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RECONCILING DUE PROCESS AND EFFICIENCY IN INTERNATIONAL ARBITRATION THE ARBITRATOR'S TASK OF ACHIEVING THE ONE WITHOUT SACRIFICING THE OTHER*

Reconciling efficiency and due process has never been an easy task for arbi trators. This task has in recent years even become more challenging as arbitration rules, arbitral institutions and practitioners in the field of international arbitration in general nowadays attach increased significance to conducting arbitrations in a time and cost efficient manner. The tool arbitrators are given to fulfil their task of balanc ing due process and efficiency is their wide discretion with regard to the conduct of the arbitral proceedings. Arbitrators should not give in to the temptation of granting each and every of the parties' requests for additional submissions, additional produc tion of evidence and extensive oral pleadings. Rather, due process should be under stood in a more qualitative way. Proactive case management and an early involvement of the arbitral tribunal not only in the procedural but also in the substantive issues of a given case can enable the arbitral tribunal to give the parties the maximum oppor tunity to present their case without at the same time sacrificing efficiency.

Key words: *International Arbitration. Due process. Efficiency. Proactive case management.*

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1. INTRODUCTION

It is the general understanding that, in international arbitration, due process and efficiency of the arbitral proceedings are antagonists. From the arbitrator's perspective, it seems hard to guarantee the one without, at least partially, sacrificing the other. Arbitrators are thus faced with the difficult task of reconciling due process and efficiency in each individual arbitration. This has been called the *"never ending battle between efficiency and due process"*.[1]

Fighting this battle, *i.e.* striking the right balance between due process and efficiency is much more an issue in arbitration than in litigation. Unlike judges, arbitrators are bestowed with what is generally called a wide discretion with regard to the procedure to be employed in a given arbitration.[2] This, of course, creates opportunities and will ideally result in proceedings tailored to the particular needs of each individual case. The lack of a rigid procedural framework does, however, also entail several risks. A violation of due process will in almost any jurisdiction have the consequence that the respective award will be set aside or will be denied recognition and enforcement. Apart from the fact that arbitrators are obliged to render an award that is enforceable[3] (and not susceptible to annulment) each decision of national courts in that regard will become publically known. Obviously, arbitrators are against this background usually very keen to stay clear of any violation, or even allegation of the violation of the due process guarantee. The motivation to render an award that is "absolutely waterproof" will thus often induce arbitral tribunals to comply with each and every request of the parties for additional submissions, the admission of additional evidence or very extensive oral hearings. This aggravates the inherent conflict between due process and procedural efficiency.

2. BALANCING DUE PROCESS AND EFFICIENCY IN INTERNATIONAL ARBITRATION

Efficiency of the arbitral process is generally understood as efficiency of time and, as a consequence, costs. It has repeatedly been stated

[1] L.Y. Fortier, "The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration 'A few Plain Rules and a Few Strong Instincts' ", in: A.J. van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, *ICCA Congress Series Volume 9*, Kluwer Law International, Alphen aan den Rijn 1999, 397.

[2] *Cf.* Article 19 (2) UNCITRAL Model Law on International Commercial Arbitration.

[3] *Cf.* G.J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award", *Journal of International Arbitration* 2/2001, 136 138.

that time is of the essence in any legal proceedings. In international arbitration, this "need for speed"[4] has been discussed extensively in the last several years. The reason for this is twofold. It has, first, not gone unnoticed that arbitrations have over the years become more lengthy and more costly. This can, inter alia, be attributed to factors that directly relate to due process, such as extensive document production or extensive and very expensive oral hearings[5]. There is, second, increasing competition in the market for alternative dispute resolution, and practitioners fear that an arbitral process that is lengthy, complicated and expensive might lose ground to other methods of dispute resolution such as mediation or conciliation.[6]

The most prominent results of the discussion of efficiency-related issues are the revisions of the ICC Rules of Arbitration and the IBA Rules for the Taking of Evidence in International Arbitration. Article 22 (1) ICC Rules now expressly stipulates that the arbitral tribunal as well as the parties are under a duty to conduct the proceedings efficiently and it is emphasized that efficiency always has to be seen in the context of the complexity and value of the dispute. The ICC Rules now also put a strong emphasis on case management. Pursuant to Article 24 (1) ICC Rules, the arbitral tribunal is obliged to conduct a case management conference at a very early stage of the proceedings and to draw up a procedural timetable. The purpose of this new provision is to make sure that the procedure adopted is tailored to the particularities of the case brought before the arbitral tribunal. Arbitrators shall be encouraged to draw up the procedure for each case individually instead of using out of the box boilerplate procedures that might not be suited for the dispute at hand.[7] Likewise a new provision promoting efficiency has been introduced in the course of the 2010 revision of the IBA Rules on the Taking of Evidence in International Arbitration. Article 2 of the IBA Rules now provides that the arbitral tribunal shall consult the parties at the earliest appropriate time in the arbitral proceedings with a view to agreeing on an efficient and fair process for the taking of evidence.

While the term of efficiency is clear cut, the concept of due process turns out to be rather elusive. It can of course be concluded from Article V (1) (b) of the New York Convention and from Article 34 (2) (a) (ii) of the UNCITRAL Model Law that due process, in very general terms,

[4] K.P. Berger, "The Need for Speed in International Arbitration", *Journal of International Arbitration* 5/2008, 595.

[5] S. Elsing, "Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds", *SchiedsVZ* 3/2011, 115.

[6] *Ibid.*

[7] J. Frey, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publishing, Paris 2012, 260 261.

means procedural fairness, equal treatment and, especially, the parties' right to be heard. Any attempt of a more specific definition is in effect thwarted by the fact that the only reliable guideline in the arbitration context can be drawn from the judicature of national courts in annulment and enforcement cases. But an award will be annulled or denied recognition and enforcement on the grounds of a violation of due process in the most exceptional circumstances only.

It is thus on the arbitral tribunal to define what due process in a given case actually means. Likewise, the task of reconciling due process with efficiency falls on the arbitrator. The tool that arbitrators are given to that effect is their extensive discretion with regard to conducting the proceedings. There are, however, limits. First and foremost, arbitrators, as a general rule, have to respect the will of the parties and thus usually cannot deviate from procedural agreements. This raises several problems that shall be addressed in turn. Furthermore, the case law of the national courts of the seat and of the likely place of enforcement constitutes an absolute boundary of the arbitrator's discretion.

3. THE ABSOLUTE BOUNDARIES OF THE ARBITRATOR'S DISCRETION

3.1. The Boundaries Imposed on the Arbitrators' Discretion by National Courts at the Seat or Place of Enforcement

The minimum requirements of due process that have to be met in any constellation and regardless of (in-) efficiency are set by the case law of the national courts of the seat at the arbitration and the likely places of enforcement. As a general observation, violations of due process are frequently asserted by the losing party in an arbitration but successful in the most exceptional circumstances only.[8]

In almost all successful annulment cases and challenges to enforcement the violation of due process had been quite obvious and it rather goes without saying that the arbitration should not have been conducted in the way that actually led to the challenge. In our context this means that, for the arbitrator confronted with the task of reconciling due process and efficiency, the case law of national courts serves as the utmost boundary of his or her discretion or, so to say, as a kind of reality check.

[8] S. Kröll, "Setting aside proceedings in Model Law jurisdictions selected pro cedural and substantive questions from the case law", *International Arbitration Law Re view* 2005, 176; A. Jana, A. Armer, J.K. Kranenberg in: H. Kronke *et al*. (eds.), Recogni tion and Enforcement of Foreign Arbitral Awards, Kluwer Law International, Alphen aan den Rijn 2010, 233.

The constellations where national courts have actually found a violation of due process can be grouped into several categories.[9] The parties are thus, absent any agreement to the contrary, entitled to an oral hearing.[10] Each party must be given the opportunity to comment on evidence submitted by the opposing side, regardless of whether such evidence was submitted directly or indirectly (as, for example, an exhibit to the report of a party appointed expert).[11] The same applies with regard to any evidence introduced to the arbitration by the arbitral tribunal *sua sponte*.[12] Finally, an arbitral tribunal shall not render so called surprise decisions, *i.e.* decisions based on legal or factual considerations it has not previously brought to the attention of the parties.[13]

Notably, it is generally not required that each party be given the opportunity to present and submit all evidence it considers relevant.[14] In particular, the principle of due process is not violated by an arbitral tribunal's decision not to grant disclosure.[15] The guarantee of equal treatment does not demand that in an oral hearing each party be granted an identical amount of time to present its case.[16] This is already a strong indication in favour of our proposition that the concept of due process is qualitative rather than merely quantitative.

3.2. The Boundaries Imposed on the Arbitrators' Discretion by Agreements of the Parties

Within the boundaries of the mandatory provisions of the *lex arbiti* and the law of the likely places of enforcement, the parties are free to agree on the procedural rules that shall govern their arbitration. Such

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[9] See the overview given by A. Jana, A. Armer, J.K. Kranenberg, 246 251; G. Born, International Commercial Arbitration, Volume II, Kluwer Law International, Alphen aan den Rijn 2009, 2580 2593 and 2746 2760.

[10] G. Born, 1831 1832; *cf.* Article 27(1) UNCITRAL Model Law.

[11] See for example Paklito Investment Limited v. Klockner East Asia Limited, Supreme Court of Hong Kong, Case number MP 2219, 15 January 1993, *Yearbook Commercial Arbitration Volume XIX*, 1994, 671 672; Rice Trading (Guyana) Ltd. V. Nidear Handelscompagnie BV, Gerechtshof, The Hague, 28 April 1998; *Yearbook Commercial Arbitration Volume XXIII*, 1998, 733; a good overview of further cases is given by M. Scherer in: Wolff, *Commentary on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Beck, Munich 2012, 306 307.

[12] M. Scherer, 307.

[13] See the overview given by G. Born, 2589; M. Scherer, 307 308.

[14] Robert Fayez Mouawad (Lebanon), Triple M. Mouawad Management & Marketing SAL (Lebanon) and others v. Henco Heneine Construction & Development Co. SARL (Lebanon), Cour d'Appel Paris, 10 January 2008, *Yearbook Commercial Arbitration Volume XXXIII*, 2008, 483.

[15] M. Scherer, 300.

[16] G. Born, 2581.

agreements can already be part of the arbitration agreement, the most pertinent example here being the agreement on institutional rules. But the parties are also free to agree on the procedure after the commencement of the arbitration. Common examples of party agreements that have an impact on the efficiency of the proceedings are agreements on the number, sequence and timing of submissions, the necessity and duration of an oral hearing or the forms of the appointment of experts and the ways in which experts will be examined by the arbitral tribunal.[17] The parties also have the power to agree that an arbitral award has to be handed down within a prescribed period of time.[18]

As a general rule, arbitrators have to respect any procedural agreements by the parties. An arbitral award that disregards such agreements will be set aside and denied recognition and enforcement, respectively, *cf.* Article 34 (2) (a) (iv) of the UNCITRAL Model Law and Article V (1) (d) of the New York Convention. An arbitral tribunal will even have to adhere to the will of the parties where the respective agreement is highly unreasonable and will lead to lengthy and inefficient proceedings.[19] Good examples are party agreements to prolong submission deadlines for a considerable amount of time or to schedule oral hearings that last for several weeks.[20] The arbitral tribunal may in such cases well voice the firm opinion that the intended agreement does not further the cause of efficient proceedings and may in fact defeat the purpose of choosing arbitration in the first place.[21] The persuasive power of the arbitral tribunal is, of course considerable and parties will in most cases give in to any reservations voiced by the arbitrators. But where the parties choose to ignore such advice and to hold on to their agreement, the arbitral tribunal in most cases[22] has no choice but to comply.[23]

[17] C. Chatterjee, "The Reality of The Party Autonomy Rule In International Arbi tration", *Journal of International Arbitration*, 6/2003, 551.

[18] M. Pryles, "Limits to Party Autonomy in Arbitral Procedure", *Journal of Inter national Arbitration* 3/2007, 328; E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, Alphen aan den Rijn 1999, 681.

[19] G. Wagner, M. Bülau, "Procedural Orders by Arbitral Tribunals: In the Stays of Party Agreement", SchiedsVZ 1/2013, 11.

[20] M. Pryles, 327; G. Born, 1756.

[21] G. Born, 1757.

[22] Arbitrators are not bound by party agreements that violate provisions of manda tory law; *Ibid*. Notably, this includes the general notions of due process. A party agree ment giving, for example, only one party the opportunity to be heard by the arbitral tribu nal will likely be considered invalid by the courts at the seat or the place of enforcement; N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, Oxford University Press, Oxford 2009^{5}, 366; M. Pryles, 329.

[23] Where the arbitrator considers the agreement to be oppressive, unreasonable or improper, the only choice that is left to him or her is to resign, see G. Born, *International*

Arbitral tribunals are, on the other hand, usually very keen to achieve consensus on questions of procedure. Such consensus raises the acceptance of any decision rendered by the arbitral tribunal at a later point in time. Furthermore, consulting with the parties will often increase the quality of the arbitral tribunal's (procedural) decision. It is usually the parties who know their dispute and commercial needs best and their input can thus prove to be very valuable.[24] As has already been mentioned, this insight has recently been reflected in provisions such as Article 24 (1) of the new ICC Rules or Article 2 of the IBA Rules on the Taking of Evidence in International Arbitration that foresee case management conferences and consultations between the parties and the arbitral tribunal at an early stage of the arbitration.

Problems arise where the nature of a case changes during the proceedings. It is, in particular, not uncommon that a dispute starts off relatively simple and in the course of the arbitration turns out to be very complex. Did the parties at the outset of the arbitration already agree on very tight procedural deadlines this might then later create problems with regard to the right to be heard.[25] The arbitral tribunal in such constellations finds itself in a very unfavourable position. It cannot override the original party agreement since doing so would render any ensuing award susceptible to challenges before the national courts. Unless the agreement itself is contrary to provisions of mandatory law, the tribunal will have no choice but to knowingly curtail at least one of the parties' rights to present its case.[26] Remedy can only come from the parties themselves who are of course free to alter the original agreement at any time during the proceedings. But this is not very likely to happen once the proceedings have progressed to a more advanced stage. Due to the adversarial nature of arbitration, one of the parties may well see an advantage in keeping the status quo even in constellations where the old agreement is clearly inadequate and the parties did obviously not consider the change in circumstances that had occurred.[27]

A related question is to what extent arbitral tribunals are bound by their own procedural orders. The underlying problem is more or less the same as above: circumstances change and the procedure envisaged at the beginning of the arbitral process turns out to be inadequate. The general rule here is that the broad discretion that arbitrators enjoy with regard to the conduct of the proceedings also encompasses the right to alter their

Commercial Arbitration, Volume II, Kluwer Law International, Alphen aan den Rijn 2009, 1757.

[24] G. Wagner, M. Bülau, 7.

[25] *Cf. Ibid.*, 9.

[26] *Cf.* G. Born, 1757.

[27] G. Wagner, M. Bülau, 9 10.

procedural decisions subsequently.[28] But things get more difficult once the parties get directly involved in the process of drafting the respective procedural order. In Germany, the Higher Regional Court (Oberlandesgericht) of Frankfurt in a decision from 2012[29] has qualified a procedural order as an agreement of the parties because the arbitral tribunal in that case had circulated a draft of the respective order among the parties, discussed the draft with the parties and incorporated the changes suggested by the parties. Finally, the tribunal had included an introductory sentence into the procedural order which stated that the order reflects the agreement of the parties with regard to certain issues. The arbitral tribunal had later on deviated from the stipulations made in the procedural order and the award had as a consequence been set aside. The decision has been confirmed on appeal, albeit with the reservation that the circumstances of the case had been very special and the reasoning of the Higher Regional Court defies generalization.[30]

While the overall impact of the decision of the Frankfurt court will thus be rather limited, the decision shows what can happen if arbitrators are overzealous to make the parties agree on each and every procedural aspect. It is suggested that decisions especially on issues such as the timing of the proceedings and the scope and admissibility of evidence should not be framed as party agreements. This way the arbitral tribunal retains its flexibility to react to unforeseen developments throughout the arbitral process. It is worth mentioning in this context that this strategy fails with regard to the Terms of Reference pursuant to Article 23 of the ICC Rules. The ICC Terms of Reference, which have to be signed by the parties, arguably constitute an agreement by the parties in the meaning of Article 34 (2) (a) (iv) of the UNCITRAL Model Law and Article V (1) (d) of the New York Convention.[31] Arbitrators are against this background well advised not to set out the procedural framework of the arbitration in the Terms of Reference but to rather issue a distinct procedural order for that purpose.[32]

4. CRITERIA FOR RECONCILING DUE PROCESS AND EFFICIENCY WITHIN THE BOUNDARIES SET BY THE NATIONAL COURTS AND BY PARTY AGREEMENT

While it is important to know the absolute boundaries of procedural discretion, the arbitrator's task does not end where it has been as-

[28] *Ibid.*, 7.

[29] Oberlandesgericht Frankfurt, 26. Zivilsenat, Case No. 26 Sch 13/10, 17 February 2011, SchiedsVZ 1/2013, 49 62.

[30] *Cf.* G. Wagner, M. Bülau, 9.

[31] M.W. Bühler, T.H. Webster, *Handbook of ICC Arbitration*, Sweet & Maxwell, London 2008[2], 259; E. Gaillard, J. Savage, 672.

[32] E. Gaillard, J. Savage, 680.

certained that neither the agreement of the parties nor the mandatory requirements under the law of the seat and the likely place of enforcement will be violated. Or in other words: the procedural discretion accorded to arbitrators by most arbitration laws does not mean that arbitrators can do whatever they can want or, rather, whatever they can get away with. The English Arbitration Act 1996 makes that very clear. In Section 33 (b) it is expressly stated that an arbitral tribunal shall

"adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

Redfern and Hunter have called this *"the arbitrator's duty to act judicially"*.[33] The content of such duty highly depends on the individual case and the scope of possible scenarios is tremendous. The subject matter therefore defies rigid guidelines or checklists. There are, however, some aspects that an arbitrator should always consider when faced with the task of reconciling due process and efficiency.

Naturally, the complexity of the matter needs to be taken into account. The more complex a case, the more time the parties will need to prepare their submissions and the more time will, as a rule, be required for an oral hearing that gives each party sufficient opportunity to present its case. This is particularly true for fact– and expert-driven cases, such as, for example, in the sphere of construction. Conversely, in the admittedly rare cases where the decision of the arbitral tribunal depends on questions of law only, less effort will, as a rule of thumb, be required. It might in these rare constellations even be conceivable to dispense with an expensive and time consuming oral hearing altogether and to rather decide the case exclusively on the basis of written submissions and documentary evidence. Such a documents only arbitration would, however, under most arbitration laws presuppose the consent of the parties.[34]

The complexity of the case always has to be seen in the context of the significance of the dispute for the parties. While the amount in dispute clearly is the most relevant aspect here, other factors have to be considered as well. An arbitration with comparatively small stakes will thus justify disproportionately high expenditures with regard to costs and time where, for example, the economic existence of one or both of the parties or the contestants' reputation in the marketplace depends on the outcome. Likewise, while the idea to hold an extra hearing on the allocation of costs seems to be fallacious in most constellations, such a hearing could actually make sense where the issues involved are intricate and the stakes

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[33] N. Blackaby *et al.*, 335.

[34] *Cf.* Article 24 (1) UNCITRAL Model Law on International Commercial Arbitration.

are sufficiently high. Particularly the latter is not uncommon in complex arbitrations where costs can easily pile up to several millions.

Another aspect that arbitrators should bear in mind when weighing due process and efficiency is the expectations of the parties. Such expectations depend heavily on the legal background of the participants in the arbitration. While, to state the most prominent example, parties (and legal counsel, for that matter) from a common law background will usually expect some kind of document production (and especially parties with a US background might often even expect full-fledged discovery), parties from a civil law background have traditionally been reluctant to accept any duty of the opposing side to produce evidence that could support their opponent's case.[35] These different expectations should be reflected in the procedure. It might still be perfectly reasonable for the arbitral tribunal to, for example, order document production in an arbitration between parties from Austria and from Germany. Such a constellation might however call for a more detailed discussion of the issue with the parties and a more thorough explanation of the rationale underlying the respective order. This will ultimately increase the acceptance of the measure in question and, as a consequence, of the proceedings as a whole.

5. OBTAINING THE ONE WITHOUT SACRIFICING THE OTHER PROACTIVE CASE MANAGEMENT AS A MEANS OF ACHIEVING QUALITATIVE DUE PROCESS

Due process and efficiency need not always be antagonists. There are many situations conceivable in which both can be achieved at the same time. The key factor here is good communication between all participants in the arbitral process and proactive case management by the arbitral tribunal.

It will be the initial view of most parties that their right to be heard and to present their case will increase proportionately with the amount of submissions they are allowed to make, the amount of evidence they are allowed to submit and, finally, the amount of "airtime" they will be granted in an oral hearing. What really matters, however, is not the mere quantity of what a party has said. The dispute will rather exclusively be decided on the basis of what the arbitral tribunal has actually understood.

The key to qualitative due process thus is effective communication between the participants in the arbitration. This starts with the submissions of the parties. The parties and their legal counsel are well advised

[35] G. Kaufmann Kohler, P. Bärtsch, "Discovery in international arbitration: How much is too much?", *SchiedsVZ* 1/2004, 14 17, who also provide a brief overview over evidentiary rules in key jurisdictions.

to focus their submissions on what is really relevant and not to bury the decisive facts and legal arguments in a heap of unnecessary information.[36] Concise submissions will not only save legal costs but will in particular facilitate an early involvement of the arbitral tribunal. Such early involvement should not be confined to setting out the procedural rules of the game in an early case management conference as it is now expressly foreseen in Article 24 (1) of the new ICC Rules. Rather, it is crucial that the arbitrators consider the relevant issues of law and of fact as early as possible, ideally after the first or second round of submissions, but in any case well in advance of the oral hearing.[37]

Such an early involvement of the arbitral tribunal will have two major advantages. First, most procedural decisions can only properly be made in the light of the underlying substantive issues. This is particularly true with regard to procedural decisions that are supposed to enhance the time and cost effectiveness of the arbitration. An arbitral tribunal that has not thoroughly analysed the case and maybe has not even yet read the parties' submissions[38] will, to give an example, be very reluctant to exclude evidence on the grounds that such evidence, in the language of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, is not relevant to the case and not material to its outcome.[39] Likewise, bifurcation of the proceedings (into, for example, a jurisdictional and a merits phase) will only enhance efficiency if it is at least conceivable that the arbitration will come to an end after the first stage and where the issues that are relevant in the context of phase one do not again arise in the ensuing phase two.[40] Otherwise, the only effect of bifurcation may well be the multiplication of costs and the unnecessary prolongation of the proceedings. An arbitral tribunal can therefore only decide on bifurcation after it has at least obtained a general understanding of the key issues of the case. Second, and most important, an arbitral tribunal that considers the key procedural and substantive issues of the case early is in a position to start a proactive discussion with the parties early which in turn facilitates an optimal preparation of the oral hearing.

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[36] *Cf.* B. Legum, "The Ten Commandments of Written Advocacy in International Arbitration", *Arbitration International*, 1/2013, 1.

[37] *Cf.* S. Elsing, 117.

[38] This is, unfortunately, not unusual given some arbitrators' heavy workload, *cf.* B. Legum, 1.

[39] Articles 3.7 and 9.2 (a) IBA Rules on the Taking of Evidence in International Arbitration. Evidence will be relevant where a clear line can be established between a given piece of evidence and the contention it is intended to prove. Materiality, on the other hand, presupposes that the contention itself will have a bearing on the final outcome of the case and, therefore, the arbitral award rendered; N.D. O'Malley, *Rules of Evidence in International Arbitration An Annotated Guide*, Informa, London 2012, 55 58.

[40] L. Greenwood, Does Bifurcation Really Promote Efficiency?, *Journal of Inter national Arbitration* 2/2011, 110.

The oral hearing is of particular significance in the perception of the parties. It is the parties' day in court, and the way the hearing is conducted will often have a great impact on how the parties perceive the arbitral process as a whole and on whether they accept its final outcome in the form of the arbitral award.[41] The oral examination of witnesses and experts is of course an indispensable part of almost every hearing. But apart from that, another important purpose of the hearing should be to enter into a discussion between the arbitrators and the parties about what is relevant in the given case. Such a discussion presupposes, as has just been mentioned, that the arbitrators already have a clear understanding of the case at the beginning of the hearing. The arbitral tribunal may even give concrete guidelines in advance on the topics it wants to discuss, including the order of discussion and instructions on which side should speak first on which issue. It has, with regard to a specific hearing, namely in the Aminoil case, been observed that "*this positive intervention by the arbitral tribunal led to a significant saving in time and money for both parties – and, in the end, to an outcome that both parties agreed as fair.*"[42]

In contrast, allowing the parties to hold seemingly endless opening statements or other oral pleadings will, as a general rule, neither further the cause of due process nor increase procedural efficiency. The arbitral tribunal's role during such extensive pleadings is merely passive and there is no compelling reason while the argument of the parties should not already have been made in the written submissions.[43] Short and concise opening statements delivered by a skilled oral advocate can be an asset as they serve as a great introduction to the hearing and often sum up the key aspects of the dispute in a way that would not have been possible in the written submissions. Any further monologue of the parties or their representatives, respectively, will usually merely waste the arbitrators' attention and other valuable resources such as time and money.[44]

Another pitfall that arbitrators need to avoid during the oral hearing is predisposition. Especially the arbitrator who comes to the hearing well prepared and with a distinct opinion with regard to the issues at dispute will often tell the parties that he or she has read and understood every-

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[41] D. J. A. Cairns, "Oral Advocacy and time Control in International Arbitration" in: A.J. van den Berg (ed), *Arbitration Advocacy in Changing Times*, *ICCA Congress Series Volume 15*, Kluwer Law International, Alphen aan den Rijn 2011, 185.

[42] N. Blackaby *et al.*, 377.

[43] A different rationale applies where parties deviate from what can now be called international best practice and agree that the traditional "common law model" be applied, *i.e.* that the facts of the case are primarily established during the oral hearing. In such a case, insisting on several rounds of written submission in addition to the extensive hearing would merely duplicate the parties' efforts and lead to inefficiency; D.J.A. Cairns, 192.

[44] D. J. A. Cairns, 185 186.

thing and that there is consequently no need to discuss the parties' case in detail. This would be the approach prevalent in the national courts of several civil law jurisdictions such as Germany and it is therefore not surprising that arbitrators from a civil law background are particularly prone to falling into this type of pitfall. But even a thorough analysis of the case can never be a substitute for a well prepared discussion with the parties. Even the most experienced arbitrators will often learn new things and discover new aspects of a case that previously seemed to them crystal clear. Apart from that, predisposition will almost always leave the parties with the impression that they were factually deprived of their day in court. Unnecessary challenges before the national courts will often ensue.

6. Conclusion

The key to reconciling due process and efficiency thus lies in proactive case management. Arbitrators who are familiar with the case and its key issues will be in a much better position to actually deny the parties' requests for extensive pleadings and extensive production of evidence. Particularly in an international context, arbitrators should always keep an eye on the expectations of the parties with regard to the conduct of the arbitrations since such expectations can differ greatly depending on the legal background of the participants of the arbitral process. Finally, there are a few pitfalls to watch out for. While discussing procedural issues with the parties is always recommendable, making the parties agree on certain procedures entails the risk that all participants will later be bound by such agreements even in constellation where the case evolved in a manner that had not been anticipated when the respective agreement was concluded. Furthermore, arbitrators should always listen to the arguments and concerns of the parties regardless of how thoroughly they have studied the case. It is the parties' dispute after all.

The arbitrator's task in this context is to facilitate a discussion between all participants of the arbitral process. Ideally, the result will be that the arbitral tribunal at the end of the hearing has fully understood the case before it which in turn enables it to render an award that touches on all important aspects and will finally find acceptance even with the losing party.