

How to conduct the arbitral proceedings: Stop, look, listen... and go!

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According to most laws and regulations regarding arbitration, the parties may freely agree on the rules governing the proceedings and, in the absence of such agreement, the arbitral tribunal defines and conducts the arbitral proceedings under the rules that it considers appropriate[1].

The arbitral tribunal has, typically, broad discretion and room for flexibility when conducting the arbitral proceedings, within certain limits: firstly, the boundaries arising from the agreement of the parties; secondly, the fundamental principles of due process[2] and, lastly, the compliance with the rules and principles of international public policy of the state where the arbitration is seated (whose law provides for the fundamental framework of the arbitral proceedings), and, to a certain extent, with rules and principles of international public of the states where the enforcement will likely be sought (insofar as the latter can be identified at such juncture) in accordance with the [New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#) [NYC, Article V, no. 2, paragraph b)] [3] and the national laws of such states.

One prominent advantage of international arbitration is, precisely, the power and duty of the arbitral tribunal to establish pertinent rules for organization and conduct of the proceedings specifically devised for the resolution of the specific dispute at hand. In setting out those rules, the arbitral tribunal takes into consideration the particular circumstances of the case, the expectations of the parties and of their counsel, as well as the need for a fair and efficient resolution of the dispute, both in terms of cost and duration[4]. An additional advantage to be considered in this respect is the faculty granted to the parties of choosing the arbitrator(s) in international arbitration, taking into account that one of the possibly relevant criteria used for that choice may be the expertise and experience which they may have in the design of the specific and appropriate procedural rules for a fair, quick and efficient resolution of each dispute.

After these preliminary notes, the question raised at the header of this article comes up again: how should the arbitrators conduct the arbitral proceedings?

First of all, it is desirable and advisable that the arbitral tribunal timely sets out the rules which will govern the proceedings. The moment (or the moments) in which the *rules of the game* are defined is (are) of fundamental importance, mainly in international arbitrations where the parties may have different cultural backgrounds and professional experiences and expectations regarding the manner of conducting arbitrations. A reasonable amount of predictability is essential for the parties to be able to organize their strategies to be pursued and their positions to be defended in the proceedings. The definition and guidance on the *rules of the game* at an early stage therefore minimize unnecessary misunderstandings, delays, unanticipated costs and, eventually, procedural disputes.

After the request for arbitration is submitted by the Claimant, the reply is filed by the Respondent and the arbitral tribunal is constituted, the definition of the applicable procedural rules is, generally, the next logical step, without prejudice to slight variations depending on the type of arbitration[5].

Thus, the definition of the most appropriate rules for the proceedings implies, firstly, to pause and consider several relevant factors: i) the facts alleged, the arguments made and the relief sought by the parties in their submissions, ii) the arbitration agreement and the possible applicable set of procedural rules – given that, depending on the type of arbitration, whether *ad hoc* or institutional, the rules to be abided by may naturally vary – and also iii) possible specificities of the procedural rules required by particular features of the case.

For that purpose, there are different guides and sets of recommendations which may be considered by the arbitrators, such as the [Uncitral Notes on Organizing Arbitral Proceedings](#), the [model of ICC Terms of Reference](#) and Appendix IV to ICC Rules of Arbitration on Case Management Techniques, [the ICC Commission Report on techniques for controlling time and costs in arbitration](#), [the ICCA Reports no. 2 - ICCA Drafting Sourcebook for Logistical matters in Procedural Orders](#) and the [ICCA checklist first procedural order](#), among others.

In fact, the first procedural order (the so called «procedural order no. 1», PO no. 1) is – and it should be – tailor-made for the particular case at hand.

Without prejudice to the power (and duty) to adapt the generally applied rules to the particular case, it is usual to include some topics in the PO no. 1, such as:

- A provisional procedural calendar contemplating several procedural stages (including the number of rounds of pleadings, the number and purpose of the hearings, whether there should be written or oral final submissions, etc.) and the respective time-limits for each procedural stage (with a main focus on the hearing date). The setting of the date of the final hearing is crucial to ensure the availability of all participants involved and to limit, as far as possible, any rearrangements in the calendar, which may be necessary or requested, promoting the intended predictability for the parties and respective counsel in the organization of their strategies;
- Inclusion or not in the provisional procedural calendar of a mid-stream conference to be held by the Tribunal and the parties between the first and second rounds of pleadings with the purpose of the parties presenting pre-hearing briefs regarding their positions on the case and their main arguments as well as the arbitral tribunal requesting for clarifications, inquiring the parties and determining the main issues to be developed and evidenced by the parties in the subsequent stages of the proceedings;
- Rules on evidence (admissible types, timings to submit and produce the means of evidence, time-limits and formal requirements to produce each type of evidence and respective rebuttal, such as documental evidence, witness statements, expert evidence, etc, stating in particular if there will be direct examination and/or cross examination of the witnesses and/or the experts at the hearing, among other basic features of evidence production);
- The language of the arbitration, the need for translation of documents and/or testimonies and the need for transcription services;
- Communications between the parties and the arbitral tribunal;
- The powers of the arbitral tribunal (in particular to amend the procedural rules without the consent of the parties) and/or of the President (to decide on his own on some procedural matters);
- Other measures or applicable rules for saving costs and time in international arbitration proceedings, such as rules regarding party representation or a possible reference to the [IBA Guidelines on Party Representation in International Arbitration](#), i.e., ethical obligations governing the manner in which counsels deal with their clients, the arbitral tribunal and opposing party representatives and/or possible sanctions and/or remedies regarding *guerrilla tactics* and/or *delaying tactics*;
- Possible reference to the [International Bar Association \(IBA\) Rules on the Taking of Evidence in International Arbitration](#), among other possible options.

Furthermore, certain additional aspects should be regulated depending on the particular case at hand, such as:

- The possible bifurcation of the proceedings;
- Rules regarding the document production;
- Confidentiality of the proceedings.

Conversely, the premature introduction of questions which may later become irrelevant or pointless could contribute to a more antagonistic relationship between the parties and/or to unnecessary delays and additional costs. Therefore, it may be convenient to postpone to a later stage the decision on some procedural aspects, such as the identification of key issues to be decided or the definition of certain practical aspects related to the organization of the hearing (e.g. how the expert evidence will be produced, etc).

Furthermore, and because of the very nature of arbitration as a form of dispute settlement based on the autonomy of the parties, the latter should have the opportunity to participate in the discussion and definition of the procedural rules. This goal may be pursued in several ways, depending, once more, on the several actors and the particularities of the case. The parties may be consulted in one or two meetings after the constitution of the arbitral tribunal, which may take place in person or by conference call or videoconference, and this(ese) meeting(s) may take place either before the preparation of a draft of PO no. 1 – in this case it would be necessary to have an agenda for the meeting – or after a first draft of PO no. 1 is sent out for comments, amendments and proposals of new ideas by the parties and, therefore, to allow for the discussion and an agreement of the parties on the procedural rules and calendar to be adopted.

Moreover, the arbitrators may define the procedural rules exclusively in a specific moment and place to discuss it or at the same time and jointly with the regulation of the substance of the dispute. However, as a general principle, it is preferable that the regulation of the procedural issues be included in autonomous procedural order(s).

In conclusion, the fair and efficient conduction of the proceedings involves the commitment and availability of the arbitrators to diligently assess not only the disputed facts, but also the procedural requirements of the particular case to be decided, taking into consideration the underlying interests of

each of the parties, the cultural backgrounds of the respective counsel, having also in mind the cultural diversity of the members of the arbitral tribunal (which is, in many cases, a collective tribunal). In this context, the choice among the several options for the definition of the *rules of the game* should primarily aim at achieving a fair, fast and efficient resolution of the dispute. This implies also the commitment and availability of the arbitrators to actively listen to the parties regarding the main procedural issues and to the pros and cons behind each of them, to promote their engagement and cooperation, thereby legitimizing the option to be adopted with respect to conducting the proceedings.

As in any decision in life, apart from the willingness and the responsibility for deciding what is best and most appropriate to the particular case, there is a basic and demanding rule based on leaving oneself behind and moving towards the other, which is the following: STOP, LOOK, LISTEN...and GO!

[1] *Vide* Article 19 of Model Law on International Commercial Arbitration (Model Law) of the United Nations Commission on International Trade Law (Uncitral), Article 17 of the Uncitral Arbitration Rules, Article 19 of the Arbitration Rules of the International Chamber of Commerce (ICC Arbitration Rules), Article 14 of the Arbitration Rules of the *London Court of International Arbitration* (LCIA Rules), Article 18 of the Rules of Arbitration of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC of PCCI), Article 30 of the Portuguese Arbitration Law (PAL), Article 15 of the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce Association for Arbitration and Mediation (Swiss Rules of International Arbitration), among others.

[2] In Portugal, the mentioned principles are applicable under Article 20, no. 4, of the Constitution of the Portuguese Republic (CPR) and Article 30 of the Portuguese Arbitration Law.

[3] Ratified, in Portugal, by Decree of the President of the Republic no. 52/94, of 8 July, which entered in force in Portugal on 16 January of 1995 (Ministry for Foreign Affairs Notice no. 142/95, of 21 June).

[4] *Vide* G. B. Born, *International Commercial Arbitration* (Volume II, 2009), pp. 1742-1744; J. Fry, S. Greenberg, F. Mazza, *The Secretariat's guide to ICC Arbitration* (2012), pp. 260-268.

[5]Vide Article 17of the Uncitral Arbitration Rules, Articles 18 and 19 of the Model Law, Article 30 of the PAL, Article 18 of the CAC of PCCI, Articles 22 to 24 of the ICC Arbitration Rules, Article 14 of the LCIA Rules, Article 15 of the Swiss Rules of International Arbitration, among others

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