Party Autonomy vs. Mandatory Rules in International Arbitration

by Olena S. PEREPELYNSKA

Needless to say arbitration, based on the agreement of the parties concerned, gives the latter possibility to determine the procedure of resolution of their case. This basic principle of arbitration is known as party autonomy.

According to one of the classic books in international arbitration — "Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitration institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition..."[1].

UNCITRAL Model Law *On International Commercial Arbitration* (Model Law) in its Article 19 (1) sets out the following provisions on party autonomy: "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". *On International Commercial Arbitration Act of Ukraine*, based on Model Law 1985, contains the same provisions.

Even from the wording of the Model Law it is obvious that the ability of parties to be master of proceedings is not absolutely boundless. So, an important practical question in this regard concerns actual limits to party autonomy.

Such limits or restrictions are established at several levels and to a certain extent depend on the time factor. In other words, from the moment of negotiating an arbitration agreement and up to receipt of an arbitral award, the extent of party autonomy could differ substantially. And even more, the applicability of certain restrictions could depend on the agreement of parties on particular questions, when reached.

Those restrictions, not allowing the parties to agree whatever they want, have different sources, purposes and background. For instance, in order to ensure validity, operability and capability of an arbitration agreement being performed, the parties shall comply with respective mandatory requirements established by law governing arbitration agreement in respect of both, form and content of the latter; indicate the correct and full name of the arbitral institution and its rules (if they agree on institutional, and not *ad hoc* arbitration) and also observe applicable mandatory provisions of the arbitration rules chosen, etc.

In addition, certain restrictions apply to the arbitration procedure as the latter should comply with mandatory rules of *lex arbitri* and law of the place of arbitration, if they differ.

The effect of the restrictions described above could be illustrated with the following examples. The parties could not agree on an oral form of the arbitration agreement if it should be in writing, they could not change arbitrability rules or modify/exclude applicability of some fundamental principles of arbitration, such as e.g. equal treatment (Article 18 of the Model Law). However, the practical difficulty in this regard could be to establish those mandatory rules of applicable law.

[1] A. Redfern and M. Hunter, with N. Blackaby and C. Partasides, Law and Practice of International Commercial Arbitration, 4th Edition, 2004 at p. 265.

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The Model Law, as well as national laws based on it, including Ukrainian legislation, provides no guidance on how to divide its provisions into mandatory and dispositive rules. Some provisions of the Model Law contain clear reference to the agreement of the parties on certain questions (e.g. Articles 3(1), 10, 11(1), 12(2), 13(1), 14(1), 17, 20, 21, 22, 23(2), 24(1), 25, 26, 28, 29, 30), thus allowing them to be qualified as dispositive rules. To the contrary, construction of some other provisions of the Model Law does not permit deviation from certain rules: e.g. Article 11(2) of the Model Law prescribes to comply with its Article 11(4),(5) and thus allows to qualify the latter as mandatory rules. But not all the provisions of the Model Law could be so easily qualified. For instance, Article 34 of the Model Law sets out rules on setting aside an arbitral award. In some Model Law jurisdictions the parties may waive the right to set aside future arbitral awards, while in others, including Ukraine, it is not permitted.

However, even the above listed dispositive rules give the parties rather ample opportunity to choose *ad hoc* or institutional arbitration, to determine the number of arbitrators and establish requirements to their qualification, to agree on the place of arbitration, language of arbitral proceedings, etc. But if the parties wish to agree some specific terms of their arbitration they should be even more cautious.

Yet another set of restrictions applies in institutional arbitration. The most apparent one concerns application by a particular institution of its own arbitration rules. Put in other words, when the parties agree to submit their disputes to a permanent arbitral institution, then they could not agree on conducting those arbitral proceedings according to the rules of another arbitral institution (e.g. the ICAC at the UCCI arbitration according to ICC rules). This principle is set out in respective institutional rules, and also in Article IV(1)(a) of *European Convention on International Commercial Arbitration, Geneva*, 1961: "Article IV — Organization of the arbitration:

1. The parties to an arbitration agreement shall be free to submit their disputes: (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution".

This restriction is connected *inter alia* with fulfillment of administrative functions by the administrative bodies of a respective institution. The institutional rules related to such functions are predominantly mandatory and could not be modified or waived by the parties. At the same time, the list of such functions varies depending on particular institution, and may include, e.g. scrutiny of arbitral awards under ICC Rules, appointing of a chairman of the tribunal by the Board in SCC Rules, appointing of a case reporter in the Rules of the ICAC at the Chamber of Commerce and Industry of the Russian Federation, etc. It goes without saying that the institutional rules on establishing sums of arbitration costs and fees could not be changed by an agreement by the parties.

The majority of institutional rules establish certain limitations with regard to procedures of appointment and challenge of arbitrators. For instance, Article 27(2) of the Arbitration Rules of the ICAC at the UCCI allows the parties to agree on a procedure of appointment of arbitrator(s) subject to the provisions of these Rules.

As far as the rules on conducting arbitral proceedings are concerned, the mandatory rules could be rather different, and qualification of certain rules as mandatory is not always an easy task. It is not a problem to deal with the rules designed as default ones, when the parties fail to agree otherwise, including opt in/opt out provisions. At the same time, realization of the parties' discretion with regard to some of those rules is subject to certain time limits. The latter is closely connected with the commencement and further progress of respective arbitral proceedings. By way of illustration, if the parties have agreed on a tribunal of three arbitrators, they could re-agree on a sole arbitrator only before the arbitral tribunal is fixed.

But how should a rule be qualified which is not designed so apparently dispositive and does not mention the parties' agreement? Can the parties still agree otherwise?

Those questions, if put in the context of applicable arbitration law(s), turn out to be even more complicated, especially if respective arbitration rules and national legislation set out different provisions on the same issue.

And finally, if the parties have agreed on certain issue, is that agreement always binding for the arbitral tribunal, or is it subject to the tribunal's approval?

There are no definite answers to all those questions, and, as practice and doctrine shows, on each occasion it is necessary to look for the respective answer in applicable rules even though sometimes it may not be not easy to find them.

Quite a reasonable approach in this regard, is taken by ICC Rules, establishing in their Article 15(1) the following hierarchy: "The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

But such "hierarchy provisions" are rather the exception than the rule. And thus, well-considered realization of party autonomy would allow potential problems to be avoided in the future.

IT IS OBVIOUS THAT the ABILITY of PARTIES to BE MASTER of PROCEEDINGS is NOT absolutely BOUNDLESS

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