

**Limits to Party Autonomy in
International Commercial
Arbitration**

Franco Ferrari
Editor

NYU
Center for Transnational Litigation,
Arbitration and Commercial Law

JURIS

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Preface

Courts and commentators have often stated that in arbitration “party autonomy is everything.” In effect, where the adjudicative power does not rest on party autonomy, there is no arbitration. But the papers published in this book, which were presented at a conference hosted by NYU’s Center for Transnational Litigation, Arbitration and Commercial Law that took place in September 2015, show that while party autonomy may trigger everything, meaning the steps necessary for one to be able to speak of arbitration, it is not itself everything. Party autonomy is limited, as the papers published here clearly show. As soon as the arbitration proceedings are initiated, the parties lose at least part of their autonomy, and the issue arises of who really owns the arbitration proceedings. The further the arbitration proceeds, the more limits party autonomy encounters.

This does not mean, however, that prior to the arbitration proceedings being initiated party autonomy does not encounter any limitations. It just means that for them to become apparent, proceedings concerning the arbitration agreement must be commenced, and for the purpose of highlighting these limitations it may well not matter whether the proceedings are state court proceedings or arbitral proceedings. All arbitration agreements contain intrinsic limitations. This is also why the best thing that can happen to an arbitration agreement as the main expression of party autonomy is the absence of a dispute between the parties, since whatever dispute may arise in connection to the agreement, it will evidence some of the limitations.

But what are the reasons for the existence of these limitations? As the papers show, these limitations are due to the number and variety of stakeholders, who range from the parties themselves, the arbitrators, the arbitral institutions, and, last but not least, the public at large.

As regards the parties themselves, one may, to give just one example referred to in the papers, think of parties to an arbitration agreement who have unequal bargaining power. Should the agreement be upheld despite this inequality? And what about an agreement to which an institutionally weaker party is party?

As for the arbitrators, limitations to party autonomy arise, *inter alia*, out of the fact that arbitrators agree to act as arbitrators on the basis of the arbitration agreement, and all the rules applicable to the arbitration arising therefrom, thus limiting, from a contract law point of view, the parties’ possibility to modify the arbitration agreement *ex post*. In effect,

PREFACE

once an arbitrator has accepted to act as arbitrator on the basis of the arbitration agreement, the arbitration agreement cannot be changed solely by the parties, at least not in respect of terms that do not have an impact exclusively on the parties, since the arbitrator contract implicitly incorporates the terms of the arbitration agreement.

From the papers one can also gather that arbitral institutions, too, have an interest in the arbitration process following certain rules, which may on occasion impose limitations to party autonomy. To give just one of the many examples referred to in one of the papers, parties cannot opt out of the fee schedule nor can they do away with the scrutiny of the award by the arbitral institution administering the arbitration, at least where the administering institution is the ICC.

But the public at large also has an interest in limitations to party autonomy, to the extent that the absence of any limitations can harm the arbitration process as such and lead to arbitration no longer being a viable alternative to State court litigation.

And it may well be worth reading the papers published in this book through the lens of the question of whether a certain limitation is due to the specific interests of one or the other stakeholder, to determine, among others, whether those interests can be promoted other than by limiting party autonomy, since party autonomy remains, despite the limitations highlighted in this book, the cornerstone of arbitration.

Franco Ferrari

New York, June 2016

— Chapter 6 —

**Arbitrator’s Procedural Powers:
The Last Frontier of Party Autonomy?**

*Diego P. Fernández Arroyo**

INTRODUCTION

Arbitration – and even more clearly international arbitration – is known as the legal field in which party autonomy reaches its highest expression. Indeed, the parties to a legal relationship not only decide voluntarily upon the selection of arbitration as the mechanism to settle their disputes, but they also agree on the functioning details of such mechanism. In this sense, they may define the subject matters submitted to arbitration, the concrete type of arbitration under which those disputes will be solved (*ad hoc* or institutional), the procedure to appoint arbitrators (and, of course, the arbitrators themselves), the seat of arbitration, the language of the proceedings, the law applicable to the merits of the case, and other procedural details. In other words, they set the framework and build their own dispute resolution process. In this sense, when it comes to arbitration, party autonomy does not end with the mere choice of one of the diverse available dispute settlement mechanisms; instead the parties’ will spreads – directly or indirectly – over every single element of the procedure. In sum, we find here a propitious area for the exercise of party autonomy.

Nevertheless, broad as it is, such party autonomy is not absolute even in this field¹ and, like any other right, it has some limitations.²

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¹ See G. Cordero-Moss, *Limitations on party autonomy in international commercial arbitration*, 372 RECUEIL DES COURS 129-326, (2014).

² See K. H. Böckstiegel, *Major Criteria for International Arbitrators in Shaping an Efficient Procedure*, SPECIAL SUPPLEMENT 1999: ARBITRATION IN THE NEXT DECADE: PROCEEDINGS OF THE INTERNATIONAL COURT OF ARBITRATION’S 75TH ANNIVERSARY CONFERENCE (1999), 2.

LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

Obviously, the better-known limits to party autonomy are those imposed by public powers based on policy reasons (contained in the applicable law). The most obvious expression of such limits consists in the definition of the matters for which arbitration is forbidden (arbitrability). Paradoxically, the will of the parties may occasionally find some limits without even leaving *its own field*. This is because there are other limits voluntarily established by the parties themselves, either expressly or implicitly. For instance, when the parties opt for institutional arbitration, they confine their party autonomy within the framework of the concrete rules of the selected institution (or at least those from which the parties cannot derogate). Therefore, we find here a clear area of limitations expressly or implicitly imposed to party autonomy.

Then, the picture shows a panorama with a clear and large party autonomy on the one side and several clear limits – implicitly or expressly established – on the other side. However, if we zoom in, we can also find a grey area located in-between the borders of both sides; here is where party autonomy and arbitrator's power collide. This paper deals with possible problematic situations concerning procedural issues that may be encountered in such grey area; basically, where all the parties agree upon procedural issues in a manner the arbitrators find unreasonable, inappropriate or inefficient.

In order to analyze said situation, the present paper will describe the whole scenario, by explaining the exercise of procedural party autonomy (and its limits), explaining the arbitrator's procedural role (including their duties, powers and limitations), as well as some other relevant factors (*e.g.* the different moments when party autonomy is exercised, the factual and legal framework). It will also present some potentially problematic situations and trigger some questions about how to resolve them. The core question is whether in the conduct of the proceedings arbitrators must always follow the parties' wishes or they can impose their own criteria for the sake of the proceedings. Then, the paper will explore different perspectives on how to answer such questions, to finally reach some conclusions, aiming at shedding some light on the topic and fostering further discussion.

ARBITRATOR'S PROCEDURAL POWERS: THE LAST FRONTIER OF PARTY AUTONOMY?

I. EXERCISING PARTY AUTONOMY CONCERNING PROCEDURAL ISSUES

A. *The Parties' Power to Select Procedural Rules*

1. *In General*

A fundamental feature of arbitration is – without any doubt – that the parties enjoy great freedom to set forth all aspects of the procedure.³ They can do so either directly or indirectly. For instance, when the parties submit their dispute to institutional arbitration, such submission in turn entails the application of the institutional arbitration rules, thus, indirectly regulating the procedure. Actually, even when the parties submit their dispute to *ad hoc* arbitration, they generally adopt a determined set of rules, such as the UNCITRAL Arbitration Rules.⁴ Otherwise, the parties might be expressly or implicitly subject to the procedural provisions of an arbitration law (generally the law of the seat).

This great expression of party autonomy is what makes arbitration so attractive to the parties, particularly at an international level. This is because it allows them to adopt or create the procedure that fits best the particularities of the dispute at hand (*e.g.* complexity of the dispute, industry involved, time constraints, among many others). The importance of party autonomy is therefore uncontested and it is present in all arbitration legislations and institutional rules around the world. Actually, a dispute resolution method without this degree of party autonomy could hardly be called *arbitration*.

2. *In Particular*

It goes without saying that no institutional rules or arbitration law could envisage all possible procedural scenarios, which in the end will depend on the particularities of each concrete case. Actually, it would be an anticipated failure to even try doing so. Therefore, the parties generally complete the selected procedural rules by establishing more

³ See, for instance, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, article 19. Hereinafter “UNCITRAL Model Law.”

⁴ UNCITRAL Arbitration Rules (as revised in 2010). Hereinafter “UNCITRAL Rules.”

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particular rules that they consider suitable for the concrete dispute. Sometimes, after discussion between the parties and the arbitrators, such rules are established through a procedural order, in the so-called *Procedural Order No. 1*. Although it is likely that the arbitrators will provide some sort of *model rules*, the idea is that the parties can adapt the details of those rules, as they prefer. This represents an opportunity to shape the boundaries of the grey area, by setting new clear limits to party autonomy (the extent of those limits will be analyzed later on).⁵

3. *Right to Sink the Proceedings?*

As mentioned already, the parties' will has some limits. But if they act within those limits, are they allowed to do whatever they want? Thus, a key question is whether the parties, when establishing the procedural details of the arbitration (directly or indirectly), should be guided by some objectives. In other words, should the parties necessarily adopt rules that will enhance the proceedings or are they allowed to even sink the proceedings (regardless of whether they do it intentionally or unintentionally)? Given that arbitration arises out of the will of the parties, it is generally said that they are the owners of the procedure because, without them, such procedure would have never come into existence. This, in turn, means that they are free to take the proceedings in any direction they want (as the owner can decide as he pleases regarding his property). However, as it is evident, the arbitrators cannot be forced to participate in unreasonable, inappropriate or inefficient proceedings.... or can they? Throughout the following sections, it will be analyzed whether such statement is true, or in any event, to what extent it is true.

B. *The Clear Limits to Party Autonomy*

1. *Public Mandatory Rules*

In the area of the clear limits of party autonomy,⁶ we find public policy and mandatory rules (contained in the applicable law).⁷ This is

⁵ See *infra* § IV.

⁶ The term "clear" refers to the existence of those limits; however, the extent of those limits will depend on the particular case.

⁷ G. B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, (Kluwer Law International, 2nd Edition, 2014), 2001.

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because, even if the parties agree on certain procedural solutions, they cannot implement them in violation of those mandatory norms that are applicable.

Besides domestic applicable law, much has been discussed about the existence of a transnational procedural public policy, which would also operate as a limit to party autonomy. Although this is not the occasion to elaborate on the topic, following other authors, it could be said that some sort of transnational procedural public policy actually exists. To comfort this idea it has been said that the terminology *public policy* as used in the 1958 New York Convention⁸ includes both substantive and *procedural* principles, as well as that the terminology *international public policy* encompasses a substantive and *procedural* aspect.⁹

The reasons justifying such assertion are not a matter of science fiction, but instead, purely factual. There are some procedural principles that can be equally found in most legal systems (although with some slight differences). Therefore, whichever legal system ends up being involved in a particular case, it is quite sure that those principles will always become applicable. Basically, such transnational procedural public policy would include: (i) the right to equal treatment and (ii) the adequate opportunity to present one's case.¹⁰ The first one mainly includes: an impartial tribunal, equality in the appointment of arbitrators, equal communication with the tribunal, etc. In turn, the second one mainly includes: proper notice of all relevant situations (*e.g.* initiation of the arbitration, initiation of the appointment procedure, pleadings, allegations and submission of evidence), reasonable time and opportunity to respond and the right to adversary proceedings.¹¹

For example, these principles can be found in the UNCITRAL Model Law, which embodies the most accepted trends at a global level. In its article 19, such instrument allows the parties to create the procedure, with the caveat that it must be subject to *its own provisions*; this has been understood as referring to equal treatment, as contained in

⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958). Hereinafter "New York Convention."

⁹ International Law Association, Committee on International Arbitration, Report for the Biennial Conference in Washington D.C., April 2014, Recommendation 1(c).

¹⁰ F. Mantilla Serrano, *Towards a transnational procedural public policy*, in 20 ARBITRATION 333, 341 (2004).

¹¹ *Id.*, 342.

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article 18.¹² In the same sense, modern arbitration laws have reduced their mandatory rules on procedure, so the parties' freedom is only subject to those same minimum requirements (equal treatment and the appropriate opportunity to present one's case).¹³

The trend can be similarly identified in the field of investment arbitration. For instance, the ICSID Convention¹⁴ also contains some mandatory provisions (*e.g.* the parties cannot derogate articles 37(2) and 48(1) requiring the arbitral tribunal has an uneven number of members).¹⁵

In sum, the ultimate limitations to party autonomy on the arbitrators' autonomous and active role in conducting the proceedings are the safeguards of impartiality and due process.¹⁶ These mandatory principles limit party autonomy and enter into play, particularly, when the set-aside or enforcement of the arbitral award is sought.¹⁷

2. *Private Mandatory Rules*

Some other restrictions on party autonomy may arise where the parties select institutional arbitration. As already stated, when doing so, the parties indirectly adopt the arbitration rules of such institution. Of course, the parties may intend to leave aside some of the provisions contained in that set of rules and almost always will succeed. However, there may be some exemptions, where they cannot derogate certain rules, simply because if they did, the arbitral institution would not accept to administer a case.¹⁸ That is to say that, although being private rules

¹² *Id.*, 339.

¹³ *Id.*, 336.

¹⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington (1965). Hereinafter "ICSID Convention."

¹⁵ A. R. Parra, *The Limits of Party Autonomy in Arbitration Proceedings under the ICSID Convention*, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, vol. 10-1, 4.

¹⁶ P. Bernardini, *The role of the international arbitrator*, 20 ARBITRATION INTERNATIONAL 113, 122 (2004).

¹⁷ *For instance*, France, England, United States of America and Switzerland. *See* the analysis of MANTILLA SERRANO (note 10), 340 *et seq.* When it comes to enforcement of arbitral awards, it is even surer that these principles will apply, as they are found in the New York Convention.

¹⁸ For further details, see Andrea Carlevaris' contribution, *supra* ch. 1. See also Böckstiegel, (note 2), 3; R. H. Smit, *Mandatory ICC Arbitration Rules*, LIBER AMICORUM IN HONOUR OF ROBERT BRINER (2005).

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without public mandatory nature, in practice they play some sort of mandatory role¹⁹ (e.g. rules on the independence of the arbitrators).²⁰

Taking the ICC Court as an example, it is not likely to accept to be bound to perform its own responsibilities in accordance with the parties' agreement.²¹ For instance, it is not likely to accept cases where the parties' intend to exclude its prerogative to extend periods of time, because it would be in an uncomfortable position, exposing itself to criticism if the arbitration cannot be completed within the contractually agreed period.²²

In the same vein, articles 13(1) and (2) of the ICC Rules, calling for the confirmation of arbitrators by the ICC Court or the Secretary General are also considered mandatory and the ICC Court has refused to administer cases where the parties intended to bypass such requirement.²³ The ICC Court has also refused to administer cases where the parties had agreed on a two-arbitrator panel, with the subsequent intervention of an umpire in case of a deadlock.²⁴

Similarly, the ICC Court is not likely to accept a case where the parties have agreed to exclude the Court's prior scrutiny of the award.²⁵ The Secretariat's Guide expressly states that the scrutiny process is considered a cornerstone of ICC arbitration from which the parties cannot derogate and that, when faced with such a situation, the Court has decided that the arbitration agreement was incompatible with the ICC Rules, so the arbitration could not proceed.²⁶

All this is because, somehow, the ICC endorses the awards rendered under its rules, what functions as an internationally recognized seal of

¹⁹ See the analysis of the mandatory provisions of the former ICC arbitration rules in SMIT, (*id.*).

²⁰ J. FRY / S. GREENBERG / F. MAZZA, THE SECRETARIAT'S GUIDE TO ICC ARBITRATION, (ICC, Paris, 2012) 115. The rationale of this position is that, even if the parties agreed on excluding the Independence requirement, the prospective award could be challenged.

²¹ E. A. SCHWARTZ / Y. DERAIS, GUIDE TO THE ICC RULES OF ARBITRATION, (Kluwer Law International, 2nd Edition, 2005), 377.

²² *Id.*, 378.

²³ FRY / GREENBERG / MAZZA (note 20), 98.

²⁴ *Id.*, 101.

²⁵ M. Pryles, *Limits to party autonomy in arbitral procedure*, 24 JOURNAL OF INTERNATIONAL ARBITRATION 327, 329. See ICC Rules, article 33.

²⁶ FRY / GREENBERG / MAZZA (note 20), 328.

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approval, which may make awards less prone to challenge.²⁷ Hence, the Court needs to be in a position to ensure that it can perform its functions properly.²⁸

In short, from a practical point of view, it could be said that those rules that are deemed essential by arbitral institutions constitute some kind of private mandatory rules,²⁹ which also limit the exercise of party autonomy.

II. ARBITRATOR'S PROCEDURAL ROLE

A. Party Autonomy as a Source and Limit of Arbitrator's Authority

Submitting a dispute to arbitration basically means submitting a dispute to someone, asking him or her to resolve it. If accepted by the arbitrator, such request somehow turns into a mandate. In other words, the arbitrator is entrusted with a specific task. That is to say that the source of the arbitrators' decision-making authority is not other than party autonomy (along with the law which authorizes submitting the dispute to arbitration). This authority entails both duties and powers, with the only underlying purpose of fulfilling the main objective (*i.e.* resolving the dispute).

Of course, this authority is not absolute either. Given that the parties are who grant the arbitrator's authority, they are obviously free to determine the extent of said authority, by limiting it (*e.g.* limiting the subject matters, the power to render interim relief, etc.), as well as by imposing specific obligations (*e.g.* indicating that the dispute is to be resolved *ex aequo et bono*). Thus, the arbitrators' main task basically translates into developing the will of the parties. As a consequence, it seems that – in principle – arbitrators are bound to follow the instructions of the parties³⁰ and cannot resist the limitations imposed by them.

B. Arbitrators' Duties

The arbitrators' core obligation is to resolve the parties' dispute, which in turn encompasses a number of closely related sub-obligations

²⁷ *Id.*, 328.

²⁸ SCHWARTZ / DERAIS (note 21), 378.

²⁹ For a deeper analysis on this issue, *see* Smit (note 18), 845.

³⁰ Cordero-Moss (note 1), 49.

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(e.g. availability, independence).³¹ Arbitrators must not cross the line that circumscribes their powers because acting in excess of authority could render the award null and void or unenforceable.³² I will now turn to analyze the main obligations of arbitrators.

1. *To Grant the Equality of the Parties and the Right to Be Heard*

Besides the barriers imposed by the parties, the arbitrators' authority is also subject to legal limitations. As already explained, party autonomy is limited by the relevant applicable mandatory rules. Thus, if party autonomy (which is the source of the arbitrator's authority) is limited by those rules, the authority created by party autonomy shall be equally limited. In practice, this means that arbitrators are also bound by the mandatory principles described above (see § I).³³ Consequently, arbitrators must respect the equality of the parties and their right to be heard. In turn, those principles also include the arbitrators' obligation to remain independent and impartial. On this basis, arbitrators become some sort of enforcers of public policy and mandatory rules.

As already explained, these principles are found in most arbitration laws,³⁴ institutional rules³⁵ and international treaties.³⁶

2. *To Conduct a Fair and Efficient Process*

Arbitrators shall also respect the procedural rules agreed upon by the parties, which includes their own rules as well as the institutional rules. Under most institutional rules, arbitrators are not only required to settle the dispute, but to do so diligently (see *infra* § III.B.2.). Therefore, they are generally under an obligation to conduct fair and efficient process.³⁷

³¹ BORN (note 7), 1986.

³² New York Convention, article V.I(c).

³³ See Böckstiegel (note 2), 2.

³⁴ For instance, UNCITRAL Model Law, article 18.

³⁵ UNCITRAL Rules, article 17; ICC Rules, article 22(4); LCIA Rules, articles 14.4(iii) and 14.5; ICDR Rules, article 20(1); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2010, article 19(2), hereinafter "SCC Rules."

³⁶ For instance, the New York Convention.

³⁷ For instance, article 14.4(ii) of the Rules of the London Court of International Arbitration. Hereinafter "LCIA Rules."

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3. *To Deliver an Enforceable Award*

It is generally discussed whether arbitrators are under an obligation to deliver an enforceable award. As to this point, scholars and practitioners are divided into two clear groups; on the one hand those who recognize the existence of an obligation to render an enforceable award,³⁸ and on the other hand, those who recognize that such obligation does not – and could not – exist. In the first group there are some who argue that, in order to comply with such an alleged obligation, arbitrators must take into account the different places of potential enforcement of the award.³⁹

Although in the field of international arbitration this discussion is always present, it becomes even more relevant in cases administered by certain institutions, whose rules indicate that the arbitrators should act in view of the enforcement of the prospective arbitral award. For instance, article 42 of the ICC Arbitration Rules state “[i]n all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.” As to the purpose of this provision, it is said to be intended to serve a much more limited purpose of guiding the arbitrators’ actions in case of a lacuna in the rules, but not to have any influence on the arbitrator’s resolution of the case, since they are not in a position to know where enforcement of the award is likely to be sought.⁴⁰ In this sense, the Secretariat’s Guide on the rules confirms that the provision does not aim to ensure the enforceability of the arbitral

³⁸ M. L. Moses, *Inherent and implied powers of arbitrators*, LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW, PUBLIC LAW & LEGAL THEORY RESEARCH PAPER NO. 2014-015, 1; Mantilla Serrano (note 10), 349. In fact, it is sometimes said that, as far as possible, arbitrators should take into account the mandatory rules of the places where enforcement might be expected; see Böckstiegel (note 2), 3.

³⁹ SCHWARTZ / DERAIS (note 21), 485. See Award in ICC Case No. 6697, *Société Casa v. Société Cambior*, REVUE DE L’ARBITRAGE (1992), 135. There the arbitral tribunal held that it was precluded by then article 26 from rendering an award that would not be enforceable at the domicile of one of the parties.

⁴⁰ *Id.*, 385-6, commenting on article 35 of the former ICC Arbitration Rules (now replaced by article 41). See the cases cited by the authors: ICC Case No. 4695 (1984) and ICC Arbitral Awards 1986-1990, 33. There the arbitral tribunal admitted its jurisdiction, but acknowledged that the award could be refused enforcement in some jurisdictions.

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award, but it is just limited to the tribunal's action in all matters not expressly regulated in the rules.⁴¹

The Arbitration Rules of the Stockholm Chamber of Commerce and of the Singapore International Arbitration Centre⁴² contain almost identical provisions in their articles 47 and 37(2), respectively. In turn, the LCIA Rules contain a quite similar rule in its article 32(2) which states that “[f]or all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat.” The wording of this provision depicts the same idea; that it works as guidance for the arbitrators, but not as an obligation. In fact, the recently issued LCIA Guidance Notes indicate that the “[p]arties to arbitrations are entitled to expect of the process a just, well-reasoned and enforceable award.”⁴³ No equivalent guide is found, for instance, in the ICDR Rules.

C. Arbitrator's Powers

In order to carry out their main task (resolving the dispute), arbitrators are naturally vested with certain powers.⁴⁴ These are necessary tools to conduct the proceedings and, if the parties grant the arbitrators the power to finally settle the whole dispute, it is logical that they are also allowed to resolve procedural issues during the course of the proceedings, especially when the parties cannot reach an agreement (*qui potest plus, potest minus*). The powers of arbitrators can be gathered in the following categories: (i) implied powers, (ii) discretionary powers, and (iii) inherent powers.

Properly exercised, these powers may help ensure the arbitral process fulfills the promise of providing a fair and reasonable way to resolve disputes.⁴⁵ The arbitrators need to be able to use those powers

⁴¹ FRY / GREENBERG / MAZZA (note 20), 422-3.

⁴² Arbitration Rules of the Singapore International Arbitration Centre (2013).

⁴³ LCIA Guidance Notes for Arbitrators (2015), § 2(6).

⁴⁴ See J. D. M. Lew, *The Tribunal's rights and duties: Why they should be more involved in the Arbitral Process*, DOSSIER OF THE ICC INSTITUTE OF WORLD BUSINESS LAW: PLAYERS' INTERACTION IN INTERNATIONAL ARBITRATION (2012), 11.

⁴⁵ *Id.*, 13.

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when the integrity of the process or the enforcement of the award is at risk, but they must carefully balance their duties against the risk that if they are considered to have exceeded their powers, the award might not be enforced.⁴⁶ Powers that in the past were viewed as inherent or implied are today frequently contained in the applicable rules (*e.g. compétence - compétence*).⁴⁷ Thus, given the broad range of actions that may be justified on the basis of these powers, arbitrators are unlikely to face circumstances where they cannot find any authority to act.⁴⁸

1. *Implied Powers*

Implied powers do not exist *per se*; rather, they stem from the parties' specific arbitration agreement, as well as from the applicable arbitration rules and laws. They are supported by the basic idea that, if certain objectives or duties have been expressly imposed on the arbitrators, it can be implied that they have the authority to take the necessary steps to implement those objectives.⁴⁹ For example, if there is a provision expressly requiring efficient conduct of the arbitration, then an arbitrator may limit the scope of document production or bifurcation of the proceedings.⁵⁰

2. *Discretionary Powers*

Another category is discretionary powers (*e.g.* authority to hold evidentiary hearings, admit and weigh evidence, determine the order and method of witness examinations, and apportion costs).⁵¹ Indeed, the discretion to determine the arbitral procedure, in the absence of agreement by the parties is considered a foundation of the international arbitral process.⁵² To some extent, these powers also have an *inherent* nature as the arbitrators are widely understood to have some inherent degree of control over the efficient conduct of procedure.⁵³

⁴⁶ *Id.*, 12.

⁴⁷ *Id.*, 6.

⁴⁸ ILA Report (note 9), 17.

⁴⁹ Moses (note 38), 2.

⁵⁰ ILA Report (note 9), 15.

⁵¹ *Id.*, 15.

⁵² G. B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, (Kluwer Law International, 2012), 148-49.

⁵³ ILA Report (note 9), 15.

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Moses illustrates the spectrum of arbitrators' powers referring to an area of sunshine and another of shadow; in the first lie the powers defined by the arbitration agreement, the rules and applicable arbitration law; in the second lies the discretion of arbitrators because the most complete agreement, set of rules or law cannot envisage all possible procedural situations.⁵⁴ In this sense, a former Chief Justice of the High Court of Australia pointed out that:

[i]t is well settled that when parties submit their dispute to a private arbitral tribunal of choice, in the absence of some manifestation of a contrary intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision. . . . No doubt the conferral of that power upon the tribunal is incidental to the power which it is given to determine the dispute submitted to the Tribunal.⁵⁵

While arbitrators will generally feel comfortable exercising such discretion where both parties acquiesce, a harder situation is presented when one of them opposes a proposed course of action. While the tribunal's discretionary powers typically do not permit arbitrators to take actions that override the parties' agreement, they may permit some non-conventional and creative procedural approaches that are not supported by the parties.⁵⁶

Arbitrators frequently invoke these discretionary powers. For instance, in permitting the mass claims of roughly 60,000 claimants to proceed in *Abaclat v. Argentina*, the majority of the tribunal determined that there was a gap in the ICSID Convention concerning collective proceedings that it could fill, by virtue of the powers to resolve procedural questions in the event of a lacunae, embodied in article 44 of the ICSID Convention and ICSID Rule 19.⁵⁷ Conversely, the decision in *Ambiente Ufficio v. Argentina*, which permitted a multiparty action of 90 claimants to proceed, seems to suggest that *ex post* joinder or

⁵⁴ Moses (note 38), 2.

⁵⁵ See ILA Report (note 9), 15, citing *Eso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10, 26-27.

⁵⁶ *Id.*, 16.

⁵⁷ *Abaclat and Others* (Case formerly known as *Giovanna a Beccara and Others*) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), ¶¶ 521-6.

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consolidation lies beyond arbitral discretion and, therefore, requires the parties' consent.⁵⁸

Of course, in order to exercise these discretionary powers, arbitrators must previously determine that the action under consideration is strictly procedural in nature and does not involve substantive rights.⁵⁹

3. *Inherent Powers*

Whereas the implied and discretionary powers are typically subordinated to the parties' agreement, inherent powers cannot be restricted by the parties because they inhere in the nature of arbitration as an adjudicative process tasked with producing an internationally enforceable award.⁶⁰ Inherent powers come into play when some conduct that is generally unexpected and unusual must be dealt with, in order to prevent the arbitral process from being undermined.⁶¹

The Iran-US Claims Arbitral Tribunal has defined the inherent arbitral powers as "those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with judicial nature."⁶² The source of this authority has been traced to international courts' need to safeguard their jurisdiction, conserve the rights of the parties and fulfill their functions as adjudicative bodies.⁶³

Arbitrators also frequently invoke the doctrine of inherent powers and although some authors draw a difference between the situation in commercial and investment arbitration,⁶⁴ in general terms these powers are present in both fields. This doctrine has been invoked to exclude a

⁵⁸ *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), ¶¶ 123-5.

⁵⁹ ILA Report (note 9), 16.

⁶⁰ *Id.*, 20.

⁶¹ *Moses* (note 38), 3.

⁶² *Islamic Republic of Iran v. United States of America*, IUSCT Cases No. A3, A8, A9, A14 and B61, Decision No. DEC 134-A3/A8/A9/A14/B61-FT, ¶ 59 (1 July 2011).

⁶³ *Id.*, ¶ 59. See also C. Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BYIL (2005).

⁶⁴ See *Moses* (note 38), 4. Unfortunately, an analysis of this aspect exceeds the extent of this work.

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counsel from appearing at the hearing,⁶⁵ as well as in many other situations.⁶⁶ In *Methanex v. United States* the arbitral tribunal resorted to the UNCITRAL Rules and the discretion they afford over evidentiary matters in rejecting documents illegally obtained.⁶⁷ Likewise, when the arbitral procedure potentially involves crimes, it is said that the arbitrators should take some measures, since they are not merely service providers, but they also serve as *guardians of international public policy*.⁶⁸ As a number of commentators have noted, enforceability problems could arise if arbitrators disregard such concerns and render an award that, when challenged before national courts, might be deemed invalid on public policy grounds.⁶⁹ Thus, it appears that arbitrators faced with such a situation could reasonably point to their inherent authority to protect the integrity of proceedings as a basis for undertaking a *sua sponte* investigation into evidence of corruption or money laundering.⁷⁰

⁶⁵ *Hrvatska v. Elektroprivreda, v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (6 May 2008).

⁶⁶ G. Born / K. Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, 21 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN (2010), where the authors conduct an analysis on whether arbitrators can make summary dispositions, despite not being expressly permitted by the rules. Some arbitral tribunals have considered that they did have the power to make summary dispositions despite the absence of an express mandate. See for instance, First Interim Award of December 2001 in ICC Case No. 11413, 21 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN; and Procedural Order No. 1 of 22/08/03 in ICC Case No. 12297, SPECIAL SUPPLEMENT 2010: DECISIONS ON ICC ARBITRATION PROCEDURE: A SELECTION OF PROCEDURAL ORDERS ISSUED BY ARBITRAL TRIBUNALS ACTING UNDER THE ICC RULES OF ARBITRATION (2003-2004). However, it is worth mentioning that in those cases, there were no concrete objections to that procedure.

⁶⁷ *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 Aug. 2005), Part II, Chapter I, ¶¶ 53-60.

⁶⁸ B. Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings*, in A. J. VAN DEN BERG (ED.), INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, Kluwer Law International (2003), 285.

⁶⁹ M. Hwang S.C. / K. Lim, *Corruption in Arbitration – Law and Reality* (expanded version of Herbert Smith-SMU Asian Arbitration Lecture, delivered on 4 August 2011), available at <www.arbitration-icca.org/articles.html>, ¶ 16.

⁷⁰ ILA Report (note 9), 18.

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In addition, courts have supported the arbitrator's inherent powers, for instance, regarding the imposition of penalties,⁷¹ even without a request by any party,⁷² or the imposition of the costs on a party found to have acted in bad faith, despite the parties prior agreement to share the costs.⁷³

Of course, it is always important to define the scope of those powers, because their wrongful exercise might have harmful consequences; actually, arbitrators often doubt the extent of such powers.⁷⁴ Circumstances justifying the invocation of inherent powers to override party autonomy rarely arise so those powers should be used narrowly, proportionately and only as far as necessary to deal with the particular situation.⁷⁵

III. WHEN THINGS COLLIDE: COMPLEMENTARITY OR OPPOSITION?

The previous sections have already explained the clear limits to party autonomy as well as the clear limits to the arbitrators' power. When the arbitrators' powers are put to work as complementary to party autonomy, both are only affected by external limitations (*e.g.* public policy, public mandatory rules and private mandatory rules).

However, in the grey area, there may be situations where party autonomy (as described *supra* at § II) and the arbitrator's role (as described *supra* at § III) collide. This may happen when the parties reach an agreement, but the arbitrators conclude that such agreement is unfair,

⁷¹ See C. Malinvaud, *Non-pecuniary Remedies in Investment Treaty and Commercial Arbitration*, in A. J. VAN DEN BERG (ED), 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA Congress Series, vol. 14, (Kluwer Law International, 2009). There, the author cites the case, *Otor Participations et autres v. Carlyle*, Paris, 7 October 2004, JDI (2005) 341, note A. Mourre / P. Pedone.

⁷² *Id.*, citing Paris, 24 May 1991, REVUE DE L'ARBITRAGE (1992), 636, note J. Pellerin.

⁷³ *ReliaStar Life Insurance Company of New York v. EMC National Life Company* (National Travelers Life Company), United States Court of Appeals, Second Circuit (9 April 2009).

⁷⁴ See, for example, BORN / BEALE, (note 66), 3, explaining that arbitrators are often uncertain about their authority to grant summary dispositions.

⁷⁵ ILA Report (note 9), 20.

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grossly inefficient, or otherwise inappropriate.⁷⁶ Although this deadlock situation is certainly rare, when it occurs, it triggers the key question of which position should prevail. This section will get deep into that grey area to analyze such collision and its consequences.

A. *Relevant Factors*

Preliminarily, in order to conduct an appropriate analysis of the issue, it is worth taking some relevant factors into account.

1. *The Contract between the Parties and the Arbitrators*

The constitution of the arbitral tribunal brings into existence a new set of contractual relationships.⁷⁷ When the arbitrators accept their appointment, they get linked to the parties through a new contract,⁷⁸ whereby both sides receive reciprocal obligations in exchange for certain rights.⁷⁹ In addition, when the parties submit a dispute to institutional arbitration, the institution's offer to administer arbitrations is accepted and there arises another contract (between the parties and the institution).⁸⁰ Consequently, those contracts give birth to a triangular relationship (between the parties, the arbitrators, the institution).⁸¹ In order to settle potential conflicts in the grey area, it is important to identify the terms of these relationships, the obligations arising from them and their scope.

When the arbitrators accept the appointment, they are subject to the applicable arbitration rules and law, which become part of the *arbitrators' contract*. On the one hand, most of those rules grant the parties the right to agree on the procedural details, so the arbitrators know beforehand the current requests of the parties, as well as that they

⁷⁶ BORN (note 7), 2001.

⁷⁷ Pryles (note 25), 330.

⁷⁸ This approach has been supported, for instance, by the English courts. *See* Pryles (note 25), 330-1, citing *Compagnie Européenne de Cerelas SA v Tradax* (1986) 2 LLOYD'S REP., 301, 306, and *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd* (1991) 1 LLOYD'S REP. 260 (Commercial Court).

⁷⁹ BORN (note 7), 1975; Lew, (note 44), 2.

⁸⁰ *Id.*, 1985.

⁸¹ E. GAILLARD / J. SAVAGE (eds), *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION*, (Kluwer Law International, 1999), 602; Lew (note 44), 3.

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may modify some aspects throughout the proceedings. However, on the other hand, the rules also impose certain obligations on the arbitrators. In this regard, several interesting questions arise: are the arbitrators entrusted with a task that they can fulfill by the means they consider best suited (of course within the limits of the previously agreed rules)? Or are they imposed a particular manner to do it (*i.e.* always following the parties' will)? In the latter case, do the arbitrators have to follow the parties' instruction without any limitation? Does the arbitrators' contract contain an open clause allowing the parties to include further unilateral modifications as if it was a blank check?

In any case, it must be taken into consideration that the arbitrators also have legitimate expectations on this contract. For instance, they expect to be paid, to do their job under normal circumstances, to devote certain amount of time (they might have rejected other commitments) and so on. These expectations could be undermined if the parties make exorbitant modifications to the arbitrators' contract.

2. *The Moment of Exercising Party Autonomy*

As it has already been pointed out, the determination of procedural rules by the parties may take place at different points in time. Such a circumstance is not without consequences. As accurately pointed out by Pryles, in considering the limits to party autonomy, it is necessary to distinguish the situation before and after the commencement of the arbitration.⁸² In fact, the moment when party autonomy is exercised is crucial to the outcome of the collision.

When the parties agree on certain procedural terms before filing the application for institutional arbitration, the institution is free to accept those terms or not. If the institution refuses to administer the case, a relationship with the parties will never exist. As already explained, arbitral institutions are not willing to renounce to certain prerogatives in the administration of cases. Thus, should the parties derogate some rules conferring such prerogatives, the institution is not likely to accept the administration of the case (*see supra* § I). Likewise, when the parties make procedural arrangements before the constitution of the tribunal, the arbitrators are free to decide whether to accept the appointment or not upon such information.⁸³

⁸² Pryles (note 25), 328.

⁸³ SCHWARTZ / DERAÏNS (note 21), 377.

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Therefore, when the parties exercise their autonomy before entering into a relationship with either the arbitral institution or the arbitrators, the scenario is not so complicated, as both have an easy way out by refraining from participating in the proceedings. This is why it is always better to have the “rules of the game” identified at a very early stage of the proceedings.⁸⁴

When the parties jointly exercise their autonomy during the course of the proceedings (*i.e.* after the constitution of the arbitral tribunal), arbitrators and arbitral institutions may be in different positions. In the case of the arbitral institutions, they are somehow protected because prior to the constitution of the arbitral tribunal the parties are already aware of their bargaining limits (imposed by the mandatory arbitral rules). However, in the case of the arbitrators, their position may be more complicated. The following sections will focus on the situation where there is a collision between the arbitrators' powers and the parties' agreement after the constitution of the arbitral tribunal, which it is the most critical situation.

3. *The Contextual Framework of the Case*

Another relevant factor is the whole contextual framework of the case, both factual and legal. As in every other aspect, the analysis of the limits to party autonomy depend, to a great extent, on the particular facts of a concrete case. In the same way, it depends on the specific legal framework applicable to the case. The next section focuses on some concrete examples, demonstrating how the factual and regulatory framework may impact the procedural outcomes within the grey area. Although one can think of innumerable examples, I will just mention the most illustrative ones. Although some of them may well be considered too extreme, it is worth bearing in mind that sometimes reality goes beyond imagination.

B. Concrete Situations

1. *Factual Context*

The collision in the grey area may reach different degrees depending on the facts surrounding the procedure. Among the various possible problematic situations, we can find the following.

⁸⁴ Böckstiegel (note 2), 4.

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- Although the procedural schedule has already been established, the parties agree to substantially modify it. For example, by multiplying the number of written submissions and by fixing the deadline for the last submission two years later than the original deadline. In this situation, the arbitrator may be affected because it was not within his or her expectations to continue with the procedure for so many years.
- The parties agree to change the seat of the arbitration for another one that, for some reason, creates serious inconvenience for the arbitrator (*e.g.* because there is no protection for arbitrators, or new legislation may come into play, which is not so arbitration-friendly).
- Each party proposes an exaggeratedly high number of witnesses and/or expert-witnesses (*e.g.* forty each) and the arbitrator is positive that the witness examination will not be effective. This could get even worse if the parties agree to cross examine all those witnesses in a quite short period of time.
- Contrary to what is customary, the parties agree on lengthy hearings for a long period of time (*e.g.* one month having hearings all week days). This would be overwhelming in any case because the arbitrators are likely (and legitimated) to have other commitments; similarly, if they were to be paid on an *ad-valorem* basis, the fees would be quite low in comparison to the real work, so probably the arbitrator could simply intend to deny the petition.⁸⁵
- The parties request *amici curiae* in an arbitration between an investor and a State submitted to the UNCITRAL Rules on Transparency (2014) while the arbitral tribunal considers that *amici* are not necessary at all in the case or that it is even prejudicial (article 5.1).⁸⁶
- In an ICC case, both parties request the ICC Court to resolve a challenge to an arbitrator expressing the reasons of its decision,

⁸⁵ Pryles (note 25), 338.

⁸⁶ See further examples in P. Pinsolle / R. Kreindler, *Les limites du rôle de la volonté des parties dans la conduite de l'instance arbitrale*, REVUE DE L'ARBITRAGE (2003), 41; Pryles (note 25); M. de Boissesson, *New Tensions between Arbitrators and Parties in the Conduct of the Arbitral Procedure*, INT. A.L.R. (2007), 177.

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which is contrary to the ICC Rules.⁸⁷ Regardless of whether the Court would accept to do it or not, the truth is that it would not be obliged to do so because the terms of the relationship between the parties and the institution are previously quite clear (as embodied in the institutional rules).

- Both parties agree that only one of them will appoint the three-member arbitral panel; or that one of them will not be heard; or that one will have substantially less time for its submissions than the other.
- The parties request the tribunal to render the final award over a complex technical dispute within thirty days after the hearings. Due to the fact that, in such period of time, it is not possible to even review the relevant documents, the arbitrator is already aware that he or she could not render a fair award.
- Upon death of an arbitrator of an ICC three-member panel, the parties agree to continue the proceedings with the remaining two arbitrators instead of appointing a replacement arbitrator, which is against the rules.⁸⁸ Irrespective of whether the ICC Court would accept the proposal or not, this is likely to create problems undermining the procedure. There would be a risk that the two arbitrators decide differently and if that happens, the rules do not contemplate how to solve the situation, which could open the door to conflicts.
- All parties, counsel and arbitrators are domiciled in Argentina, the seat of the arbitration is in Santiago de Chile, but the parties agree to hold a one-day hearing in Hong Kong.
- The parties present a request for a consent award in circumstances that reasonably indicate that the arbitration is being used as a vehicle to facilitate money laundering or reward corruption (*see supra* § I.A.3.).
- The parties agree to debate at the hearings but without schedule, order or time limits. It goes without saying that such proposal could never be accepted because, for the sake of the proceedings, at least

⁸⁷ ICC Rules, article 11(4). The ICC policy over this aspect might change in the near future.

⁸⁸ *Id.*, article 12(1).

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minimum rules of organization are required. This is a deliberate silly example, with the only purpose of illustrating that sometimes it can be reasonable to limit the parties' will.

It is fair mentioning that, sometimes, the parties may have legitimate reasons to propose this kind of changes. For instance, they may request a stay of the proceedings because they are negotiating, they are working together on another project, a national State is involved and they are awaiting the new government's attitude, among many other circumstances. On top of that, it is certainly not easy to measure the procedural efficiency, as it may look differently through the lenses of the parties and the arbitrators.

Again, all these situations (and their solutions) might be substantially dependent on the facts of the particular case. For instance, the existence of ten witnesses is not the same as forty, just as three weeks is not the same as three months, and so on. Besides, the situations may also depend on the regulatory framework.

2. Regulatory Context

Institutional arbitration rules provide different solutions, which may translate into different degrees of restriction on party autonomy. In fact, even between similar rules, little details in the wording may yield great differences. Thus, the concrete answers may vary dramatically depending on the legal and institutional framework. Some arbitration rules contain provisions providing the arbitrators' express powers to conduct the proceedings. In order to analyze whether those powers are to override the will of the parties, it is worth transcribing some of them.

Article 22 of the ICC Rules states:

“1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute” (emphasis added).

Here, the provision imposes a duty on the arbitrators to employ their best efforts. In the same sense, the ICC Commission Report on Controlling Time and Costs in Arbitration (2012) sets out various techniques to reduce time and costs in arbitrations.

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Article 14(4) of the LCIA Rules state:

“Under the Arbitration Agreement, the Arbitral Tribunal’s general duties at all times during the arbitration shall include: [...]

(ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute” (emphasis added).

This provision expressly imposes a duty to act efficiently. Consequently, it could be argued that the tribunal is somehow impliedly empowered to take some measures to achieve such purpose.⁸⁹

Article 20 of the ICDR Rules indicate:

“1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

2. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute” (emphasis added).

This provision grants discretion to the tribunal because what matters is what *it* considers appropriate. Besides, by employing the term “shall,” it imposes the obligation to run an expedite procedure.

The UNCITRAL Rules state in their article 17(1):

“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 proceedings so as to avoid unnecessary delay and expense and to

⁸⁹ See *supra* § III.C(i).

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provide a fair and efficient process for resolving the parties' dispute" (emphasis added).

Here, the arbitrators receive an express power to decide the procedure without regard to the parties' consent. Indeed, this provision is considered to grant wide discretionary powers to the arbitrators.⁹⁰ Therefore, whenever these rules apply, it is for the arbitrators, not the parties, to have the ultimate decision on procedural issues and if the parties do not wish to proceed in such fashion, they may terminate the arbitration and initiate new proceedings under an amended arbitration agreement.⁹¹

For its part, article 19 of the SCC Rules state:

“(1) Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate.

(2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case.”

Here, this provision seems to restrict the arbitrators' powers and subject them to the agreement of the parties. However, it also imposes a duty to conduct an expedite procedure *in all cases*.

Regarding the time limits set in the terms of reference, article 23(2) of the ICC Rules state that the Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so. In the same vein, as to the time limit to render the final award, article 30(2) repeats the same formula. Here, the power to decide on the time limit seems to lie exclusively on the tribunal and the ICC Court, without regard to the parties' intention. This is

⁹⁰ D. D. CARON / L. M. CAPLAN, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY*, (Oxford Commentaries on International Law, 2nd Edition, 2013), 30 *et seq.*

⁹¹ BORN (note 7), 2002. *See* Lance Paul Larsen v. Hawaiian Kingdom, PCA Award (5 February 2001), where the Procedural Order No. 4 is transcribed at ¶ 6.5.

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considered to be a reasonable restriction, as the arbitrators will inevitably be affected by the parties' agreement.⁹²

In the field of arbitration laws, article 34(1) of the English Arbitration Act (1996) states that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter." Thus, it grants a wide prerogative on the arbitrators as to the procedural matters, but it also acknowledges the importance of the will of the parties.

In sum, although in general terms, the aiming of these rules seems to be quite similar (guarantee efficient proceedings), sometimes they provide slightly different wording. These small differences could provoke significant different outcomes, when applied to the various situations exemplified in the previous section.

C. Different Views on the Topic

The key question of the collision between party autonomy and arbitrators' powers is which of them should prevail. As already stated, the solution may depend on many factors, but in general terms, there are good arguments to support both sides. I will now turn to present the most relevant arguments of each position.

1. Party Autonomy Prevails

The most admitted position on the issue is that, in the end, party autonomy should always prevail. This is because the arbitral procedure would not exist without the will of the parties. Consequently, they own the proceedings and can decide its direction. A strict position is that the arbitrators cannot impose their position⁹³ even if the parties' agreement seems inappropriate (unless there is a violation of mandatory norms) and in any event the arbitrator may have the option of resigning.⁹⁴ Notwithstanding this solution, of course, when encountered with these

⁹² SCHWARTZ / DERAIS (note 21), 377. There, the authors comment article 32 of the 1998 ICC Arbitration Rules.

⁹³ See BORN / BEALE, (note 66), 3, explaining that, absent an express authority and absent any manifestation of the parties to that effect, arbitrators may feel uncomfortable imposing summary disposition procedures to the parties.

⁹⁴ BORN (note 7), 2002.

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situations, the arbitrators can (and actually should) raise their concerns,⁹⁵ but beyond efforts of persuasion, there is not much that arbitrators can really do, without being told that they are affecting due process for a party.⁹⁶

A quite moderate position, states that the arbitrators are also entitled to consider their own position (*e.g.* wishing to move forward and finish the arbitration relatively soon so as to get paid and continue with further works), but when weighted against the interest of the parties (each of which is at risk of losing money in losing the arbitration, among other consequences), the arbitrators' interest should give away.⁹⁷

Nonetheless, under certain situations the obligation to follow the parties' agreement may lose strength; for instance, if it violates mandatory provisions,⁹⁸ or if the arbitral rules grant the arbitrator discretionary powers. Of course, the parties' agreement may not violate the mandatory provisions of the applicable arbitration law (*e.g.* equal treatment); however, if both parties reach an agreement by which one of them is to have more time to file its submissions, one could doubt whether that actually amounts to a violation of equal treatment if such party accepted that.⁹⁹ Nevertheless, the arbitrator may prefer to be cautious to avoid future challenges.

For instance, Pryles raises the key question of whether the rule set forth in article 19(1) of the Model Law is limited to agreements until the moment when the arbitrators accept the appointment, or it is still operative afterwards.¹⁰⁰ The issue was particularly discussed in UNCITRAL and the proposal to limit it until the acceptance of the appointment was finally rejected on the basis that, in the end, arbitrators cannot be forced to accept the new rules and can always resign; in spite of this, it is generally said that article 19(1) is not mandatory and can be derogated by the parties.¹⁰¹

⁹⁵ *Id.*, 2002.

⁹⁶ K. H. Böckstiegel, *Party Autonomy and Case Management – Experiences and Suggestions of an Arbitrator*, address at the Conference of the German Institution of Arbitration (DIS) “Organising Arbitral Proceedings – Regulations, Options and Recommendations,” Berlin 24-25 October 2012.

⁹⁷ Pryles (note 25), 338.

⁹⁸ BORN (note 7), 2001.

⁹⁹ Pryles (note 25), 336.

¹⁰⁰ *Id.*, 331.

¹⁰¹ *Id.*, 332.

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The Court of Appeal of Paris has also ruled favoring party autonomy over the arbitrator's authority. In particular, it refused to enforce an award, which had been rendered after the time limit period agreed upon by the parties, since it considered that it was a violation of international public policy. In particular, it was stated that the arbitrators were not authorized to extend such a period.¹⁰²

2. Arbitrators' Power Prevails

Others say that, given that the parties and the arbitrators are bound by a contractual relationship (*see supra* § III.A.1), the parties cannot unilaterally modify the terms of their relationship without the consent of the arbitrator. Besides, in exchange for all their duties, arbitrators are also entitled to some rights, including the parties' good faith cooperation in the conduct of the proceedings.¹⁰³ Therefore, the arbitrators are not at the mercy of the parties on every single aspect, at least when they decide to modify their mandate in a substantial way.¹⁰⁴

From the moment the parties and the arbitrator enter into a contractual relationship to resolve the dispute, the arbitrator might have already scheduled his or her agenda in view of its role in the arbitration. Considering all this, it would be highly unfair to say that the only option for the arbitrator is to resign.¹⁰⁵

Sometimes, an arbitrator "may find himself conducting the arbitration at the will, or even the whim of the parties, and sometimes against his better notions of what may be most efficient and fair for the proceedings, for the outcome of the case, and for the integrity of the award."¹⁰⁶ This is definitely not a desired scenario. For example, if someone hires an artist to work on a blue painting, the former cannot later demand the latter to use only red ink. Similarly, when the arbitrator is entrusted with a main task, the parties cannot legitimately ask him or her to act in a way that prevents the fulfillment of such a task.

¹⁰² See Mantilla Serrano (note 10), 347, citing Cour d'Appel, Paris, 22 September 1995, REVUE DE L'ARBITRAGE, 100 (1996).

¹⁰³ BORN (note 7), 2025.

¹⁰⁴ Böckstiegel (note 2), 2.

¹⁰⁵ P. A. Karrer, *Freedom of an Arbitral Tribunal to Conduct Proceedings*, 10 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, (1999), § 9.2.

¹⁰⁶ Mantilla Serrano (note 10), 349.

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After the constitution of the arbitral tribunal, with the birth of the contract between the parties and the arbitrators, the freedom of the former to determine the procedure may be circumscribed.¹⁰⁷ In this sense, Pryles affirms that after the constitution of the arbitral tribunal there are higher limits to party autonomy because the arbitrators accept their mandate on the basis of express and implied terms; *e.g.* if the parties agree on a 5-year period to exchange memorials the arbitrator would not be bound to accept and could either shorten it or resign.¹⁰⁸

It could be said that when the arbitrators are required by the rules to consult the parties, they are obliged to do so, but not obliged to obtain their consent.¹⁰⁹ In this vein, the International Law Association has considered that the parties cannot limit the arbitral authority in a manner that undermines a tribunal's jurisdiction, damages the integrity of the proceedings, or might result in an award likely to be set aside or unenforceable.¹¹⁰ Hence, it is the arbitrators' duty not to introduce procedural trappings if they are unnecessary to the integrity of the award and if their only effect is to slow down the proceeding.¹¹¹ Besides, it can be said that the arbitrators also have an obligation to carry out their task with due diligence;¹¹² it is obviously reasonable to expect someone to do his or her job efficiently.

Whereas it is true that if the losing party accepts the result of the arbitration, there will be no possibility for a court to review the decision, if the losing party does not voluntarily comply with the arbitral award, courts will intervene and the limitations to party autonomy will come into the picture once again.¹¹³ Thus, given that procedural decisions might affect the integrity of the award,¹¹⁴ the arbitrators may decide to reject the parties' proposal. Mantilla Serrano states that nowadays both arbitrators and counsel have raised the bar on procedural matters, allowing more procedural safeguards than would be required for the

¹⁰⁷ Pryles (note 25), 330.

¹⁰⁸ *Id.*, 333.

¹⁰⁹ *Id.*, 335.

¹¹⁰ ILA Report (note 9), 20.

¹¹¹ Mantilla Serrano (note 10), 352.

¹¹² A. REDFERN / J. M. HUNTER / N. BLACKABY / C. PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, (Oxford University Press, 5th Edition, 2009), 328; BORN (note 7), 1995.

¹¹³ Cordero-Moss (note 1), 49-50.

¹¹⁴ Mantilla Serrano (note 10), 350.

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purpose of upholding the integrity of the award, only because they fear reprisals from the parties and the courts at the enforcement or set aside stage.

The possibility to limit party autonomy through the powers of arbitrators was confirmed in the case *ReliaStar v. EMC*. There, the parties entered into an arbitration agreement, which provided that both of them would equally pay the costs of the arbitration. In the arbitration, the majority of the tribunal decided to order one of the parties to pay all fees and costs, because it found that it had acted in bad faith during the course of the arbitration proceedings. The US District Court concluded that the award violated the agreement of the parties, so it vacated part of the award. However, on appeal, the US Court of Appeals of the Second Circuit held that the parties' broad agreement to arbitrate conferred on the arbitrators the equitable authority to sanction a party's bad faith conducts.¹¹⁵

Sometimes, the applicable rules grant the arbitrators the power to decide the procedure without regard to the parties' consent. Under those circumstances, some authors consider that arbitrators may reject the parties' proposals and, in any event, the parties might terminate the arbitration and start a fresh one.¹¹⁶ This seems a quite extreme position too, but again, it depends on the particular case. For instance, in the case *Lance v. Hawaiian Kingdom*, despite the fact that the arbitral tribunal had already identified the issues to be resolved before moving to the merits of the case, the parties requested the tribunal to determine another preliminary issue in an interlocutory award. The tribunal considered that the request was not appropriate and in a procedural order it conclusively stated the following:

It is not open to the parties by way of an amendment to the Special Agreement to seek to redefine the essential issues, so as to convert them into 'interim' or 'interlocutory' issues. In accordance with article 32 of the [1976] UNCITRAL Rules, and with the general principles of arbitral procedure, it is for the Tribunal to determine which issues need to be dealt with and in what order. For the reasons already given, the Tribunal cannot at this stage proceed to the merits of the dispute; these merits include the question sought to be raised as a preliminary issue by

¹¹⁵ *ReliaStar v. EMC* (note 73).

¹¹⁶ BORN (note 7), 2002.

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Article I. If the arbitration is to proceed it is first necessary that the preliminary issues identified in its Order No 3 should have been dealt with.

If the parties are not content with the submission of the dispute to arbitration under the UNCITRAL Rules and under the auspices of the Permanent Court of Arbitration, they may no doubt, by agreement notified to the Permanent Court, terminate the arbitration. What they cannot do, in the Tribunal's view, is by agreement to change essential basis on which the Tribunal itself is constituted, or require the Tribunal to act other than in accordance with the applicable law.¹¹⁷

Also applying the 1976 UNCITRAL Rules, the tribunal in *ICS Inspection v. Argentina* held:

The Tribunal holds an inherent power over procedure. This power is implicit, but is also set out in Article 15(1) of the UNCITRAL Arbitration Rules [...]

Within the bounds of equality, due process, and the explicit stipulations of the UNCITRAL Arbitration Rules, the Tribunal has nearly unlimited discretion in relation to procedural matters. It has even been noted that under the UNCITRAL Arbitration Rules, as opposed to other procedural frameworks, a tribunal may even enjoy broad power in certain cases to overrule the parties' agreements on procedural matters.¹¹⁸

D. Getting a Balance

One could wonder why an arbitrator would be concerned about unnecessary delay or expense, a matter that will mainly affect the parties, if they have reached a unanimous agreement.¹¹⁹ In the end, the truth is that the rules stating that the arbitrators must conduct the proceedings efficiently are only meant to protect the interests of the parties

¹¹⁷ Lance Paul Larsen v. Hawaiian Kingdom (note 91), ¶ 6.5.

¹¹⁸ ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, Award on Jurisdiction. UNCITRAL, PCA Case No. 2010-9 (10 February 2012), ¶¶ 253-4.

¹¹⁹ Pryles (note 25), 336.

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(presumably to resolve the dispute efficiently). Therefore, if the parties agree on a procedure, it is hard to imagine how a rule, which aims at protecting them, could operate as a limit to their agreement. In this sense, it is convenient, to the extent possible, that the arbitrators analyze the underlying reasons why the parties have decided to conduct the proceedings in such a way (*e.g.* the complexity of the dispute, new developments related to the dispute, pendency of settlement negotiations, a determination of another tribunal or court, an imminent change of government in an arbitration involving a State party).¹²⁰ In this fashion, the arbitral tribunal could identify whether the agreement of the parties really undermines their final objective.

Nevertheless, due diligence requires that the arbitrators always raise their concerns and try seeking to implement an alternative solution.¹²¹ To this end, they should use their experience and convince the parties that shaping the procedure in a different way would be much more efficient (towards their own objectives).¹²² Truth be told, in practice, the parties will generally be willing to show some sympathy towards the arbitrators, since they are the ones to finally decide the merits of the case. In this sense, with the arbitrators considering the real interest of the parties and the parties collaborating with the tribunal (either to enhance the procedure or to gain sympathy), they may both manage to meet halfway.

CONCLUSION

Arbitration is essentially based on party autonomy; however, such autonomy is not absolute and, to the contrary, it is subject to some limitations. Among those limitations, we can mainly find public policy and public mandatory rules. In almost all legal systems, these limitations involve – at least – equal treatment of the parties and their right to present their case; therefore, creating some sort of transnational procedural public policy. In addition, there are some other – less visible – limits, such as private mandatory rules, which are voluntarily accepted by the parties only because the arbitral institution is not willing to renounce them.

Submitting a dispute to arbitration means entrusting its resolution to an arbitral tribunal and, in order to fulfill their task, arbitrators are vested

¹²⁰ *Id.*, 337.

¹²¹ BORN (note 7), 2002.

¹²² Böckstiegel (note 2), 3.

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with some powers (implied, discretionary and inherent). Thus, party autonomy is the source of said powers. Of course, those powers are also subject to certain limits. Basically, they are limited, firstly by the will of the parties (source of the powers) and secondly by the same limits that party autonomy is subject to (*i.e.* public policy, public mandatory and private mandatory rules).

When the arbitrators' powers and the parties' will are in line, they are complementary. Thus, in such area both are only subject to clear external limitations. However, there is also a grey area, where the limits are not so clear; here party autonomy and the arbitrators' authority (duties and powers) occasionally collide. There are some relevant factors to analyze this tension (*e.g.* the contractual relationship between the parties and the arbitrators, the moment when party autonomy is exercised and the contextual framework). The collision occurs when, during the course of the proceedings, all the parties agree upon some procedural rule, but the arbitrators considers it to jeopardize their procedural role (the fulfillment of their other main task and subsequent duties). Here, the arbitrators would simply find themselves between a rock and a hard place. Should they use the weapons they are vested with to honor their procedural duties, or should they be loyal to the parties who provided them those weapons?

Overall, there are plausible arguments supporting both positions. Some consider that the parties cannot unilaterally modify the contractual relationship with the arbitrators, so the arbitrators may use their powers to limit the parties' agreement. Conversely, some consider that, given that the arbitration would have never come into existence without the parties' agreement, they own the proceedings and the arbitrators must respect their new agreements. Of course, besides those general and opposite positions, this depends on the particular factual and regulatory context. For instance, when those powers must be implemented *after consultation with the parties* and the parties express a common opinion it is hard to think that the arbitral tribunal can impose its own different view to the parties. Probably, in order to avoid trouble, the arbitrators should make sure that the conditions of their role are all clear before accepting the appointment, just as is the case of the arbitral institutions. However, this is not only rare, but it would also be difficult to achieve.

From a practical standpoint, seeking a balance between both positions seems quite safer. The arbitrators should be cautious in the exercise of their powers and, in principle, use them when the parties cannot reach an agreement. But when there is an agreement, it is hard to

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imagine a scenario where it would not represent – to some extent – an advantage for the parties. Actually, the parties are arguably in the best position to analyze whether a solution satisfies their needs or not. Even when such an advantage may not be crystal clear, their opinion should hold some preference. Therefore, only in really extreme situations they should try using their powers to limit party autonomy. In any event, arbitrators should always try to persuade the parties to shape the proceedings in due course, showing them the advantages of the proposal. In turn, the parties should collaborate with the arbitrators by giving a second thought to their agreements, when the arbitrators suggest it. In any event, if the parties demonstrate a true conviction on the convenience of running the proceedings some other way, the arbitrators should be supportive and help them to enhance their idea. Showing this flexibility would probably prove an arbitrator to be *a good arbitrator*, and in the end... as is said, arbitration is only as good as the arbitrator is.

