

## CHAPTER 30 The Concept and Scope of the Arbitrator's

### Autonomy

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#### §30.01 Introduction

In this chapter, I shall examine the question of the existence of the concept of arbitrator autonomy, its scope, and relevance in international arbitration. Julian Lew in his 1978 book on *Applicable Law in International Commercial Arbitration*, promotes party autonomy and agrees with its definition as a doctrine that frees the parties to select the law that governs their relations, which, 'is thus accompanied by an initial removal of the responsibility from the judge or arbitrator to the parties'.<sup>1</sup> This description of party autonomy remains true with arbitration laws and rules granting parties greater voice in their arbitration. This chapter argues that there is increasingly a shift from party autonomy to arbitrator autonomy, with the tribunal empowered to determine more procedural issues where the parties have not made any decisions or choices. The idea of the autonomy of the arbitrator arises from the question of who the master of the arbitral process is: the parties or the arbitrator? In this chapter, arbitrator also includes the arbitral tribunal. In the context of this topic, I like the definition of 'autonomy' provided by the Collins Dictionary as, 'the ability to make your own decisions about what to do, rather than being influenced by someone else or told what to do'.<sup>2</sup> This definition ably captures the question of the role of the arbitrator in the international arbitration process and the arbitrator's control over the arbitral process.

This chapter will revisit the concept of autonomy in arbitration linked back as Julian Lew postulates to the autonomous nature of international arbitration (2). A brief discussion of the purpose autonomy will follow (3) before the discussion of the shift to arbitrator autonomy and its scope (4); followed by a conclusion (5).

#### §30.02 The Concept of Autonomy and International Arbitration

Arbitration is widely recognised as an efficient dispute resolution mechanism adopted primarily for the resolution of commercial disputes (whether cross border or domestic). As a

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<sup>1</sup> Julian D.M. Lew, *Applicable Law in International Commercial Arbitration: a Study in Commercial Arbitration Awards* (Oceana Publications) 1978, para. 87 (references excluded).

<sup>2</sup> Collins Dictionary online: <https://www.collinsdictionary.com/dictionary/english/autonomy> (accessed 15 August 2022).

dispute resolution mechanism applied by trading organisations, individuals, and firms, it was reputed for being fast in comparison to litigation before national courts.<sup>3</sup> This description may now be contested as some courts have tried to note that their processes can be equally fast. One interesting example can be found in the decision of the Supreme Court of the United Kingdom in the much discussed *Enka v. Chubb* where Lord Hamblen notes:

It is a striking feature of the English proceedings that the trial, the appeal to the Court of Appeal and the appeal to the Supreme Court have all been heard in just over seven months. This is a vivid demonstration of the speed with which the English courts can act when the urgency of a matter requires it.<sup>4</sup>

It remains correct to assert that most arbitration references take a shorter time to get to a final award than a final decision in litigation from most first instance courts. This is certainly the case in most jurisdictions. It has been noted that in some developing jurisdictions, litigants may wait up to ten or more years to get a first instance judgement.<sup>5</sup> Some arbitration institutions also set out the average time within which final awards should be published by tribunals under their rules.<sup>6</sup>

In his 2005 Freshfields/School of International Arbitration 20<sup>th</sup> annual lecture titled, *Achieving the Dream: Autonomous Arbitration*,<sup>7</sup> Julian Lew argued that international arbitration occupies an autonomous legal regime the effect of which is to:

remove the process from the control of national law and courts. The arbitration exists in a different domain, a non-national or international sphere.<sup>8</sup>

It is in the spirit of this autonomy of international arbitration that this chapter argues for the autonomy of the arbitrator vis-a-vis the parties and their autonomy, concluding that the

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<sup>3</sup> See for example an account of commercial arbitration in the European Middle Ages in Gary Born, *International Commercial Arbitration*, Volume I (2009) pp. 27-32.

<sup>4</sup> *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38 at para. 24. We are also aware that some cases at the same time had been pending before the English courts for much longer periods. See for example, National Statistics for the Civil Justice Statistics Quarterly: January to March 2022, at: <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2022/civil-justice-statistics-quarterly-january-to-march-2022> (accessed 15 August 2022).

<sup>5</sup> Examples of such jurisdictions include India and Nigeria.

<sup>6</sup> See for example, Article 31 of the ICC Arbitration Rules, 2021.

<sup>7</sup> Julian Lew, 'Achieving the Dream: Autonomous Arbitration', *Arbitration International*, Vol. 22, No. 2 (2006), 179 (hereafter 'Achieving the Dream').

<sup>8</sup> *Ibid.*, at p. 195.

arbitrator's autonomy overrides that of the parties during the arbitration proceedings. It is however, important to note the cautionary view of the authors of *Redfern and Hunter on International Arbitration* that:

Such emphasis of the 'autonomy of the parties' might suggest that parties and arbitrators inhabit a private universe of their own. But this is not so. In reality, the practice of resolving disputes by the essentially private process of international arbitration works effectively only because it is supported by a complex public system of national laws and international treaties.<sup>9</sup>

### §30.03 The Purpose of Autonomy in Arbitration

The issue of autonomy leads back to efficiency in arbitration. Arbitration practitioners easily recount delay tactics adopted by a party (usually, not themselves) in an arbitration they were involved. We herald 'party autonomy' as the essence of arbitration: it is the decision of the parties, we hear. This chapter critically examines this view in the context of arbitral practice to understand if this is the full story.

Party autonomy is a phrase that is almost synonymous with arbitration and by its use we basically mean that the law that governs the arbitration agreement grants the disputing parties' powers to determine how they wish to operationalise their arbitration. Examples of these are where most national laws allow the parties to choose the place/seat, language, arbitrator appointment procedure, arbitrator challenge procedure, applicable substantive laws or rules, etc, of the arbitration.<sup>10</sup> These provisions are usually couched in permissive language and act as default rules to apply where the parties do not exercise the power to make those decisions.<sup>11</sup> The parties therefore, as masters of their dispute, are provided with the tools to effect the execution of their arbitration agreement.

It is also this 'autonomy' of the parties that is said to be one of the major attractions of arbitration as a dispute resolution mechanism to commercial parties. The Queen Mary/PWC

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<sup>9</sup> Nigel Blackaby & Constantine Partasides QC with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th ed., OUP, 2015) at para. 1.08 (hereafter, *Redfern and Hunter*).

<sup>10</sup> See for example Articles 10, 19, 20 and 28 of the UNCITRAL Model Law on International Commercial Arbitration, (2006 version) with text available at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf) (accessed 15 August 2022).

<sup>11</sup> This is usually by the use of the word, 'may' instead of 'shall' or 'will'.

2006 survey found that of the top reasons why parties choose international arbitration, flexibility of the procedure and the ability of the parties to select the arbitrators were ranked very highly.<sup>12</sup>

The scope and contours of the autonomy of the parties is also accepted by commentators as being limited by mandatory provisions of the applicable law (which may be the law of the seat of arbitration as the law with the closest connection to the arbitration or the law of the place of enforcement) and the public policy of the relevant place which may be the seat of arbitration or the place of enforcement as well. It is correct that some commentators refer to international public policy<sup>13</sup> (and reference the New York Convention,<sup>14</sup> though, the New York Convention does not mention international public policy), and some national laws also refer to international public policy in the context of cross border disputes.<sup>15</sup>

There is no such clarity or even agreement among commentators on the existence and scope of the arbitrator's autonomy. What is however agreed, is that the main obligation of the arbitrator is to resolve the dispute submitted to it by the parties. Lew, Mistelis and Kroll note that this obligation, 'includes in particular a duty to conduct the arbitration in such a way that it leads to a valid award not open to challenge'.<sup>16</sup> This comment aptly captures the relevance of this discussion on the arbitrator's autonomy.

The individual with the primary burden to resolve the dispute between the parties is the arbitrator (not the parties). It is argued that to enable the arbitrator to discharge this fundamental and primary obligation, they require a degree of autonomy that will allow them to (using the definition of Collins dictionary), make their, 'own decisions about what to do, rather than being influenced by someone else or told what to do'. In this case, the arbitrator should not be influenced or told what to do by the disputing parties or arbitral institution. The arbitrator should be solely guided by its obligations under the relevant arbitration agreement, arbitration rules and arbitration law.

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<sup>12</sup> Queen Mary/PriceWaterHouseCoopers, *International Arbitration: Corporate attitudes and Practices*, (2006) at p. 6 and available at: [https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy\\_2006.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf) (accessed 15 August 2022).

<sup>13</sup> See for example Julian Lew, 'Achieving the Dream', *supra* n. 7, at p. 201.

<sup>14</sup> Convention for the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958. See for example, Article V(2)(b) of the New York Convention.

<sup>15</sup> For example, Article 1520(5) Arbitration Law of France, 2011 (French Code of Civil Procedure, Decree No. 2011-48); and Article 26 OHADA Uniform Arbitration Act 2017.

<sup>16</sup> Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), at p. 279 (para. 12-12). See also Redfern and Hunter, *supra* n. 9 at paras 1.80-1.86.

As it refers to party autonomy, there is, therefore, no serious contentions on its existence and scope in arbitration, especially as these powers of the parties are regulated under national arbitration laws and arbitration rules. Can we also reach the same conclusion as it relates to the autonomy of the arbitrator?

### §30.04 Arbitrator Autonomy

How then can we describe the ‘arbitrator autonomy’? simply put, this refers to the authority or power of the arbitrator to exercise control over the arbitral proceedings. As it stands, the tension is in determining who determines procedural issues in arbitration: the parties or the arbitrator or even the arbitral institution?

The arbitrator becomes involved in arbitration from the moment they accept their appointment (or the full panel is constituted) until their final award is published, or if relevant, any corrections to the final award is completed.<sup>17</sup> These are the periods the mandate of the arbitrator commences and terminates.

From the various arbitration rules, the power to make default decisions rests with the arbitrator from the moment the arbitrator enters into the arbitral proceedings.<sup>18</sup> Examples from the UNCITRAL Arbitration Rules include the general provision under Article 17 which provides:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the 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. The arbitral tribunal, in exercising its discretion, shall conduct the

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<sup>17</sup> For example, General Principle I of the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) sets out this time period as, ‘Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.’ The IBA Guidelines are available at: <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (accessed 15 August 2022).

<sup>18</sup> I have not used the word commencement since arbitration commences at different times under different legal regimes. For example, under the ICC Rules (Article 4(2)) arbitration commences when the request for arbitration is received; while under Article 3(2) of the UNCITRAL Arbitration Rules (2010) arbitration commences when the notice of arbitration is received by the respondent.

proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute<sup>19</sup>

This provision of the UNCITRAL Rules expressly empowers the arbitrator as stated above. However, Article 22.2 of the ICC Rules (2021) limits this power of the arbitrator by reference to the parties. The ICC Rules provide:

In order to ensure effective case management, *after consulting the parties*, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, *provided that they are not contrary to any agreement of the parties* ... [Emphasis added].

The ICC Rules expressly limit the powers of the arbitrator to the views, comments, or agreement of the parties.

Is there any major difference in these two formulations? In this author's view, there are fundamental differences. Under the UNCITRAL regime, the arbitrator can be described as the master of their procedure. It is for the arbitrator to run or conduct the arbitration as they see fit with the only caveat being to ensure the equality of treatment of the parties, avoiding unnecessary delay and expense and ensuring the efficiency of the proceedings. It is arguable that though in practice, the arbitrator may seek the views of the parties in making procedural decisions, they do not necessarily have to do so, as long as they can justify that their procedural decisions meet the criteria set out under Article 17.1 of the UNCITRAL Rules. However, the situation under the ICC Rules differs. The ICC Rules expressly require the arbitrator to consider the views of the parties and not to make procedural decisions before consulting the parties; and the procedural measures the arbitrator adopts cannot be contrary to the agreement of the parties. Thus, under the ICC Arbitration regime, the arbitrator must take notice and consider the views of the parties in its procedural measures.

Under the English Arbitration Act 1996 (EAA), similar provisions ensure the autonomy of the arbitrator over the arbitral proceedings. Section 33 of the EAA sets out the general duty of the arbitrator as a mandatory provision to:

(1) (a) act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

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<sup>19</sup> There are different formulations of this provision in different rules of arbitration.

(b) 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 failing to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all powers conferred on it.

Section 33 of the EAA does not condition or subject the exercise of the powers conferred on the tribunal to the, ‘view, comments or agreement’ of the parties (as in the ICC Rules). The recent decision of the English commercial court in *Union of India v. Reliance Industries Limited and another*, evidences this power of the arbitrator over the proceedings by preventing abuse of the arbitral process through the exercise of its procedural powers.<sup>20</sup>

Having noted these two different regimes: the ad hoc regime of greater arbitrator autonomy and the ICC regime of more or less, greater party autonomy over the procedural phase of the arbitration, the question that arises is which regime better serves the arbitration process. In this author’s view and from their practice, the better view is the autonomy of the arbitrator over the arbitral process subject only to due process and efficiency requirements.

Will such a regime negatively impact on party autonomy? It does not appear so since the two regimes: arbitrator autonomy and party autonomy are not contradictory or in opposition but directed in achieving efficiency and due process in the arbitral process. However, it is argued that each ‘autonomy’ has a separate sphere of influence and period. Party autonomy should and does operate from the period the underlying transaction is completed (leading to the conclusion of an arbitration agreement), commencing the arbitration in accordance with the arbitration agreement,<sup>21</sup> until the arbitrator accepts appointment. Upon the constitution of the arbitral tribunal, it is argued that the arbitrator should take control or charge over the arbitral proceedings without their powers being subjected to the vagaries of the parties. This will greatly enhance the actualisation of the efficiency requirement of the various arbitration laws and rules and reduce the ability of the parties (or one of them) to delay and frustrate the progression of the arbitral proceedings, and of course, abuse of the process.

This discussion raises the question whether the arbitrator or the parties are the masters of the dispute. It is suggested that the phrase ‘master of the dispute’ may need further clarification to reflect the arguments in this chapter. It is obvious that the parties are the

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<sup>20</sup> *Union of India v. Reliance Industries Limited and another* [2022] EWHC 1407 (Comm).

<sup>21</sup> Which includes exercising all rights to defend and uphold the arbitration agreement.

masters of their dispute but the discussion argues that the arbitrator is the master of the arbitral proceedings from the moment the tribunal is constituted.

## §30.05 Conclusion

This chapter has argued briefly that the arbitrator should be the master of the arbitral proceeding from the moment they enter into the arbitration until their mandate ends. This view ensures that the arbitrators have full authority and power to run the arbitration in an efficient, and time and cost-effective manner. Does this view deprive the parties of control over their dispute? The short answer is, No, it does not and it should not. The parties retain control over their *dispute* while the arbitrator retains control over the *arbitral proceeding* upon accepting appointment, at which moment the parties cede their powers or authority to the arbitrator to enable the arbitrator to perform the terms of their arbitration agreement, which is to determine their dispute in accordance with the terms of the arbitration agreement, relevant arbitration rules and laws.