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Autonomy of the Parties and Autonomy of the Arbitrators: Supremacy vs. Collaboration

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Introduction

Indeed, party autonomy is the cornerstone of any proper arbitration. The arbitral proceedings as such are an expression of the will of the parties – shortly, arbitration is the product of party autonomy (*l'autonomie de la volonté*).¹ Parties in arbitration proceedings are free to shape the way how their legal disputes are going to be adjudicated to the extent broader than in any other adjudicative proceedings, in particular those before the national courts.

Yet, even the greatest freedom has its limits. The opening lines of Rousseau's Social Contract argue that everyone is born free, but people live in chains everywhere.² How unlimited is the freedom of the parties to steer every detail relevant for the handling of their conflict? Are the parties, once when they select the arbitrators and constitute the arbitral tribunal, still the masters of their case, the *domini arbitrationis*? Or, should their creation, the arbitral tribunal, take over that role? In this short paper, I will address the relationship of the powers (autonomy) of the arbitrators and the powers (autonomy) of the parties to shape the arbitral proceedings once the arbitral proceedings

have been instituted. Both the substantive autonomy (power to select applicable substantive rules) and the procedural autonomy (power to fix the arbitration procedure) will be discussed, raising in particular the issues relevant for Croatian and Slovenian arbitration practice.

Powers of the parties and powers of the arbitrators: complementary or opposing?

Just like the arbitration is the creation of the parties, the arbitral tribunal is also in principle the result of their willing and autonomous decision. The forum created for arbitrating the dispute is built upon the fundament of party autonomy. Once created, however, it starts to live the living of its own. The consent to arbitrate, once validly given, cannot be unilaterally withdrawn.³ The obligation to arbitrate can even survive the original contract regarding which arbitration was stipulated. In short, the autonomy and freedom which has created the arbitration agreement leads also to an independent, separable obligation to submit to arbitration certain dispute, play by the rules in the arbitration proceedings, and obey the orders and decisions made by the arbitral tribunal. We can say that the arbitrators,

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1 See Fouchard/Gaillard/Goldman, On International Commercial Arbitration, The Hague, 1999, pp. 29-32.

2 J.J. Rousseau, Du contrat social ou Principes du droit politique, Genève, 1762, p. 1.

3 Redfern/Hunter, Law and Practice of International Commercial Arbitration, London, 2004, p. 9.

engaged, appointed and paid by the parties, depend on the parties. But, in spite of the fact that they draw their mandate from the parties, they also have the independent power to conduct the proceedings, issue binding orders and even discipline the parties. Does this mean that the puppets may also take over the power from the Puppet Masters?

Indeed, one should not fear that arbitrators will act as heroes from horror stories. The arbitrators are not loose cannons, and their powers are not arbitrary. They are bound from multiple angles: by applicable law, by arbitration agreement, by agreed procedural rules etc. However, it is undeniable that a certain level of discretion still remains – and it is not to be neglected. The arbitrators, just as judges, have to adjudicate difficult disputes, and that is not imaginable without an appropriate level of authority, of residual powers to steer, rule and decide in the proceedings. Altogether, while party autonomy may be taken as the origin and starting point of any arbitration, at the heart of any arbitration – in its preparatory and central stages – the arbitrators' autonomy plays a very important role.

In most of its aspects, the arbitrators' autonomy is complementary to parties' autonomy. By making their choices of procedural tools and undertaking concrete steps in the proceedings, the arbitrators give concrete shape to the procedure envisaged by the parties. By and large, the activities of the arbitrators in the arbitral process are the natural extension and concretization of the will of the parties. Yet, in certain situations the arbitrators' autonomy may come into opposition to parties' autonomy. This can raise interesting questions regarding balancing of the two autonomies (or supremacy of one or the other). In the following text, we will focus in particular on such situations.

Powers of the parties and powers of the arbitrators in the selection of applicable substantive law

"Autonomy" as the notion presupposes the one's right to follow the law that has been self-imposed and self-enacted. In arbitration, naturally, the arbitrators have to apply to the merits of the dispute the law that was selected by the parties. This, however, has several aspects. First of all, the main and most important source of law in the dispute is usually the same contract that contains the arbitral clause. By far, the most legal issues in arbitration deal with the interpretation

and application of the contractual provisions from the main contract (or set of contracts) concluded by the parties. Yet, if we stick with the conventional understanding of "law" as the set of rules enacted by some national legislation, the most important choice of the parties regularly deals with selection of the national law that is applicable to their contractual relationship.

If the parties, in their arbitration agreement, have designated one particular national law, e.g. "the law of Republic of Slovenia", it is interpreted as the law applicable to the merits of their dispute. If such designation is lacking, and the parties have failed to agree on the law applicable to the dispute, such law has to be determined by the arbitral tribunal. The trends in development of contemporary arbitration laws go here in the direction of stretching of the arbitrators' autonomy. In the latest revision of the UNCITRAL Rules, enacted in 2010, the modern formula gives the arbitrators the wide discretionary power to decide on the applicable law. Failing the express designation by the parties, the arbitral tribunal will apply the law which it determines to be "appropriate".⁴ While we can assume that, in most cases, the arbitrators will find the law that would correspond to the interests and expectations of the parties, in some cases it can still happen that the arbitrators select as "appropriate" the law that was not envisaged by any of the parties.

What should a party (or both parties) do if they regard that the selection of the applicable law does not correspond to their perception of "appropriateness"? Selection of the applicable law is a part of the arbitration agreement, and the parties are in principle authorized to amend or supplement the arbitration agreement as long as this is feasible and sensible, even during the arbitration proceedings. If both parties, after finding about the arbitrators' designation of law, agree on different law, it should be binding for the arbitrators. Yet, this is almost never the case, as at this stage it is hardly to expect such a consensus on the side of the parties. But, it is important to give at least the opportunity to the parties to reflect and discuss with the arbitrators on the issue of applicable law, as their failure to designate it in the arbitration agreement need

⁴ UNCITRAL Arbitration Rules (2010), art. 35 para 1. Same provision is contained in Slovenian Arbitration Law (2008), art. 32 para 2. The Croatian Law on Arbitration (2001) provides that the arbitrators shall apply the law that they consider to be „most closely connected with the dispute“ (art. 27, para 2).

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not be interpreted as the definite waiver of the right to exercise any influence on this matter. Therefore, good practices in arbitration suggest that the arbitrators include the applicable law among the points that are being determined at a very early occasion, if possible in preparatory stages of the proceedings. In many arbitrations, applicable law is being determined already in the first decision made in the arbitral proceedings, often called "Constitutional Order" of the arbitral tribunal. It is advisable to circulate a draft of the Constitutional Order among the parties to receive eventual comments and suggestions. Naturally, unless both parties come up with the same suggestion, the final decision is with the arbitrators. Even if their choice does not in theory correspond to the most "appropriate" choice of law, it will very hardly be successfully challenged in any possible subsequent setting aside proceedings. In another possible scenario, where arbitrators go on without consulting the parties and issue their constitutional order without letting the parties to comment on the choice of law, there may be some objections to that choice later. Arbitrators may also change their mind in the light of the new comments, but this is not very likely and may lead to further problems. Still, the worst solution is the one where the arbitrators leave the selection of the applicable law for the very end of arbitration and make their determination only in the final award. In such a case, even if the arbitrators' choice of law is the best and the most appropriate one, it can still be subject to criticisms that the parties did not have an opportunity to express their views on this point. The success of this objection would depend on several factors: whether the parties have argued about the applicable law in their submissions (and whether the arbitrators have taken their arguments into consideration), what is the usual attitude of the courts at the place of arbitration etc. However, the outcome can, in some case, be the annulment of the award – not on the basis of the incorrect selection and application of law (which is not among the setting aside grounds), but on the basis of the violation of the right to be heard.⁵ This point is, in our experience, very relevant for the arbitrations (including the institutional ones) that take place in South-Eastern Europe, since many inexperienced arbitrators from that region emulate the practice of state courts and avoid legal discussions with the parties, skip

the preparatory steps (e.g. elaborate constitutional orders) and tend to start their legal analysis of the case only when the hearings have been already closed and they get to the drafting of the arbitral award. A share of the responsibility for such a situation may also be attributed to lawyers, who – at least in countries like Croatia – rarely enter into extended legal arguments and sometimes stick almost exclusively to the factual side of the dispute. There may be a widespread belief that old Roman saying *da mihi factum, dabo tibi ius* is still applicable, but – at least in the context of arbitration – this should be discouraged, both by the arbitrators and by the arbitral institutions. Otherwise, too much autonomy (or, better, autocracy) of the arbitrators in determining the applicable law may lead to serious problems, not only in regard to possible setting aside, but also in the stage of enforcement of the arbitral award.⁶

The law applicable to the merits of the dispute is not necessarily the only law needed to decide on all claims and objections raised in the proceedings. The law applicable for the main contract may be different from the law that governs the arbitration agreement.⁷ Although the parties rarely think of the law applicable to the arbitration agreement, in a concrete dispute it can become the decisive element, in particular when the objections to the substantive validity of that agreement were raised in the proceedings. Wherever there is an uncertainty about that point, the law applicable to the arbitration agreement has to be determined by the arbitrators. How should they decide? In contemporary arbitration scholarship, it is suggested that where the express designation of the applicable law has been done, "there is a strong tendency to regard the choice of the law as equally applicable to the arbitration agreement."⁸ However, where no choice of law is undertaken in the arbitral agreement, various factors and considerations may govern the decision-making of the arbitrators. Effectively, this may lead to "splitting" of their decision on the applicable law. The nature of

⁵ Art. V para 1(b) of the New York Convention (a party was "otherwise unable to present his case"); see also Art. 40 para 2/1 of the Slovenian Arbitration Law and Art. 36 para 2 point 1.c of the Croatian Law on Arbitration.

⁶ Violations of the right to be heard may be raised also in the opposition to enforcement of the award. Even if, e.g. national courts (Croatian and Slovenian) might have a tolerant view as to the need to discuss all legal points with the parties, the courts in the state of enforcement (e.g. in Austria or Germany) may hold this to be a kind of a "surprise award" (*Überraschungsschiedsspruch*) which effectively deprives the parties from their right to be heard.

⁷ See Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration*, p. 107-108.

⁸ *Ibid.*, p. 107.

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the dispute, nationality of the parties etc. may motivate the choice of the law applicable to the main contract, while the selection of the place of arbitration may be decisive as to the selection of law that is applicable to the arbitration agreement. The national laws, if they regulate this issue, contain ambiguous formulas⁹ so that arbitrators have a wide space for autonomous decision-making on these points. If we add another point, e.g. the law applicable to the parties, their representatives and their capacity to conclude the arbitration agreement and arbitrate them in a particular arbitral venue, the space for arbitrators' discretion is even wider.

Here is one Slovenian/Croatian example of a dispute where arbitrators would have to exercise their autonomy in selection and application of applicable rules of law. Hypothetically, if in a Slovenian arbitration case one Croatian party would sue another Croatian party, the arbitrators would have to decide *inter alia* about the substantive validity of such an arbitration clause. Under current Slovenian arbitration law, there is no restriction for Croatian parties to arbitrate in Slovenia, and Slovenian parties may agree on the jurisdiction of foreign arbitral tribunals unless exclusive jurisdiction of Slovenian courts is stipulated.¹⁰ However, under Croatian arbitration law, Croatian parties may not validly agree on arbitration outside the territory of the Republic of Croatia – for valid arbitral agreements on foreign arbitral venues one needs an “international element”.¹¹ The validity of the arbitration agreement in this case may depend on the capacity of (one or both) parties to enter into arbitration agreement. The capacity of the parties is generally governed by the law of their nationality (incorporation, citizenship), in this case by Croatian law. Under the rules of Slovenian law, there would most likely be a tendency to “save” such an arbitration agreement. Consequently, in such a case the arbitrators would have ample opportunities to evaluate all possible solutions and choose among them. Considering the public policy element of such a case and the fact that an eventual Slovenian arbitral award

would almost certainly not be enforced in Croatia, it is to be hoped that the autonomous decision of the arbitrators would in such a case go against the autonomous choice of forum by the parties who wished to evade the restrictions of their national law.¹²

Procedural autonomy of the parties and the arbitrators: power to fix the arbitration procedure

Indisputable, the arbitral tribunal performs a judicial function. However, one of the areas where arbitration is mostly distant from the court procedure is the area of arbitral proceedings. This is the area where, unlike in the state courts, both the parties and the arbitrators have a much wider autonomy. In the court proceedings, options to modify the procedural rules or choose the proceedings are in principle excluded. According to conventional Continental European position, the provisions of civil procedural law have strict, mandatory nature.¹³ In opposition, it is generally held that an essential feature of arbitration is the freedom of the parties to select how arbitration is going to be conducted.¹⁴ Insofar, the arbitration proceedings are to a much lesser extent influenced by the national procedural legislation, and to an even lesser extent by national legislation on civil procedure. For the Southern and South-Eastern European legal tradition it may perhaps come as a novelty. In a not-so-distant past, until the enactment of the most recent arbitration laws, both in Croatia and in Slovenia the rules of civil procedure were applied *per analogiam* also in arbitral proceedings. This seems to be quite improper in the context of modern approach to arbitration. An eminent contemporary commentary states that “rules of national civil procedure are invariably unsuitable and irrelevant for international arbitration.”¹⁵

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9 Croatian Law on Arbitration (see Art 6 para 7) provides that the law applicable to the validity of the arbitration agreement *ratione materiae*, failing the express designation will be either the law applicable to the substance or the law of the Republic of Croatia (as the place of arbitration). The Slovenian law leaves this point fully open, as it regulates only the form of the arbitration agreement, and leaves aside the issue of the law that is valid as to its substantive validity.

10 See art. 5 of the Slovenian Arbitration Law.

11 See art. 3 of the Croatian Law on Arbitration (on arbitrability).

12 See more on this point in Uzelac, A., „Arbitrabilnost - aktualno uređenje i neka otvorena pitanja u hrvatskom pravu“, *Pravo u gospodarstvu*, 49:4/2010, str. 1033-1043.

13 On this point see Triva/Dika, *Gradansko parnično procesno pravo*, Zagreb, 2004, p. 118 („what procedural law does not provide, is in principle not permissible“).

14 See eg Fouchard/Gaillard/Goldman, op. cit., p. 452 (speaking about the “primacy of the parties' agreement” as “the fundamental principle underlying the whole of the arbitral proceedings”).

15 Lew/Mistelis/Kröll, op. cit., p. 523 (21-7), quoting Oppetit, „Philosophie de l'arbitrage commercial international“, 120 *Clunet* 811 (1993), p. 818.

The need to observe *audiatur et altera pars* principle is absolute, but it is not unlimited

Both autonomies are limited only by (rare) mandatory rules of the *lex arbitri*, and by the need to give each party the opportunity to be heard.

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emphasizes the party autonomy, but also highlights the arbitrators' autonomous role. Since the enactment of new arbitration legislation in Croatia and Slovenia, instead of elaborate procedural rules of the Codes of Civil Procedure, there are new, specific procedural rules on the conduct of arbitration proceedings contained in the Arbitration Law. Yet, the arbitration laws regularly follow the international patterns set by the UNCITRAL and define the procedure only in very general, vague way.¹⁶ There are very few precise procedural rules, and the core institutes of procedure such as service of notifications, taking of evidence or decision-making are provided in only a few lines or legislative text, drafted in an open and permissive manner. The fundamental approach to regulating arbitral procedure is contained in two basic principles, described in Art. 19 of the UNCITRAL Model Law on International Commercial Arbitration:

- ♦ the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings;
- ♦ failing agreement of the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

These rules, adopted also by our national laws,¹⁷ delineate the borders of two autonomies, the parties' and the arbitrators'. Both autonomies are limited only by (rare) mandatory rules of the *lex arbitri*, and by the need to give each party the opportunity to be heard. This rule, also known as "*Magna Carta of arbitration*,"¹⁸ is in practice much more important and relevant than any mandatory national provision. It is in various formulations present both in most national and international arbitration rules,¹⁹ and in the nation-

al laws on arbitration.²⁰ The need to observe *audiatur et altera pars* principle is absolute, but it is not unlimited. In the recent development of UNCITRAL texts on arbitration one may note a certain modification of the original language of the UNCITRAL Rules (1976) and UNCITRAL Model Law (1985), where it is emphatically argued that *each party* should be given *at any stage* of the proceedings *the full opportunity* to present its case. In the more recent UN documents, like the 2010 edition of the UNCITRAL Arbitration Rules, the arbitrators are obliged to give to each party *a reasonable opportunity* of presenting its case *at an appropriate stage* of the proceedings. This change reflected the discussion at the UNCITRAL Working Group on Arbitration which pointed to possibilities of procedural abuses.²¹ In any case, even in this aspect, additional flexibility is given, including the new discretion given to arbitrators to define what is under circumstances "an appropriate stage" and "a reasonable opportunity".

Therefore, the apparent supremacy of the party autonomy and the subsidiary nature of the arbitrators' authority to fix the procedural rules have to be taken with caution. In fact, the arbitrators' autonomy is in the ambit of procedure much more pronounced. The parties' autonomy is in most cases exhausted in the reference to the applicable procedural rules (e.g. to the UNCITRAL Arbitration Rules or the Rules of Arbitration of the Permanent Court of Arbitration attached to the CCIS, or to the Zagreb Rules). These rules are mainly written with a view to preserve the flexible nature of arbitration, so that they either regulate the arbitral proceedings in a rather general way, or contain rules that contain discretionary and optional rules (e.g. what arbitrators "may", but need not undertake).

In short, the arbitrators have rather broad powers in fixing the arbitral procedure. While bound by the parties' selection of procedural rules, they still have a whole series of procedural issues which may have to be determined on their own, starting with the basic organizational elements of every arbitration (language, place of hearings, form of proceedings), and finishing

16 The national arbitration laws, in particular those dealing with international commercial arbitration, are fairly short. Redfern and Hunter note that Swiss Code on arbitration contains only 23 articles (many of them having only one sentence), and French Code only 16 articles. Croatian and Slovenian laws are a bit less concise, and have about 50 articles – still not much in comparison to ten times more voluminous Codes of Civil Procedure.

17 See Art. 23 of Slovenian Arbitration Law; Art. 18 of Croatian Law on Arbitration.

18 See Holtzman/Neuhaus, A Guide to the UNCITRAL Model, Kluwer, 1989, p. 550.

19 See UNCITRAL Arbitration Rules (2010 rev), Art. 17 para 1: "parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. Art. 26 para 1 of the CCIS Arbitration Rules ("the parties [should be] treated equally and ... at any stage of the proceedings each party [should be] given a full opportunity to assert their rights and to present their case.")

20 Art. 17 of Croatian Law on Arbitration, Art. 17 of Slovenian Arbitration Law (*Equal Treatment of Parties, enakopravnost strank*).

21 See UNCITRAL document A/CN.9/614, para. 77 (WG Report, 45th Session of October 5, 2006).

with the concrete technical directions as to the conduct of the proceedings (fixing dates for parties' submissions and the hearings, setting places of meetings and the administrative assistance, method of making protocols etc.). Regularly, all of these elements are determined at the initiative of the arbitrators.

Sometimes, the parties are dissatisfied with certain procedural direction of the arbitral tribunal. A special issue may arise when both of the parties wish to amend the procedural order issued by the arbitrators. Are arbitrators authorized to reject the parties' proposal and continue the arbitration pursuing their procedural direction? This question boils down to the question whether party autonomy in determining procedure ceases with the establishment of the arbitral tribunal. There are different views on this point. This issue was therefore taken by the UNCITRAL Working Group, which suggested that the autonomy of the parties does not stop with the appointment of arbitrators. Still, from the practical perspective, once the proceedings are started, the proceedings are fixed by the arbitrators.²²

In other words, the arbitrators in principle may encounter situations where both parties would not be fully satisfied with their method of proceeding with the arbitration. If the parties' autonomy is continuous, it would be recommendable that the arbitrators also plan and organize the proceedings together with the parties. The idea of the "working co-operative", *die Arbeitsgemeinschaft*, of adjudicator and the parties, was also at the core of well-known procedural reforms of Franz Klein, who argued that the litigants and the court have to avoid confrontation, and achieve loyal collaboration. This is something what is *a fortiori* applicable to mutual relationship of arbitrators and parties in the arbitral proceedings. Optimally, the tribunal should seek the parties' agreement regarding the proposed course of the arbitral proceedings. Realistically, this is not always possible, as the differences in views of the parties may cause rather obstructive than constructive attitude of one or more of the parties. In such situations, the arbitrators have to take the lead and fix the procedure, both in general and in regard

to particular procedural steps.²³ Many procedural decisions may require urgent action and speedy reaction. For them, giving the opportunity to comment is out of the question. In practice, the arbitrators often empower the presiding arbitrator to issue the decisions on the procedure alone, precisely because the need to consult and prepare the draft order jointly may cause delays. Of course, an opportunity to react on the issued procedural decision, be it by the co-arbitrators, be it by the party, shall be given at a later stage. In any case, if the arbitral tribunal does not follow the unanimous criticisms of the parties and maintains a too autocratic style of steering the process, under circumstances the arbitral award may be successfully challenged because "arbitral proceedings were not in conformity with the agreement of the parties".²⁴

It is essential that the decisions on the key elements of the organization of the arbitral proceedings are made early in the proceedings. The key to effective arbitration is careful planning of the proceedings.²⁵ A common method of the planning of proceedings is to issue procedural directions in the form of procedural orders and procedural timetables. Procedural directions may be circulated among the parties, and eventually even co-signed by them. Yet, once they are issued (ideally in the text that reflects everyone's wishes), these directions become binding on the parties.²⁶ These directions have an important function of preventing procedural abuses and inordinate delays. Therefore, the limits of tolerance of the arbitrators to parties' requests for extension of deadlines and failures to follow the time limits set in the procedural timetable have to be properly adjusted. In some – not too frequent – cases,

23 In this context, it seems Art. 34 of the CCIS Arbitration Rules which allows/motivates the arbitrators to conclude an "agreement on the proceedings" with the parties has good justification. However, it may also be that this specific agreement, in contrast to ICC's *acte de mission* (Terms of Reference), will not be effective enough, as it depends solely on the will of the parties.

24 See e.g. Art. 40 para 2, point 1.d. of the Slovenian Arbitration Law.

25 This is, *inter alia*, reconfirmed by the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings, which point to the broad discretion and flexibility in the conduct of arbitral proceedings allowed to the arbitral tribunal: "This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute", but "such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed." (Notes, at 4-5, p. 1-2).

26 Cf. Lew/Mistelis/Kröll, p. 531.

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22 See Sanders, "Chapter 12: Arbitration", in Cappelletti (ed.), IECL Vol XVI: Civil Procedure (Mohr 1996), para 157, p. 102-103. See also Lew/Mistelis/Kröll, op. cit., p. 525 (21-13).

the principles of fairness and due process may require extensions of the deadlines; in most other cases, for the sake of procedural discipline and protection against prejudice that might be caused to other, co-operating party, the arbitrators should make clear that they will be ready to enforce their procedural schedule.

It is useful to include in the first procedural order ("Constitutional Order", as the case may be) a recapitulation of the basic constitutive elements of the arbitration. The arbitrators may wish to include e.g. the full citation of the main contract and the text of the arbitration clause, the supplementary provisions on language and place of arbitration, the data on appointment of arbitrators as well as the indication of claims and counterclaims. Most of these elements are the product of the parties' autonomy, but – by taking them on board – the arbitrators help creation of a co-operative atmosphere, enable more autonomous acceptance of the arbitrations directions, and, last but not least, prepare from the very first steps in the process the draft of the arbitral award.²⁷

Some difficulties may arise if the parties failed to include in their arbitration agreement some of the essential constitutive elements, like e.g. the selection of the place (seat) of the arbitration, and the language of the proceedings. The selection of the juridical place of arbitration involves the choice of mandatory rules of the forum, the concept of public policy, the nationality of the arbitral award, courts competent for setting aside etc. Such a designation would in the first place be expected from the parties. They do it in an overwhelming majority of cases (according to ICC statistics, parties expressly determine the place of arbitration in over 80% of the cases).²⁸ In many of the remaining cases, the applicable procedural rules contain some guidance.²⁹ It can happen, however, that the parties fail to agree on the place of arbitration in an *ad hoc* arbitration agree-

ment. Unless the parties come to an agreement during the initial stage of the arbitration process, the selection of the place of arbitration by the arbitral tribunal may be the only way to go – but with many potential dangers, as in such a case the arbitrators select not only the procedural rules, but also the arbitration law and court system (including its public policy rules) that will have jurisdiction to decide on their mandate.³⁰

Whether or not defined in the arbitral agreement, another point that has to be determined in the very early stage of arbitration deals with the language (or languages) in the arbitration proceedings. In arbitrations where all participants do not share the same language background, the arbitrators often have to decide on various language points. If language was fixed by the parties in the arbitration agreement, there still may be some language issues, e.g. whether translation of all the documents will be required or not; what will be the way to hear witnesses who do not speak sufficiently the "official" language of arbitration; whether arbitrators will internally communicate in different languages etc. If the parties have not determined the language of arbitration, it has to be fixed by the arbitral tribunal. The language is not directly connected with the selection of the forum. It is more common to consult the language of the arbitration agreement and the main contract (some documents even speak of the "implied choice of language"),³¹ as well as the language skills of the parties. The language skills of the arbitrators may also be an issue. Combined with the lack of express selection of the language and the differing views of the parties about the appropriate language, they can become the stepping stone in the arbitral process.

For instance, in a recent arbitration between a Slovenian and Bosnian party, the parties have opted for Vienna as the place of arbitration, but most of the documents in the case (including the main contract and the arbitration agreement) were either in Bosnian or in English language.³² The Slovenian party appointed an Austrian arbitrator who had no knowledge of Bosnian (or Slovenian) language. Both parties rejected the selection of English as the language of arbitration. The Bosnian party wanted Bosnian, and the Slovenian

27 All of the said elements need to be contained in the arbitral award. The experienced arbitrators therefore tend to frame their procedural orders in a way that will enable them to copy their common parts and paste it into the draft of the arbitral award.

28 Fouchard/Gaillard/Goldman, op. cit., p. 675.

29 Eg. the LCIA Rules provide that, in the absence of a choice by the parties, the seat of arbitration will be London; under the ICC Rules, the ICC Court has to determine the forum. Under Zagreb Rules 2002, if parties have not agreed otherwise, "the venue of arbitration shall be at the seat of the Arbitration Court" (Art. 4). The text of the CCIS Rules suggests that every selection of the Rules presumes the selection of the seat of arbitration in the Republic of Slovenia (Art. 11).

30 In my personal practice, I had one such case, in which the arbitrators managed to achieve consensus with the parties on the seat of arbitration.

31 See AAA ICDR, Art. 14. Lew/Mistelis/Kröll, op. cit., p. 540.

32 The case is known personally to the author of this text.

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arbitral process

party expressed its preference for German as the language of the arbitration proceedings. Ultimately, the arbitrators selected both German and Bosnian as equally authentic languages of arbitration, in an attempt to follow the parties' will, enable all arbitrators to follow the proceedings, and still maintain the link with the languages originally used by the parties in their transactions. This may have solved the problem at hand (and have created the new problem regarding effectiveness), but the whole situation raised the issue of knowledge of language,³³ and parties' autonomy in the choice of arbitrators.³⁴

After defining the organization and timetable of arbitral proceedings, every participant in the arbitral proceedings – including the arbitrators themselves – is expected to observe the set rules and schedule and not depart from them without the consent of all other participants.³⁵ The arbitrators may wish to preserve a bit more freedom to themselves, which would allow them to react in a flexible, swift way and adjust *proprio motu* the course of action, without giving the parties an opportunity to (ab)use their powers and attack the award later. Creating a co-operative atmosphere is commendable, but formulating every procedural plan in terms of agreement between the arbitrators and the parties may also have its own inherent risks. So, for instance, if it was agreed that the arbitrators would address the issue of jurisdiction in the separate, partial award, and they decide on this point together with the merits of the dispute, such an award may under circumstances

be successfully challenged.³⁶ Therefore, for the arbitrators it may be wise to regulate in a "consensual way" (for instance by an "Agreement on arbitration proceedings" in the style of CCIS Rules) only the issues that would not raise such potential problems. All the practical issues that may require amendments would better be regulated in the form of a procedural order which, although discussed and, if possible, consented by the parties, still remains the decision that is issued by the arbitrators and that may be subject to change on their own initiative.

For some issues, it is better to avoid too much "consensuality" and keep them in firm grip of the arbitral tribunal. The bottom line is that, by being authoritative and firm in the conduct of the proceedings, the arbitrators essentially work in the interest of the parties, and sometimes also discharge their express statutory duty to act without undue delay.³⁷ The expeditiousness of the proceedings may have to take precedence over the convenience of the parties, or better – their lawyers. For instance, if after reasonable attempts it is not possible to find a date that will be soon enough and still acceptable to parties' counsels, the arbitral tribunal must fix a date without such agreement.³⁸ After all, the arbitrators should keep in mind that the purpose of the parties' autonomy is to protect their interests and that in matters such as calendars and procedural timing these interests are not always fully identical with the interests of their procedural representatives.

As it is expected from arbitrators to conduct the proceedings "in an expeditious and cost-effective manner" and to ensure "effective case management",³⁹ they should also be sovereign in their proposals for ordering the steps in the proceedings, and in their suggestions regarding the effective technical ways of organizing the process. The arbitral rules and codes usually regulate the exchange of written communications between the parties in only some points, allowing also depar-

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33 The IBA Rules of Ethics for International Arbitrators, Art. 2(2) impose a moral obligation on the arbitrator to accept the appointment only "if he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of the arbitration". However, if the parties have not expressly determined the language of arbitration, it may be hard to challenge the arbitrators' appointment on these grounds, in spite of the fact that a kind of "implicit" choice of appropriate language(s) at the moment of drafting of the arbitration agreement could have been envisaged.

34 In this case, one of the parties complained that the other, by its choice of party-appointed arbitrator who does not speak several of the potentially selectable languages of arbitration, wanted to unduly influence the arbitrators' decision on the language of the proceedings.

35 A good method of ensuring procedural discipline is to provide that, save in exceptional cases, the determined and agreed schedule and timetable will not be possible to amend unless the party requests extension in due time before the expiry of the deadlines, and obtain the consent of the other party.

36 See decision of the Cour d'appel Paris, 19 December 1986, Rev Arb 359 (1987) in which the court has set aside the award because the arbitrators have not followed such provision contained in terms of reference of an ICC arbitration. Cf. also Lew/Mistelis/Kröll, op. cit., p. 528.

37 Eg. Art. 11 para 2 of the Croatian Arbitration Law provides that „an arbitrator must conduct the arbitration with due expeditiousness and undertake measures on time in order to avoid any delay of the proceedings.“

38 Redfern/Hunter, op. cit., p. 258-259.

39 ICC Rules of Arbitration (2012), Art. 22 para 1-2.

ture from the dispositive provisions of the law.⁴⁰ In Croatian or Slovenian law and arbitral rules there are no provisions on communication by e-mails, which has become not only customary, but indispensable for the effective conduct of contemporary arbitration proceedings. Even in arbitrations where less skillful local practitioners represent the parties it is generally no problem to impose the duty on the parties to send their written communications simultaneously by regular and electronic post,⁴¹ and determine the rules for such exchange of communications. Requiring the parties to submit an electronic duplicate of the whole case file may be a more demanding task, but – when faced with alternatives that may incur additional loss of money and time – parties are often willing to accept voluntarily even the practices that they were not using before (e.g. scanning the documents into searchable .pdf files, production of audio-recorded rather than typed or hand-written protocols etc.).

The supremacy of the arbitrators comes into play in particular when the agreed rules have to be enforced by decisions that do not allow delays. This is the case, for instance, at the hearings. The scheduling of hearings in arbitration cases usually takes place months in advance; parties spend weeks preparing for the hearing; the witnesses are available only within a short window of time. Therefore, any inordinate delay may at this stage jeopardize the effectiveness of the whole arbitral process. Emphasizing this position, the ICC Rules provide that “the arbitrator shall be in full charge of the hearing”.⁴² It is not only normal, but expected, that arbitral tribunal “proceeds firmly but fairly” and that each party imposes “some discipline upon itself as to the way in which its case is presented”.⁴³ After giving each party a fair opportunity to express its views on timing of the hearing, including the time available for questioning the witnesses and other procedural actions, the arbitral tribunal may and should set the timeframe for the hearing, and enforce it accordingly. Every time, it is wise to leave some time “in reserve” and generally try to reach agreement with the parties regarding the time needed. But, the target

timing is here to be enforced, and the arbitrators may use various tools to stay within the planned limits, e.g. by using the method of “chess clock arbitration”.⁴⁴

Conclusion

The autonomy of the parties and autonomy of the arbitrators have a dynamic relationship. Balancing both of them is a proper way to proceed, keeping in mind the main purpose of the arbitral proceedings – proper, fair, swift and inexpensive resolution of the parties’ disputes.

40 See eg Art. 13 of the CCIS Rules (Service of Process); Art. 6 of the Slovenian Arbitration Law.

41 This is currently a standard compromise between the “old” and the “new” means of communication.

42 Art. 26 para 3 ICC Rules (2012).

43 Redfern/Hunter, op. cit., p. 265.

44 See Karrer, “Chess Clock Arbitration”, in: *Liber amicorum T. Szurski*, Warszawa 2008, p. 41-47.