitral tribunal should distinguish between the types of conflict and avoid unnecessary conflict. Relationship and task conflict must be distinguished. Task conflicts can be a beneficial component of the work of a team assuming that there is a proper identification of the issues and a productive communication about the conflicts. In arbitration, they are the essence of the procedure.

Nevertheless, task conflict should be handled efficiently. Under a teamwork approach, each party should make clear what the relevance of the issue is, how it can be solved and what impact the proposed solution has on the efficiency of the arbitration proceedings.

Relationship conflicts do not help the team. An attentive arbitral tribunal with properly suppressed egos⁵⁸ will recognize such conflicts at the early stage. The right forum to tackle them may differ from situation to situation; however, when in doubt, an arbitral tribunal should address the relationship conflict only with the persons concerned. Obviously, the limit to *ex parte* communication must be respected.

3.3 CONCLUSION

Although it may have been counterintuitive at first sight, the large majority of success factors of teamwork either exist in arbitration proceedings anyway or can be fostered by a skilful arbitral tribunal, acting as a dispute manager.

Section 5 illustrates some practical tools for teamwork-based arbitrations. Before doing so, the legal framework will be explored briefly in the following section 4.

4 LEGAL FRAMEWORK

Before developing the teamwork approach in arbitration further, the legal framework will be considered briefly to see whether it poses any obstacles to such an approach.

Three aspects are distinguished when looking at the legal framework for managing arbitrations:

- the requirement of fair trial;
- the procedural party autonomy;
- the procedural discretion of the arbitral tribunal.

⁵⁸ See *supra* n. 49.

4.1 FAIR TRIAL

It is clear that the starting point of the consideration of the legal framework for a teamwork approach is the requirement of a fair trial. No case management approach whatsoever can change this. However, there is also a legal duty on the arbitral tribunal to use its best efforts to conduct efficient proceedings.⁵⁹

The English Arbitration Act 1996 contains a very concise summary of what arbitration is about. Article 1(a) stipulates that ‘the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense’.

Similarly, article 21 of the Swedish Arbitration Act provides that ‘[t]he arbitrators shall handle the dispute in an impartial, practical, and speedy manner. They shall act in accordance with the decisions of the parties, unless they are impeded from doing so’.

A number of arbitration rules express the same. Article 28(1) of the VIAC Rules of Arbitration (‘Vienna Rules’) will serve as an example⁶⁰:

The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties in an efficient and cost-effective manner, but otherwise according to its own discretion. The arbitral tribunal shall treat the parties fairly. The parties shall be granted the right to be heard at every stage of the proceedings.

First, it is important to understand what the legal requirements of a fair trial are and what they are not. A good starting point is the jurisprudence of the European Court of Human Rights (ECtHR) in cases concerning litigation before domestic courts.⁶¹ Its pragmatic approach is illustrated, for example, in *Dombo Beheer*.⁶² The ECtHR stated that equality of arms ‘implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent’.

It is noticeable that the ECtHR speaks of ‘reasonable’ and ‘substantial’. This makes clear that no watchmaker’s justice is sought after, but a procedure that safeguards the essence of the parties’ rights.

⁵⁹ Nadia Darwazeh, *Is Efficiency an Arbitrator’s Duty or Simply a Character Trait*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* 57, 58–60 (Patricia Shaughnessy & Sherlin Tung eds, Wolters Kluwer 2017); Philipp Habegger, *The Arbitrator’s Duty of Efficiency: A Call for Increased Utilization of Arbitral Powers*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* 123, 124–129 (Patricia Shaughnessy & Sherlin Tung eds, Wolters Kluwer 2017).

⁶⁰ See also ICC Rules of Arbitration, Art. 22(1); LCIA Arbitration Rules, Art. 14.4(ii); ICDR Arbitration Rules, Art. 20(2); SCC Arbitration Rules, Arts 2(1) and 23(2).

⁶¹ See e.g. Christoph Liebscher, *Ch. II. Human Rights* secs 1.3, 1.4, in *The Healthy Award* (2d ed., Christoph Liebscher & Alexandra Winkler eds, Kluwer Law International, forthcoming in 2020) [hereinafter *The Healthy Award*].

⁶² *Dombo Beheer v. Netherlands*, A.274, ECtHR, 27 Oct. 1993, paras 33 et seq.

In *K.S. v. Finland*⁶³ the ECtHR restated that the concept of adversarial proceedings also implies the right of the parties to a trial ‘to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court’s decision’.

It is not yet decided by the ECtHR whether the same principles apply in arbitration. What can be noted is that the ECtHR considers an arbitration agreement as a partial waiver of the guarantees to a fair trial under Article 6(1) of the European Convention on Human Rights. However, so far, the ECtHR has not specified exhaustively which rights are deemed to be waived by an arbitration agreement.⁶⁴

In any case, no sensible arbitral tribunal would consider ignoring the guiding principles illustrated above as a minimum. Although the principle of fair trial in arbitration may take different shades in national jurisdictions and national court practice, in essence, many jurisdictions in this world follow what is outlined above by the ECtHR.⁶⁵

4.2 PROCEDURAL PARTY AUTONOMY

The arbitral tribunal has to respect any procedural agreement of the parties. Not respecting such an agreement may result in a successful challenge of the award and the refusal of its recognition and enforcement.

As regards the latter, Article V(1)(d) of the New York Convention provides for the refusal of recognition and enforcement, if the ‘arbitral procedure was not in accordance with the agreement of the parties’. According to Article 34(2)(1)(iv) of the UNCITRAL Model Law, an award may be set aside for the same reason.

In practice, the parties rarely face an arbitral tribunal with a firm procedural agreement; rather, they make a joint proposal to be considered by the arbitral tribunal.⁶⁶ Still, the arbitral tribunal should be clear whether it wants to retain the authority to modify procedural rules, after having heard the parties on the intended

⁶³ *K.S. v. Finland*, Appl. no. 29346/95, ECtHR, 31 May 2001, para. 21.

⁶⁴ See e.g. Ursula Kriebaum, *Ch. II. Human Rights* sec. 1.2.1.2, in *The Healthy Award* (2d ed., Christoph Liebscher & Alexandra Winkler eds, Kluwer Law International, forthcoming in 2020).

⁶⁵ See e.g. for fourteen jurisdictions (Austria, Brazil, China, England and Wales, France, Germany, Hong Kong, India, Russia, Singapore, Sweden, Switzerland, United Arab Emirates, United States of America): Christoph Liebscher, *Ch. X. Synthesis* secs 3.1.1, 3.1.2, 3.2.2, in *The Healthy Award* (2d ed., Christoph Liebscher & Alexandra Winkler eds, Kluwer Law International, forthcoming in 2020); for England, France and Switzerland: Philippe Pinsolle, *The Need for Strong Arbitral Tribunals*, in *International Arbitration and the Rule of Law: Contribution and Conformity* 823, 845–862 (ICCA Congress Series No. 19, Andrea Menaker ed., Kluwer Law International; ICCA & Kluwer Law International 2017).

⁶⁶ V. V. Veeder, *Who’s Arbitration Is It Anyway – The Parties’ or the Arbitral Tribunal’s?*, in *The Leading Arbitrators’ Guide to International Arbitration* 87, 89 (3d ed., Lawrence W. Newman & Richard D. Hill eds, Juris 2014).

change, even if they are based on a joint proposal of the parties or on their procedural agreement.

In addition, at the beginning of the arbitration the arbitral tribunal can attempt to obtain the consent of the parties that any procedural agreements of the parties require the consent of the arbitral tribunal to become effective.

The willingness of the parties to agree to such rules may be less if this issue is framed in legal terms, which may easily introduce an adversarial flavour into the situation. The readiness to except this provision may be greater when the idea has been introduced as one element of the teamwork approach by the arbitral tribunal, and the parties see the value thereof.

4.3 PROCEDURAL DISCRETION OF THE ARBITRAL TRIBUNAL

In the absence of an agreement by the parties, the arbitral tribunal usually has a large discretion how to organize the proceedings. It is obvious that procedural steps which would require the cooperation of the parties are difficult to enforce, to say the least, if one party refuses to cooperate.

The legal framework is clear. As Article 19 of the UNCITRAL Model Law states:

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

In essence, the legal framework gives the arbitral tribunal a very clear and broad base of formal power (see above under 3.2.2).

5 APPLICATION TO ARBITRATION

The following is an illustration how the teamwork approach can impact individual aspects of the arbitration process.

5.1 ATTITUDE

All tools remain largely hollow vessels without the right attitude of the arbitrators. Therefore, to start with, the inner attitude of the arbitrators will have an important impact on how the arbitration is run. It will make a great difference if they fully appreciate the persons involved in the arbitration as members of one team or

whether they think that the lawyers are not doing a very helpful job. It makes a huge difference if they think they are the boss or if they think that their job is to take into account the needs of the participants of the arbitration and form an efficient team for a common goal.

Extensive research, conducted over the past decades, clearly demonstrates that the attitude has a massive impact on oneself, and on the persons one interacts with.⁶⁷

‘Mindfulness’ is knocking at the arbitrator’s door.

Bunting⁶⁸ quotes the following definition of mindfulness by a Chief Executive Officer (CEO): ‘Being mindful is our ability to pay attention and respond to every situation in the healthiest way possible – to accept whatever happens and respond with kindness, compassion and understanding’.

On a more abstract level, for Langer⁶⁹ ‘the key qualities of a mindful state of being [are] (1) creation of new categories; (2) openness to new information; and (3) awareness of more than one perspective’. Facets of the behaviour of a ‘mindful arbitrator’ are described above under 3.2.2.

Mindfulness is a key element for teamwork but does not replace the other leadership qualities.⁷⁰ ‘Mindful arbitrators’ will be able to gain the respect of the parties more often than others. This will increase management power and, for example, the chance that they and the parties can come to agreed efficient solutions for procedural issues at hand.

A mindful arbitrator will ask a very important question, whenever coming across a situation which he or she dislikes: What was my contribution that caused me to experience this situation and to change it? It could have been wrong expectations, wrong assumptions, in case of an arbitration also bad case management. The truth of the matter is that usually, with some due diligence, one does find one’s own share in the situation one dislikes and, thereby, a route for improvement.

In addition, to rather be a solution-orientated person than a problem-orientated one also helps in asking this question and finding answers for efficient case management.

⁶⁷ See e.g. HBR Emotional Intelligence Series, *Mindfulness* (Harvard Business Review Press 2017); James M. Kouzes & Barry Z. Posner, *The Leadership Challenge* 101–103 (John Wiley & Sons 2017); Michael Bunting, *The Mindful Leader: 7 Practices for Transforming Your Leadership, Your Organization and Your Life* (John Wiley & Sons 2016); Ellen Langer, *Mindfulness 25th anniversary edition*, (2d ed., Da Capo Press 2014); Servaas van Beekun, *Mindfulness and Leadership: A Critical Reflection*, 2 Bus. & Mgmt. Stud. 44 (2016).

⁶⁸ Bunting, *supra* n. 67, at xviii.

⁶⁹ Langer, *supra* n. 67, at 64–74.

⁷⁰ See e.g. Bunting, *supra* n. 67, at xix.

Being solution-orientated does not mean to ignore problems. However, for such a person, recognizing problems is just an intermediary step; the focus is on the (pragmatic) solution; and it is helpful to think outside the (legal) box.

Now what is an arbitration-specific attitude one would look for in the context of teamwork? A good basic attitude could be: 'What are the resources available for the arbitration process and how can I contribute to make the most efficient use of them?' The team's 'resources' are to be understood in a very comprehensive way. They include also the personalities of the actors, their backgrounds, their expectations, etc. The guiding principle in looking at the resources is: How can I put them to work in an efficient way, looking at the participants of the arbitration as one team to achieve the goal: a fair and efficient process to reach a decision on the matters in dispute.

And there is something else: Benjamin Disraeli wrote: 'The greatest good you can do for another is not just to share your riches but to reveal to him his own'.⁷¹ This is part of a teamwork attitude.

Finally, it is worth looking over the fence of arbitration into another activity of lawyers, for inspiration, the negotiation of contracts. From the point of view of teamwork, the negotiation setting is much more challenging than the arbitration setting, because usually there is no team leader accepted by all sides.

As in arbitration, also in this setting there is an adversarial situation. However, in the process of drafting the agreements and bringing them to conclusion, very often there is a clear spirit of a common goal, which in practice may be reinforced by a clock ticking towards a set deadline for signing the deal. By the way, usually, this deadline is established by the persons who have the business responsibility for the deal, and not by the lawyers.

5.2 ENVIRONMENT

The priming effects of the environment are often underestimated. A good team manager would not do this. The feeling when spending a day in a windowless room with artificial lighting equipped with sterile office furniture is very different from the one in a comfortably furnished room with a view of nice gardens, the fire in the open fireplace burning. It may make a difference whether to convene in a classical hearing centre or in the meeting room of a hotel or in an environment with much more personal atmosphere.⁷²

⁷¹ *Ibid.*, at 109.

⁷² Veeder, *supra* n. 66, at 90, referring to Cedric Barclay's evening arbitrations at his house near Sloane Square.

The seating arrangements may also matter. Being seated around one round table or in the typical U-shape creates a very different atmosphere. Particularly for a case management conference (CMC), the roundtable set-up should be considered.

Apart from the influence of the location, that of food and drink is usually underestimated as well. First of all, it should be considered to have lunch together in a nicely set lunchroom. Secondly, the food should receive attention, it is a management issue for the arbitrators. One way to foster a productive atmosphere is, for example, to serve food from the different countries of the parties or also the arbitrators and counsels involved. This provides for a cultural exchange in a very natural way. When people eat and drink together and talk about food and drink, it puts them in a different – convivial – world.

These seemingly completely irrelevant matters are management tasks of quite some importance.

5.3 DUE PROCESS PARANOIA

Before concrete examples of elements of a teamwork approach in arbitration are developed, the phenomenon of due process paranoia will be considered in a teamwork context.

Due process paranoia is defined by the International Arbitration Survey 2015⁷³ as ‘a reluctance by [arbitral] tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully’.⁷⁴

Rightfully, Lucy Reed⁷⁵ distinguishes true due process concerns from tactics which use the words ‘due process’ as a camouflage for tactical goals. The tactics can play out on two levels: first, in the arbitration proceedings, being difficult and giving the arbitral tribunal a ‘chance’ to make mistakes; secondly, in court proceedings concerning the award where ‘due process’ concerns are used to try to obtain the setting aside of the award or the refusal of its recognition and enforcement, or, at least, to delay the fulfilment of an award as long as possible.

⁷³ Survey 2015, *supra* n. 1, at 10.

⁷⁴ See e.g. Robin Oldenstam, *Ch. 8: Due Process Paranoia or Prudence?*, in *Stockholm Arbitration Yearbook 2019*, 121 (Axel Calissendorff & Patrik Schöldstrom eds, Kluwer Law International 2019); Pinsolle, *supra* n. 65, at 823; Lucy Reed, *Ab(use) of Due Process: Sword v. Shield*, 33(3) *Arb. Int'l* 361 (Sept. 2017); Remy Gerbay, *Due Process Paranoia*, <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/> (accessed 20 Feb. 2020); Leon Kopecký & Victoria Pernt, *A Bid for Strong Arbitrators*, http://arbitrationblog.kluwerarbitration.com/2016/04/15/a-bid-for-strong-arbitrators/?_ga=2.263698636.1134813683.1573656555-354620155.1573656555 (accessed 20 Feb. 2020).

⁷⁵ Reed, *supra* n. 76, at 361, 365.

Berger and Jensen⁷⁶ list a number of alleged due process issues, which, if at all, have raised concerns with state courts only rarely; they concern decisions of arbitral tribunals whether to:

- grant a request for the extension of a deadline;
- accept an unsolicited submission;
- accept evidence submitted after the expiry of the cut-off date;
- admit late new claims;
- reschedule a hearing.

Oldenstam⁷⁷ refers to ‘the delicate balancing act involved in procedural decision-making’ and states that ‘the arbitrators must balance, among other factors, the potential for adding time and costs to the proceedings against the interest of the requesting party in being given a reasonable opportunity to present its case’.

This important statement merits four comments, two from a legal perspective and two from a management perspective.

It will be true in many domestic legal systems that the violation of the principle of fair trial allows the challenge of an award, whereas the violation of the duty to proceed efficiently does not. The remedy for the latter may, in extreme cases, be a liability of the arbitrators. However, it may be discussed that arbitration proceedings are only fair if they are also efficient.

From a management point of view, the first comment is that typical examples of issues raised by parties are⁷⁸:

- unavailability of the counsel or other persons to complete the submission in time or to attend the hearing;
- filing of evidence or submissions after cut-off dates;
- document production issues;
- requested change of the timetable because of change of counsel.

If the arbitration proceedings are well-managed from the very beginning, only a true *force majeure* event could upset the foreseen schedule. Such events are extremely rare. Therefore, such events will really present a serious challenge for an arbitral tribunal acting as a skilful dispute manager.

The second comment is that the management is always about balancing acts, among other things. The balancing will be relatively easy and successful, if a clear framework is set for the arbitration with clearly communicated goals behind it.

⁷⁶ Klaus Peter Berger & J. Ole Jensen, *Due Process Paranoia and the Procedural Judgement Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 Arb. Int'l 415, 425–428 (2016).

⁷⁷ Oldenstam, *supra* n. 74, at 121, 123.

⁷⁸ Reed, *supra* n. 74, at 361, 375.

The teamwork approach is based on consensus as a starting point. Therefore, it will be an excellent remedy against due process paranoia. When a teamwork approach is applied, 'due process tactics' are much more difficult to deploy.

Usually, in particular at the beginning of an arbitration, the parties pay great attention to the attitude and expectations of the arbitral tribunal. Further, due process tactics are usually employed by the party who expects to lose the case. It may require some development of the case for a party to experience such fears. If the process is already designed from the beginning as a team approach,⁷⁹ it is much more difficult for one party to change track and become obstructive.

However, if the arbitral tribunal's focus on teamwork is rejected from the outside, the arbitral tribunal knows that it may have to expect some form of guerrilla tactics.⁸⁰

5.4 ILLUSTRATIVE EXAMPLES

The purpose of the following examples is just to illustrate how an arbitral tribunal can exercise leadership by acting as team leaders; they should not be understood as the start of a new set of soft law.

5.4[a] *Involvement of the Responsible Businesspersons*

As stated above under 3.1 an arbitration can be seen as a triangular team of sub-teams, which may itself consist of further sub-teams.

At the end of the day, international commercial arbitration serves a commercial purpose. Therefore, it is crucial to involve the persons who have the business responsibility for the outcome of the dispute in the design of the particular arbitration procedure. Suggesting this is not based on 'the belief that an arbitrator better understands the parties' true interests than their own rapacious lawyers, particularly in matters of arbitral procedure'.⁸¹

The reasons are different; the in-house team of the party and the team of the external counsel have different roles and responsibilities from those of the businesspersons. More importantly, arbitration is a legal means to a commercial end. All lawyerly skills are but tools for the business to achieve its goals in the arbitral proceedings. Therefore, it is only logical that a responsible member of the business team is also present when organizing the proceedings. Otherwise, an important participant is missing.

⁷⁹ See examples, *supra* n. 3.

⁸⁰ See *Guerilla Tactics*, *supra* n. 52.

⁸¹ Veeder, *supra* n. 66, at 88.

5.4[b] *Case Management Conference as a Team Work Session*

It is an acknowledged advice to hold a CMC as early as possible. A CMC is also foreseen by a number of arbitration rules.⁸²

Meeting in person may meet practical obstacles. Still, when in doubt, it is the clear preference to do so. People lose many important elements of communication if they just talk on the telephone. Video-conference is better than nothing but cannot replace a personal meeting. If an arbitral tribunal sees itself as the manager of a team, which is the right approach according to this article, its power of persuasion will be much greater in a personal meeting.

If it is not possible to hold a personal meeting straight after the arbitral tribunal is constituted, it is worth organizing just the first steps by telephone or video-conference, for example, the exchange of a first round of submissions with exhibits after the initial one, and to foresee a second CMC in a personal meeting after this exchange of submissions.

This means that the arbitral tribunal may not provide a fully-fledged general procedural order at the outset, but only at or after the second CMC, as the case may be. This second CMC may well resemble the mid-term conference according to Kaplan.⁸³ It may also allow a much more detailed discussion of the structuring of the arbitration proceedings in the most efficient way.

Whenever the first contact between the arbitral tribunal and the parties takes place, it is key to convey the teamwork message from the very beginning, e.g. in the first telephone conference, should it not be possible to have the first CMC in the form of a personal meeting. Among the key questions to be discussed are: What are our specific common goals? How can we work together to achieve it?

To obtain the commitment from the team members is important. It can make a big difference in compliance, whether one just asks a person to do something or one obtains the confirmation from this person that she or he will do it. The second version raises the barrier for this person not to comply, because a promise given would have to be broken.

5.4[c] *Detailed Comprehensive Procedural Timetable*

As part of good team management, the arbitral tribunal should be transparent about the timing of its own decision-making process. It should therefore include

⁸² See e.g. ICC Arbitration Rules, Art. 24; LCIA Arbitration Rules, Art. 14.1; SCC Arbitration Rules, Art. 28.

⁸³ See *supra* n. 29.

deliberation times in the timetable, as well as a date for the issuance of the award; of course, the arbitral tribunal may wish to make a reservation for unforeseen circumstances.

5.4[d] *Lean Submission Schedule*

It is obvious that, in principle, before a hearing the parties have to fully plead their case and adduce the evidence they deem necessary. However, when foreseeing submissions, the question is whether it is absolutely necessary for the taking of evidence in the hearing, to have all rounds of submissions in before the hearing.

There may be merit to shift one round of submissions to the time after the hearing. It is only when factual elements could not be sufficiently covered before the hearing that this may entail the risk of a second hearing. Still, for the hearing it may suffice to have any additional evidence in, without pleadings.

Having established a teamwork spirit, it may be easier for the arbitral tribunal to implement a leaner submission schedule.

5.4[e] *Decision Tree and Risk Analysis*

A decision tree is a useful, still largely underemployed, tool to manage arbitration proceedings. It lists all possible questions to be answered to solve the case and presents them in a logical sequence.⁸⁴ A simple illustrative example is contained in Annex 2, *infra*.

Drawing up a decision tree jointly can be an important moment in the arbitration. However, it may be that the parties cannot agree on the decision tree. For tactical purposes, to give an example, one party would like to start with quantum whereas the other would like to start with liability. Even in such a situation there is merit a joint exercise to create a decision tree, if necessary two alternative trees.

The merits of doing this are, on the one hand, the decision tree itself, but more important is the process that leads to the decision tree. It also gives the arbitral tribunal a good feeling what to expect during the course of the arbitration and of the cooperative spirit of the parties, or the lack thereof.

The decision tree can be a basis for a risk analysis.⁸⁵ An example is also shown in Annex 2, *infra*. For a risk analysis the probability of the answers to each question

⁸⁴ Jörg Risse, *Chapter IV: Alternative Dispute Resolution – Procedural Risk Analysis: An ADR-Tool in Arbitration Proceedings*, in *Austrian Arbitration Yearbook 2009*, 461, 463–464 (Christian Klausegger & Peter Klein et al. eds, Manz'sche Verlags- und Universitätsbuchhandlung 2009).

⁸⁵ *Ibid.*, at 461, 464.

is estimated. The financial outcome related to each answer is multiplied by the respective probability. These results are added up. Their sum is the estimated value of the dispute.

The advantage of proceeding like this is that the results can be easily communicated to non-lawyers and this may keep these members of the team fully involved. It may not be very often that parties can be convinced to do this risk analysis in the arbitration proceedings. Still, doing such risk analysis would lead to upper and lower probabilities, each party making its own estimate; this may further assist in an intelligent planning of the arbitration proceedings.

In addition, a decision tree, possibly combined with a risk analysis, is an excellent element to reduce complexity in arbitrations. The decision tree and the risk analyses can be useful tools for efficient resource planning within the team.

5.4[f] *Cooperative Pleading*

Cooperative pleading may be considered once both parties have made full submissions on their case and the teamwork principle has been established. It is a further tool to reduce complexity.

Such cooperative pleading requires the parties to get together with or without the arbitral tribunal and work through the case jointly, thereby identifying what is precisely in dispute, which facts are disputed, and which are acknowledged, where the parties take different legal views and what is the basis for doing so. The results can be presented in a table similar to a Redfern schedule.

5.4[g] *Expert Evidence as Team Effort*

In principle, for expert issues either one or more experts appointed by the arbitral tribunal may be involved or party-appointed experts. In today's practice of international commercial arbitration, one rarely sees the first alternative. The system of party-appointed experts can actually point to very long-standing philosophical roots, the dialectic method.⁸⁶

No matter which method for the selection of experts is chosen, there is an important management task for the arbitral tribunal. It is again a reflection of seeing the arbitration process as teamwork. Therefore, the question is, what can the arbitral tribunal contribute to an efficient expert procedure? Actually, there is quite a lot. Without impeaching on the parties' rights in case of party-appointed experts, the arbitral tribunal must still manage the expert process. Therefore, at the

⁸⁶ See Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/hegel-dialectics/> (accessed 20 Feb. 2020).

beginning of the expert process a special CMC could be held, dedicated to the expert procedure. To combine this with the first CMC will usually not be possible, as in many cases the experts will not be on board at this early stage of the arbitration.

It is important that the arbitral tribunal communicates with the experts and exchanges about the expectations of the role of the experts. No matter how the experts were selected, their role in the end is simple: teachers of the arbitral tribunal. And very importantly, they should be aware that the arbitral tribunal sees them as a team of 'teachers'.

Managing the expert procedure takes care, amongst others, of the following.

First, it is of crucial importance that the experts work from the same materials and based on the same assumptions. The fact that, in all likelihood, the parties take different views on what materials or assumptions are relevant, will not come as a surprise. What matters is that each expert should have the same 'box' of materials and assumptions to which both parties contributed.

Second, the same is true for the structure of the expert reports; each party may have different views on what should be covered. What matters is that the experts have exactly the same list of issues and questions before them.

Third, to work efficiently with expert opinions, amongst others, it is important to understand where the experts diverge, and for which reasons. To deal with this efficiently at the hearing requires thorough preparation well before it takes place. A table similar to the Redfern schedule⁸⁷ may be useful to present the experts' views at this stage.

The CMC at the beginning of the expert procedure will allow a thorough discussion between the arbitral tribunal, the parties, and the experts on these and other issues to obtain the optimum value from this importance resource.

5.4[h] *Efficient Document Production*

Part of good teamwork is the efficient use of resources. Therefore, the starting point of any document production exercise should be the question of the relevance of the documents sought after.

Relevance may play on different levels. For example, documents may be required to (1) prove facts which trigger legal consequences; (2) provide some 'background' or shed a bad light on the other party; (3) support other elements of evidence; (4) rebut elements of evidence adduced by the other party.

As regards the legal relevance, a decision tree will often help to clarify what the exact issues in dispute are. With regards to the other reasons to ask for

⁸⁷ See *supra* n. 24.

documents, a previous clarification within the team (arbitral tribunal – parties), for which other purposes documents may be sought, will provide additional orientation and facilitate document production decisions and contribute to their transparency.

There are different views whether the burden of proof should be taken into account in deciding document production requests. Even if one follows the view that one should, in practice this is not so easy. Assuming that the arbitral tribunal will decide on the balance of probabilities and not according to the principle of near certainty, a shred of evidence may be sufficient. Therefore, the opposing party may have a legitimate interest to obtain evidence to be able to counter this shred of evidence which otherwise would make the balance tip in favour of the party who submitted it.

Also in this respect, communication is key. The role of burden of proof and of the standard of proof may merit some discussion already when organizing a document production phase.

5.4[i] *Reasoned Objections*

Also in a teamwork approach, it may happen that a party raises an objection against a certain procedural step of the arbitral tribunal.

In a teamwork world, the objection would not just spell out the complaint and the way in which the action of the arbitral tribunal violates certain rights. It would also propose how to remedy the issue and describe the impact of the remedy on the efficiency of the arbitration proceedings, and in terms of cost and time.

5.4[j] *Sacred Hearing*

In practice, it is often very difficult to find a hearing date which suits all participants. Therefore, it is important that the arbitral tribunal, as manager of the proceedings, makes clear that this date will be defended at all costs.

In case of any unforeseen events, the ultimate test will be whether a change of the hearing would be absolutely necessary. The arbitral tribunal, involving the other team members, should use all its creativity and persistence to safeguard the hearing date and deal with issues which potentially could endanger the hearing date. Should a party, for example, want to introduce additional evidence, it is still to be considered as first priority, whether it is not wiser to proceed with the hearing and to risk holding another hearing as opposed to postponing the hearing, possibly for many months. At the end of the hearing, the arbitral tribunal may be in

a much better position to discuss with the parties whether the additional evidence is required. The arbitral tribunal may even decide to start deliberations with the reservation to reopen the proceedings, should the arbitral tribunal consider that this evidence is of potential relevance.

It may be considered to have a parties' agreement on the hearing date so that any rescheduling request by one party could only be entertained by the arbitral tribunal if the other party consents.

This would be an expression of a teamwork approach where, except in extraordinary situations, one team member should not be allowed to upset the work schedule of the team.

5.4[k] *Commitment to Final Deadline for the Award*

The time between the last submission of the parties on the merits and the rendering of the award has been a focal point of the efforts to improve time efficiency of arbitration proceedings for quite some time.⁸⁸

In a teamwork world, the arbitral tribunal would start early and consider, for example, how it will best be prepared for the hearing of evidence. An Early Opening⁸⁹ may be a good opportunity to discuss relevance, possibly with the help of a decision tree. Further, it may be useful to consider a Reed Retreat⁹⁰ before the hearing.

The key question is, how the arbitral tribunal can best live up to one of its important duties as part of the team, to deliver a solid work product as quickly as possible.

Finally, asking one of the most important teamwork questions, 'How can I contribute?', means in this context that the arbitral tribunal will not wait for the parties to ask them when they may expect the award, but the arbitral tribunal will be transparent, right from the beginning of the arbitration about their timing and how they will proceed to render a timely award. As suggested above under 5.3.3, it would be good teamwork practice to insert the deliberation periods in the procedural timetable.

⁸⁸ See e.g. ICC Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration, <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/> (accessed 20 Feb. 2020), paras 118–122.

⁸⁹ See *supra* n. 27.

⁹⁰ See *supra* n. 28.

6 CONCLUSIONS

The triangular relationship between arbitral tribunal-claimant-respondent is to be considered as a team. Apart from this main team, there are several sub-teams, for example, a party usually consists of such sub-teams. The differences which exist for teams in business organizations are not essential and are no impediment to use teamwork models and principles as an orientation for managing arbitration and to develop arbitration-specific tools and procedures based on the teamwork approach.

The purpose of this article was to show whether it is sensible to invest further thought and possibly research into the topic. The answer to this question is clearly affirmative.

The legal framework of arbitration allows a large room for manoeuvre for efficient case management. Attempting to learn from the experiences in successful teamwork in organizations will enlarge the toolbox for such efficient case management.

An explanatory article like this one cannot propose final solutions. It has shown that it is worth investigating this approach further to enhance the efficiency of arbitration proceedings, also building on the 'technical' advances which international commercial arbitration has seen over the past decades.

In any case, applying the teamwork approach is an offer to the parties. If they refuse to go along, so be it. It may well be that the such a situation occurs only very rarely. If it does, at least it provides clarity to the arbitral tribunal to expect severely adversarial proceedings.

What would a teamwork approach in arbitration achieve? Not only more efficient arbitration proceedings, not least in terms of cost and time, but also a greater involvement of parties and arbitrators in the process, and a more valuable experience for the human beings involved in the process. Further, the teamwork approach will make arbitration markedly different from many state court proceedings, improving arbitration's USP (unique selling proposition).

Hopefully, this article will be followed by discussion, exchange of views, sharing of experience, and research, e.g. of issues such as the functioning of the sub-teams or diversity (such as in terms of gender or culture), and the double role of arbitrators as managers and service providers.

ANNEX 1: DECISION TREE AND RISK ANALYSIS

FACTS

We-Can-Do-It Inc. sells a production line for the extrusion and finishing of metal profiles to On-Y-Vas S.A. One selling point mentioned in the marketing

materials of Seller is that proprietary laser technology produces indentations in the profiles with previously unknown precision.

The sale and purchase contract (SPC) stipulates that any claims of Purchaser expire six weeks after the handing-over of the production line.

One of the main customers of Purchaser, Let-It-Be Ltd., is one of the first acquirers of these profiles to use them as parts of a more complex product. Two months after the delivery, they complain that the finishing of the profiles does not meet the requirements of their customers, in particular as regards the position and size of certain indentations in the profiles. The performance, they allege, is below the performance of comparable other machinery on the market.

Purchaser claims frustrated expenses of Euro 653,000 and lost profit of Euro 1,712,000, in total Euro 2,365,000.

The SPC excludes any claims for loss profit.

The quantum of the claims is not in dispute.

DECISION TREE

Below is an illustrative simplified decision tree; a real decision tree may well be more complex:

1. Is the contractual time bar valid?
Yes: Claims are rejected.
No: Go to 2.
2. Are the marketing materials of Seller relevant to determine the agreed quality of the production line as regards indentations?
Yes: Go to 5.
No: Go to 3.
3. Are the industry standards for indentations implied terms of the SPC?
Yes: Go to 4.
No: Claims are rejected.
4. Does the production line meet industry standards in terms of the indentations?
Yes: Claims are rejected.
No: Go to 6.
5. Does the production line exceed industry standards in terms of the indentations?
Yes: Go to 6.
No: Claims are rejected.
6. Is the contractual exclusion of lost profits valid?
Yes: Claim for frustrated expenses granted.
No: Claims for frustrated expenses and for lost profits granted.

RISK ANALYSIS

Below is an illustrative simplified risk analysis built on the above decision tree; a real decision tree may well be more complex. It would, for example, include the arbitration costs, the parties' costs and the in-house costs.

First, one looks at the outcome of each answer, multiplies the outcome by the probability and arrives at the expected value under the assumption that the case is decided accordingly. All probabilities (as decimals) have to add up to 1. Probabilities are attributed on the basis of the expert knowledge and experience.

Once the table is filled the expected values are added up and give the expected value of the dispute.

Question	Answer	Outcome (in €)	Probability (as decimal)	Expected value (in €)
1	Yes	0	0.10	0
1	No	-	-	-
2	Yes	-	-	-
2	No	-	-	-
3	Yes	-	-	-
3	No	0	0.10	0
4	Yes	0	0.20	0
4	No	-	-	-
5	Yes	-	-	-
5	No	0	0.05	0
6	Yes	653,000	0.30	195,900
6	No	2,365,000	0.25	591,250

Sum of the expected values = expected value of the dispute: EUR 787,150

The expected value of the dispute is about one-third of the claims (amounting to EUR 2,365,000).

*ANNEX 2: QUEEN MARY UNIVERSITY OF LONDON SCHOOL OF
INTERNATIONAL ARBITRATION & WHITE & CASE 2015 AND 2018
INTERNATIONAL ARBITRATION SURVEYS*

<i>Issue ranked in 2018</i>	<i>Rank in 2015</i>	<i>Frequency in 2018</i>	<i>Frequency in 2015</i>
Cost	1	67%	68%
Lack of effective sanctions during the arbitral process	2	45%	46%
Lack of power in relation to third parties	6	39%	24%
Lack of speed	4	34%	36%
Lack of insight into arbitrators' efficiency	3	30%	39%
National court intervention	5	23%	25%
Lack of insight into how institutions select in the appointment of arbitrators	—	15%	—
Lack of appeal mechanism on the merits	7	14%	17%
Lack of insight into institutions' efficiency	8	11%	12%
Other	9	7%	9%
Lack of flexibility	10	2%	3%

