**Written Skills in International Arbitration**

**Cours 1**

Timeline of an Arbitration Agreement:

* Request for arbitration
* Constitution of the Arbitral Tribunal
* Terms of Reference:
  + Generally contains some rules
* Statement of Claim (4/6 months)
* Statement of Defence (4/6 months)
* Document production phase:
  + today became a standard, because after the statements the TA generally knows what the Parties are standing for
* Reply (2/3 months)
* Rejoinder (2/3 months)
* Hearings
* Post Hearing Briefs
* Award

It is possible to have other phases with regards of the specification of the arbitration.

In Investment Arbitration: possible to divide the proceedings between the jurisdiction and the merits of the case.

Between the request for arbitration and the answer you will have only two months.

* Research of documents: need to investigate the facts, gets the correspondence from the clients, the draft history of the contract… the search for documents is very important and is key.
  + People don’t like to give documents
    - It is often what people have done in their corporation and as they will be afraid not to have done the right thing, will not give the documents nor factual elements.
  + Need to get the objective facts: in order to be able to have an overview of the case
  + Very important to have the history backed up by the facts
* Comply with the Rules:
  + There are very specific things to include in the various steps of the procedure and in the written elements as well
  + Be careful to draft as the Tribunal expects it
  + Evolution: also before the TA gave the Parties to draft as they wanted, but now TA have developed their own preferences and at the stage of Terms of Reference the TA will explain its preferences and the councils to apply these recommendations

The writing is an exercise of strategy: Cf. examples

Written advocacy:

* How to present a good argument? Format need to be respected, spell checks, foot notes…
* Regarding the content: it’s the way you write and present your arguments.
  + The TA will go back to your writings.
* Explain and convince the TA of your position.
  + Find the facts, the argument and write an outline.
  + Also witnesses: best strategy is to address the witnesses.
    - You do that with your clients, even thought need to dig.
* Investment arbitration: an investor and a case, the investor need to have a qualified investor actually making an investment.
* The way you raise issues must be extremely careful, because the proceedings might go back on it later on.
  + Very strategic matters
    - Build your theory!
  + The way the claims are drafted: clearly sets up the case.
* Need to make the most compatible defence with regards to the fact and your regard on the case
  + You tell a story including the “bad facts”: need to address them

Need to address all the claims:

* Answer to the Request for arbitration: just put an hint, not display the all case: it is not your statement
* Corruption: possible to argue fraud and that consequently the contract is null and void and therefore non enforceable, you can go as well to a criminal court
* However, in case you loose on that argument, need to argue on alternatives at the same time
* Statement of reply: need to appoint an expert to deconstruct the remedies.
* And then you address what you have to say.
* Also it is important not to right the same things depending on the judges
  + The TA does not like last minute surprises: so very early in the procedure all the elements must be displayed.
* Request for relief

Finally an important element is that you have to do every thing under the applicable law.

Regarding the costs of arbitration: share of the costs or possible to put the costs on to the losing party.

Corruption: International Public policy: bribery, corruption…Regarding all these elements, you need to look at the international public policy into the domestic law to have the details about how it is forbidden an sanctioned.

Request for relief:

Terms of reference:

UNCITRAL proceedings :

* language,
* confidentiality,
* calendar,
* everything about written submissions,
* document production,
* cost: institutional arbitration, ad hoc differen
  + in institutional arbitration: arbitration stops if the parties do not pay
  + ad hoc: advanced on cost payed by one party only and at the end, allocation on costs
    - it goes into the award and is therefore enforceable

Tribunal likes to start a process by knowing what the rules of the game will be: bible that will be the reference throughout the arbitration. Orders in general stating that if something raises: power given to the tribunal.

* counter claims on jurisdictions : convincing…
* table of content

Witness: statement and cross examination:

The US government

As a matter of strategy, it is often better to be the claimant. In Investment arbitration: generally the investors start the arbitration but counterclaims are allowed.

**Statement of Claim / Defence**

Statement of claim: assess the evidence you have.

In the US the discovery is pre-trial: you start the case by doing discovery: extremely aggressive and invasive but effective: even before any written submission

In Arbitration: used to be called discovery but as we don’t want a confusion: not going to be pretrial: it is generally after the first round of submissions

Supposed to give everything and then if something is missing you are supposed to hand it out

You want to put out the entire case

After this is done, then first: second round is a rebuttal of what as been said in the first instance

You hand out your documents and then ask what is missing : and the AT determines if it is relevant, can also require the production of it at any point

Only rebuttal afterwards

Document production: request, objections or production, decision of the AT and the for the party who loses production

Statement of claim: need to put the full case, experts reports, witness

Make sure the witness will make a statement that is not detrimental to him or others

And tribunals don’t like

The minister engages the responsibility of the state

Credibility: background, …

Religious oath ? a formal oath is not always taken

Make sure you render an enforceable award

Fifteen years ago, the principle evidence would have been documentary, today things have shifted: it has became much more

Experts you do have, but facts witnesses are often use to give some color to your case.

Evolving process: that takes time

And if no one is good given that credibility is key, then no fact witnesses

Claim: you cannot keep a key argument for later

However, according to the document production: possible to change your case

Anticipation of the witness statement: it is okay for lawyers to draft the statement

Possible to have a sentence at the end

Basically you seat down with the witness and take notes: possible to record and on the basis of that you can structure: but it has to be their word and their position

They have to go through the document and say every single word is theirs

Cannot twist

It can be sophisticated : you can make it simpler in ideas but not in the wording

No need to put 50 pages: the more you put the maximisation of chances

Sometimes: tactics; 2/3 pages

One important point: general in PO: prehearing teleconference

Question of the scope of examination : key

There is no rule, the assumption before was that not possible to examine it outside the scope of his statement, but for exports the assumption was that experts could be asked on outside questions : therefore principle shifted:

Now it is reversed: you can ask the witness about pretty much everything

Was much easier when keeping the cross examination in the scope: now very complicated

For instance a letter submitted but not comprehended in the witness statement

Human psychology;

Make sure he is willing to go through

Job to try to convince: tricky issue

Need to do it before filing the witness statement

If a very strong witness on an issue, no need of two more, depends however, of the position,…

There has been a shift: 15 years ago: was interesting to have witnesses, but today more a show: expect the show, so give it to them but you don’t want to bore them and need to be efficient

As a matter of tactic: other side wanted to burry them: on a vey narrow subject: 5 experts reports, then you select

Be careful: cross examination as a way of challenging

One of the type of provision : acceptation is no question during the cross examination

The AT wanted to be able to call pretty much anyone: pretty dangerous

But more and more: TA can appeal pretty much who they want

But possible to imit the scope of that provision : becoming the trend

Expert report: the principle is the same

Amicus curiae: can come to the assistance of the court

Can u examine amicus curiae?

Possible that the expert refuses to change a statement but negociation, if still refuses;, the decision is on you

Document production : the more you can target the better

No fishing expedition

And if you can match two letters: very difficult to object to the production on a meeting, or minutes of a meeting…

Read the IBA guidelines: relevance and materiality is the test, no fishing expedition and no burdensome documents

And then the priviledge: you can raise attorney/ client, when with a secret: defence document

Priviledge needs to be demonstrated

If you have given a document : waiver of priviledge : be careful

The documents: defence secrery: cannot even be spoke about

Also business secret: especially if competitors on the other side

Can be estimated by the Tribunal

Key timing: very technical and very aggressive

Civil law countries or asia: don’t want to produce the documents : teach to the clients

Anticipation is key

**Document production**

Document production: how you file your request and give the reason for your request and finally the TA’s decision: usually TA finds it burdensome

Need to justify carefully: privileged, defence secrecy…

Document production can be very intrusive

Need to anticipate in the briefs: usually writing the briefs and the documents’ requests at the same time

**Letters**

What is important is the reservation of rights.

The default is to be aggressive: important to adapt and find the right tone, much more effective to be more neutral

Fact based and no adjective nor adverbs, only when they bring something

Find a balancing tone

Need to structure the ideas: such as in statement of claim

Triggering letter: essential requirement to be able to start the arbitration

The arbitral tribunal

Respectfully request

**Case**

Request for arbitration :

* less bottles than agreed Non completion/non performance of the contract
* unilateral termination: Le contrat sera résilié à son terme: 2014
* always been working with them: they put an end to the business relationship : need to explain the relationship and the fact they were part of the success

Witness statement:

* clarify the nature of the relationship with the former group SODAPIC
* why waiting to end the contract?
* Property rights ?

CEO:

Creation of bottles best in France and Europe

At the end of the 90’s: contacted by SODAPIC who had a new bottle they wanted to sell in France and they came to get their unic expertise

99: started working

Glass 1 provided the bottles and we

“it was a huge success, everyone was pleases

we were ask by sodapic to share the decoration of the bottles with Glass 1

We were not hppy with it because we had made all the designs

We requiested sodapic to share the knowledge with Glass 1

XXXX Company from the Netherlands

We signed a contract in 2008: first contract with Bottles

Bottles: decided to formalize the agreement

They insisted to have this agreement, I was not so much in favour, they insisted so we signed

We have orders and a long term relation ship and for a lot of years they asked for the same decorations

Clause 12: company wich choose the bottles, an other that purchase

Glass1 is one of our major competitors in France, at the beginning they just produced bottles

They realizd money on the decoration

At the time we were surprise that Bottles decided not to pursue the contract and just continue the relation with glass1

We had the impression that they had cut a deal in our back therefore we told them if they kept on that idea SODECA would sue them

The settlement provided a concession reciproque

We agreed if we signed the settlement agreement they would sign a new contract

With this contract we could invest in orther projects

We really depended on this contract

We did not even discuss sharing knowledge at that time

Glass1 suggested to bottles they were able to decorate the

They are responsible for Bottles to brutaly terminate the contract

Therefore Bottles asked at the time of the settlement agreement that Sodeca waive its rights on the decorations

Our claim was not against Glass 1 it was also against bottles

Bottles: contract

Glass 1: non contractual claim

Paris soda is one of the major product commercialised in France and in Europe

This agreement provided we had a purchase order

We have been working on this product since 1999, in France when you have long relationship:

For us a guaranty to decorate XX bottles until XX

Glass1 were trying to cut price: I imagine it’s money

But they always told us our technics were better handle by our company than glass1

After 2004/2005 westoped speaking our only contact was through Sodapic and Bottles

Reserve the rights to sur them if the contract was terminated

Making a lot of investment and the finance department were making calculations and that is how we got to these number of letters

The volumes were decreased in the avenant: we signed the avenant at their request and then we realise they were still not performing their obligation

Favour making them but if they did not respect their new obligations in the avenant we would go back to the original agreement

These specific bottles request a particular tecnic: we use serigraphic

Cook the bottles

All tehse different technics we make different models of design and use them on the bottles,

All the different steps that we

And that we adapted to these bottles

Without our assistance they could not have decorate the bottles the way we have

And serigraphy also requires specific material we invested for

We had the assurance of Sodepic that the relationship would go on and as we were long term partner we relied on our long term relationship to share our technics

We never even imagine to

They contract with us for our capacity to design and

We did not register the patterns because that is why they engaged us for

My knowledge is protected under French law

In order to decorate millions of bottles we had to invest by a new factor, hire new employees: normal investment based on the guara,ntee we would have to decorate millions of bottles

And in addition to that we had R&D: lots of requirement with new inks, more environnemental norms,… the investment is essential

Tremendous pressure from the Bottles : 100 000 bottles and we started to decorate millions and we had to repect the delays

And when we reach the point where we were not able to complete their commands, we had to share our knowledge because we were afraid at some point to loose the business

They convinced us they would have more business to give to us in the coming years

Clearly they were suggesting that any refusal may have severe consequences in the future

Article 2: new process : increase of your productivity

They wanted to have this new line because technic used in the US market and they had requested this new technic: Glass 1 unable to do this

We showed them what we were able, we invested to prepare for this ew technic but I believe they had already decided to terminate the contract

They were saying Glass 1 was not providing the bottles and that theywould come next month but they did not and we kept investing

Bottles is one of our main client and we wanted definetly to keep this client

And even if they could not perform their obligation which was a breach we wanted to keep our partnership

4 million bottles : 14 million euros

we made some choices

there are letters SODAPIC complented us

In our mind our decoration is the main reason why Paris Soda succeed

Marie Durand: she works on the factory, is the person I rely on, she can assess the volums produced

She was an engeenir

She decided to join one of our competitor

I don’t like them: try to still my business

We were dependent on this business, and to share all our knowledge

We have a 10 years partnership: brutal termination

We were anticipating that they wanted to renogociate the contract because they had do so and it was also not in line with their behaviour as they were always referring to our projects and new designs needed, attempt on their hand to renegotiate the bargain: they tried to convince us they had no intent on terminating

They did not really stop speaking about the future

Consequences: we did not renewed contract, decided not to recruit 100 person, did fired 5 assistants..;

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whether the witness fills gap

**Cours 4**

A witness is only there to give a testimony as to the facts.

Difficulty: strategy and opinions.

Important to develop on the activity.

Need to think about:

* to what extent putting a witness can be risky ? what is the extent on the case?
* Sometimes witness statement can be a wining or loosing factor

IBA Guidelines : accepting that lawyers write Witness statement

Correction : point 4 : no “understand”: because was an actor of the situation

The end

Important for the At to have someone “involve”

Assume the AT does not know the case