



Dispute Resolution for International Distribution

IDArb Training Seminar on managing arbitration, with particular reference to expedited arbitration under the Swiss Rules

Geneva, 8 November 2018

Programme

The seminar will be chaired by Fabio Bortolotti and Jean-Paul Vulli  ty. The discussion of the various themes will be guided by two participants, of the two arbitrators lists, who will discuss between themselves and in particular provoke discussion with the floor.

The discussion leaders may contact each other by email or at the dinner the day before, but the purpose is not that they make a presentation but simply that they provoke a discussion with the participants on the subject matters in question on the basis of their experience.

MORNING SESSION	
9:30-10:00	Registration
10:00-11:00	<p>The first steps of the arbitrator - Main issues to be discussed at this stage</p> <p>Once appointed, the arbitrator must contact the parties and agree on the organization of the arbitral proceedings.</p> <p>The prevailing practice for non-expedited arbitrations is to have a management conference, where the various points (time-table, way of hearing witnesses, exchange of briefs, presentation of evidence, etc.) are discussed and the result is normally drawn up in an initial procedural order.</p> <p>How should this first stage of the proceedings be managed in an expedited procedure? Should there be a conference call with the parties or should the arbitrator send a draft of procedural rules by e-mail? Is a meeting at this stage to be preferred? Who should participate? Only counsels or also their clients?</p> <p>If the parties have not made already a full statement of claim and of defence in their Notice of Arbitration and Answer, the arbitrator shall fix a term for the submission of the statement of claim and defence, containing all the documents submitted and the indication of the witnesses (including party representatives) to be heard at the hearing. The arbitrator may agree with the parties to a sequential or simultaneous delivery of the written submissions.</p> <p>Setting a cut-off date for presenting evidence? When? Before the hearing with the exception for new issues appeared at the hearing, if the arbitrator agrees to make an exception.</p> <p>If the arbitrator wishes the parties to conclude orally at the end of the evidentiary hearing, this should be clearly stated from the beginning, since this would be very surprising for counsels of certain countries.</p> <p>Horst Becker, Ariathes Rechtsanwälte, Munich</p> <p>Ignacio Alonso, Even Abogados, Madrid</p>
11:00 - 11:30	Coffee break
11:30 - 12:30	<p>Dealing with requests of discovery/document production</p> <p>In some cases, a party may request discovery of relevant documents from the other party.</p> <p>Discovery in general (as practiced in many common law jurisdictions) requires a lengthy procedure which is difficult to reconcile with an expedited arbitration, which should in principle be refused by the arbitrator.</p> <p>On the contrary, requests for the production of specific documents the importance of which appears during the arbitration, may be reasonable in the context of certain situations, such as for instance: right to commission on sales made by the principal in the exclusive territory of the agent; sales by supplier in the territory on the distributor, etc..</p> <p>This type of requests should be considered after the first exchange briefs, when it is possible for the arbitrator to have a more precise idea of the terms of the dispute.</p> <p>What happens if the requested party refuses? Can the arbitrator draw conclusions from the refusal to</p>

	disclose? Didier Ferrier , Professor of Law, University of Montpellier Edward Miller , Reed Smith, London and Paris
12:30 - 14:00	Lunch

AFTERNOON SESSION	
14:00 - 15:00	<p>Dealing with a request of interim measures - Expert evidence</p> <p>Interim measures. Let us imagine that the distributor who pretends that the contract has been unlawfully terminated requests an interim measure prohibiting the supplier to sell within his exclusive territory. The supplier claims that he would suffer a huge damage, for which the distributor would have be held responsible if it appears that the termination was lawful.</p> <p>What are the conditions for granting interim measures under the Swiss Rules?</p> <p>The arbitrator may ask the parties to evaluate the amount of the possible damage that may be suffered in case the interim measure appears not to be justified. This may convince the requesting party abandon this claim.</p> <p>Expert evidence. It should be clear that expert evidence is in principle not compatible with an expedited procedure. As far as possible, such solution should be avoided.</p> <p>However, this may be necessary when complex calculations of commission, royalties, goodwill indemnity, etc., are needed. If an expertise is really necessary, this issue should be decided as soon as possible, in order to be able to examine the expert at the hearing. If this is not possible, parties may agree to renounce to the expedited procedure.</p> <p>Paolo Marzolini, Patocchi & Marzolini, Geneva Lisette Bieleveld, Van Doorne, Amsterdam</p>
15:00 - 16:00	<p>Dealing with possible objections regarding jurisdiction - Absence of a party</p> <p>If one of the parties objects to the jurisdiction (e.g. by invoking the nullity of the arbitration clause) the arbitrator is entitled to decide this issue.</p> <p>A common jurisdictional objection is that the arbitration clause has not been agreed in writing. Would it be useful to make some considerations about Swiss law and jurisprudence on this subject matter?</p> <p>Sometimes this issue is raised before the Institution, but, except for very exceptional cases, the Institution will not be entitled to decide the issue and will leave the decision to the arbitrator.</p> <p>The party raising this issue may request the arbitrator to decide on it as a preliminary question, but this solution should be avoided in an expedited procedure. If the lack of jurisdiction is evident from the beginning (a rather unlikely situation), the arbitrator may decide that he/she has no jurisdiction without dealing with the merits of the dispute.</p> <p>If a party decides not to participate to the arbitration, the arbitrator will proceed in the absence of that party and will take all possible precautions to avoid a possible objection by such party, by informing that party in writing of any procedural step in order to show that the party was given any opportunity to present its arguments. Moreover, the arbitrator shall evaluate critically the arguments made by the other party and take upon himself the burden of testing the assertions made by the active party</p> <p>Frank Spoorenberg, Tavernier Tschanz; SCAI, Geneva Patrick Rohn, Thouvenin Rechtsanwälte, Zurich</p>
16:00-17:00	<p>Witnesses and evidentiary hearing</p> <p>It is essential for a good understanding of the case that the arbitrator has the opportunity to question the witnesses and the parties (individuals involved in the dispute).</p> <p>The usual practice is to ask the parties to prepare witness statements and then to examine the witnesses at the evidentiary hearing. In an expedited arbitration it may be sufficient to request that the parties indicate the witnesses and the issues on which they will be heard, especially when the dispute is between parties who are not used to this type of procedure.</p> <p>As to the examination of the witnesses the usual system (direct examination, cross examination) should be followed. If the parties are not used to it (a situation that may arise in case of small disputes with lawyers not experienced in international arbitration), they should be informed in time.</p> <p>What about special forms of examination, such as joint examination (so called "hot tubbing") or examination by video-conferencing?</p> <p>Problems may arise if the counsel of one party uses an aggressive approach in cross examination. In this context the arbitrator should warrant that there is equal treatment between counsels, if the cross examination skills of the two counsels are too different and the counsel practicing in a common law country would have an undue advantage.</p> <p>How to react when counsel of a party makes unjustified requests, threatening to invoke the violation of the right of defence if they are not accepted?</p>

	<p>As a general rule, the arbitrator should try to convince counsel that the request cannot be accepted, explain the reasons for this position, and try to find an acceptable compromise.</p> <p>If this is not possible, and the arbitrator is sure that he/she is right in refusing the request, he/she should not fear do so, especially if accepting unjustified requests may prejudice the rights of the other party. Finally, an excessive acquiescence to unjustified requests of the parties may adversely affect the credibility of the arbitrator.</p> <p>Aimery de Schoutheete, Liedekerke, Brussels</p> <p>Susanne Margossian, UP International SA, Geneva</p>
--	--

Practical Information Agenda

November 7, 2018

Welcome drink and Dinner	19:30	Café Cult 5 place de Jargonnant 1207 Genève
--------------------------	-------	---

November 8, 2018

Registration	9:30	
Morning Session	10 - 12:30	Lalive 35 rue de la Mairie 1207 Genève
Afternoon Session	14:00 - 17:00	
Lunch	12:30 - 14:00	Chez Calvin 2 rue du Nant 1207 Genève

Costs

Dinner cost to be paid directly to the restaurant	55 CHF or 65 CHF depending on the menu choice
---	--

Contribution for coffee break and lunch to be paid during the registration	50 CHF
--	---------------

For any further information, please contact Carlotta Mazzetti at idarb@idiproject.com