Terms of Reference.

An Arbitrator's Perspective

Karen Mills
Chartered Arbitrator
KarimSyah Law Firm, Jakarta

One of the features which sets ICC arbitration references apart from other arbitration procedures, institutional or *ad hoc*, is the requirement for Terms of Reference ("TOR"). Article 18 of the current (1998) ICC Rules sets the drawing up of the TOR as the first activity of the Tribunal, as soon as it has received the file from the ICC Secretariat. Article 13 calls for the Secretariat to transmit the file, consisting of, *inter alia*, the Request for Arbitration, the Answer thereto and any counterclaim, if any, to the Tribunal as soon as the Tribunal has been constituted, provided that the Secretariat has by then received an advance at least sufficient to cover costs through to the completion of the TOR.

Although a requirement only for ICC arbitrations, TOR, or a close equivalent, may sometimes be utilised in other references where the arbitral tribunal deems it appropriate or helpful, and although many arbitrators find it an unnecessary waste of time, some others with considerable ICC experience, tend, in appropriate cases, to carry this procedure through to other, non-ICC references as well.

Particulars of the TOR

The primary purpose of the TOR, today, is to define the scope of the arbitration and, unless the arbitrators do not deem it appropriate, identify the issues to be decided. Article 18 (1) of the ICC Rules requires the TOR

to contain at least the following particulars:

"a) the full names and descriptions of the parties;

b) the addresses of the parties to which notifications and communications arising in the course of the arbitration may be made;

c) a summary of the parties' respective claims and the relief sought by each party, with an indication to the extent possible of the amounts claimed or counterclaimed;

d) unless the arbitral tribunal considers it inappropriate a list of issues to be determined;

e) the full names, descriptions and addresses of the arbitrators;

f) the place of arbitration; and

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*."

Additional points may, in the discretion of the Tribunal or if requested by the parties, be included as well. These might include specification of the language of the arbitral reference, directions as to the giving of evidence, discovery, if any, exchange of witness statements, perhaps witness-conferencing, form for submission of documentary evidence and other notices between or among the parties and the Tribunal, and often a notation allowing the Chair to issue procedural directions on behalf of the other arbitrators, in the case of the three-person Tribunal.

Background

Terms of Reference have been a feature of ICC arbitration since the ICC promulgated its first set of rules in 1923, although at that time they were referred to as "Form of Submission" and were to be drawn up by the

Secretary of the Court and not by the Tribunal. It was in the 1955 revision of the rules that the phrase "Terms of Reference" was first applied, and at the same time the duty to draw these up was shifted to the Tribunal[1]. Since that time there have been several revisions to the form or substance of the TOR, perhaps the most significant ones occurring in the most recent, 1998, version, which has relaxed some of the requirements and given more discretion to the Tribunal.[2]

The ICC originally deemed the TOR necessary since many civil law systems, the French in particular, did not recognise as binding an agreement to arbitrate entered into by the parties prior to the existence of a dispute, such as an arbitration clause in their underlying commercial contract. Such systems required that the parties agree upon arbitration as the means to settle their dispute only after the dispute had materialised, by means of an agreement, often known as "*compromis*", which would not only designate the forum for resolution but also identify the issues to be adjudicated. Thus the TOR was originally intended to serve as a *compromis*, and the practice has continued in ICC arbitrations to this day, despite the fact that most civil law jurisdictions, France included, now recognise pre-dispute agreements to arbitrate as binding on the parties: a necessary adjunct to freedom of contract.

Civil Law vs. Common Law Practice

As undoubtedly some of my colleagues will also mention in this symposium, one of the great challenges, and beauties, of international arbitration has

1 Note we use the term "Tribunal" herein to designate the arbitrator or arbitrators sitting in any subject reference, despite the fact that most ICC arbitrations are heard by a single arbitrator rather than three, from which the term "tribunal" emanates.

2 See also Michael Schneider, *The Terms of Reference*, in The New Rules of Arbitration - Special Supplement, THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, November, 1997.

been its ability to merge, or reconcile, many common and civil law practices yielding almost a hybrid procedural regime, with considerable flexibility allowed to the arbitrators in their conduct of the proceedings. While civil law litigation techniques depend almost entirely on documents: comprehensive pleadings, witness statements, memorials and other documentary evidences, all of which are exchanged among the parties and the court or, in the case of arbitration, the Tribunal, with oral hearings held only where requested by a party or deemed necessary for clarification by the Tribunal; the usual common law strategy is to provide the minimum possible information to the opposing party and the court (or Tribunal) at the outset and allow the facts to emerge through requests for further information and documentation by the other party (discovery) and extensive cross-examination of witnesses in prolonged hearings. Often parties will not fully disclose even the issues at stake or the relief sought at the outset, so as not to allow their opponent sufficient notice adequately to prepare counter arguments and evidences. Indeed, the TOR eliminates this cost- and time-inefficient common law practice.

Almost all arbitration rules today allow the Tribunal to conduct the arbitration in such manner as it deems appropriate, and the tendency is normally, particularly where the parties originate from diverse systems of law, for the emphasis to be on documentary submissions, with only minimal hearings called, first to structure the procedures and schedule submission and hearing dates, and then for examination (generally only cross-examination) of witnesses, but only to the extent that the arbitrators or opposing party, needs to clarify or substantiate the evidence provided in witness statements. Limited discovery may be allowed, but for the most part each party's case will rely upon such evidences as that party itself will introduce. In this sense international arbitration seems to follow civil law procedures somewhat more than it does those of the common law, although

it should be noted that the common law custom of citing and following precedent in similar cases is applied, often even more broadly than it might be in a single common law jurisdiction, as cases from any jurisdiction may be cited and relied upon in a party's legal argument, to be considered by the Tribunal at least as guidance, although not necessarily binding precedent.

Drawing up of the TOR

As arbitration is a creature of consent of the parties, the parties will have the right to agree upon most aspects of the conduct of the arbitration. Where the parties do agree, the Tribunal is normally bound to follow such agreement. Parties, or more often their counsel, may take a cooperative attitude and agree upon such matters as scheduling, scope of discovery, if any, number and nature of witnesses and the procedure for presentation of evidence. Parties may also be able to agree upon the characterisation of the issues in dispute without intervention by the Tribunal. A high degree of cooperation between or among the parties makes the drawing up of the TOR a very smooth exercise for the arbitrator. Such cooperation is not common today, but it is certainly consistent with the original spirit of arbitration: a gentleman's way of resolving disputes where both sides cooperate to reach a solution, smoothly, quickly and fairly.

More often, however, the parties do not take the initiative to cooperate and sometimes, particularly where common law litigating counsel are involved, a party may utilise all manner of delaying or obstructing tactics to frustrate the other party's efforts to reach consensus. In such cases, the Tribunal will need to take a more pro-active role.

Article 18 (1) of the ICC Rules call for the Tribunal to draw up the TOR ". . *on the basis of documents or in the presence of the parties and in the light of*

their most recent submissions. . ." as soon as it has received the file from the Secretariat. Often there will be additional submissions of the parties in the interim between receipt of the file and drafting of the TOR, such as suggested language for the TOR itself, and these, of course, will also be considered. The TOR is to be signed by the parties and the members of the Tribunal and submitted to the Secretariat within two months of date of transmittal of the file to the arbitrators. This time limit may be extended if required, but most Tribunals seek to comply, and sometimes are able to complete and submit the TOR more quickly than that.

Clearly the Tribunal has discretion whether to formulate a draft on its own before submitting it to the parties for their consideration, or to consult the parties: in writing, by conference call or at a hearing/meeting to discuss the matters face to face. The latter is recommended where the parties and arbitrators are in geographical proximity, or where the issues are complex and the quantum of the dispute substantial. However, for a moderate claim, and particularly where the parties and arbitrators reside far apart, it may be more cost- and time-effective for the arbitrators to prepare a draft for the parties' consideration, either at the outset if the issues seem reasonably clear from the initial pleadings, or after discussing with the parties by teleconference, conference call, or in writing. Or the parties may be invited to submit their own suggested draft language for consideration by each other and by the Tribunal. And, as mentioned above, occasionally, if the parties are represented by cooperative counsel experienced in ICC practice, they may together prepare a draft for consideration by the Tribunal. While allowing the parties to prepare the draft TOR sounds attractive from the viewpoint of cooperation towards possible settlement, it may also have its drawbacks. More time than is warranted (with resulting waste of parties' legal costs) may be entailed in the negotiations. And, more importantly, if this task is done for them the arbitrators may not take the

opportunity at this point to analyse the issues nor fully familiarise themselves with the pleadings and nature of the dispute. Many ICC arbitrators use the TOR as a framework for the eventual drafting of the award, and this opportunity, and perhaps some of the issues, may be missed if the Tribunal itself does not take part in the drafting of the TOR.

Of course, the latter concern would not matter if the cooperation of the parties in drawing up the TOR should result in a settlement of the dispute. And indeed that is the potential beauty of the TOR, as it forces each of the parties to recognise each other's position and seek to reach consensus on certain matters right at the outset, a step in the right direction if the parties are sincere in their desire to seek resolution of the dispute. However, this kind of idealistic resolution is rare, and normally even negotiations for the TOR can be fraught with delay, recalcitrance and other difficulties.

If one of the parties refuses to participate in the drafting of the TOR, and/or to sign it, the Tribunal may submit the TOR to the ICC Court for its approval. Needless to say, a party not a signatory to the TOR cannot be held to be limited by the characterisation of its claims as set out in the TOR, and this should be kept in mind by the Tribunal during the later conduct of the reference. Once the TOR has been signed by all or, if not by all, approved by the ICC Court, the arbitration may then proceed, and should do so as time-efficiently as possible as the Tribunal is required to render its award within six months thereafter (Art. 23), although this time limit may be extended if deemed necessary.

Scheduling

In addition to the requirements set out in Article 18 (1), some parties seek to include in the TOR schedules for submissions and hearings. However, this is generally not recommend because the TOR is a contractual

agreement among the arbitrators and the parties, which each has signed on to (unless approval of the Court was necessitated by the failure of a party so to do), and thus any subsequent alteration to such schedule could require an amendment of the TOR, again to be signed by all parties and the arbitrators. This would give a recalcitrant party an excellent opportunity to cause unnecessary delay. As a practical matter, it is rare that an arbitration proceeds without some alteration to initially anticipated scheduling, and thus to bind everyone to a schedule at the outset is impractical.

Instead, Article 18 (4) provides for the schedule to be established in a separate document, either at the same time as the TOR or as soon thereafter as possible. This document might be in the nature of a direction or order of the Tribunal, or even a consent order of the parties which, creating arbitral rather than contractual obligations, can be altered at a later date as and when necessary.

Contents of TOR

As for content of the TOR, most of the particulars will not be in issue. The identification of the parties and the arbitrators and addresses for notification should raise no controversy. The place of arbitration normally will have been designated by the parties in their agreement to arbitrate but if it has not, and the parties have not subsequently agreed upon such a place, it will have been set by the ICC Court in accordance with Article 14 of the ICC Rules, although the Tribunal may wish to hold hearings elsewhere, and it may do so, after consultation with the parties. Procedural rules to govern an ICC arbitration will be those currently in force of the ICC, and, where such rules may be silent on an issue, such rules as may be agreed

upon by the parties or, if the parties cannot agree, as designated by the Tribunal.

The TOR should also set out whether the parties have agreed, either in the underlying agreement to arbitrate or subsequently, to give the Tribunal the power to act as *amiable compositeur* or decide *ex aequo et bono*, or if they must strictly adhere to the letter of the governing law and the underlying contract only. This issue should be considered carefully, particularly if there may arise issues which are not specifically covered by the contract or the law. It is not always possible to determine this at this early stage and thus the arbitrators may wish to encourage the parties to allow this kind of flexibility for the Tribunal. But note, the Tribunal does not have discretion to assume this power. It can only be granted by consent of the parties.

The substantive matters contained in the TOR, which are the ones that are most likely to entail discussion and negotiation, are primarily the identification of the issues and the summary of the respective claims and relief sought by each party. As mentioned above, if the parties, or their counsel, are civil law based, the pleadings submitted with the file will probably be sufficiently clear to allow the Tribunal to draft a reasonable characterisation of all of these for submission to and discussion with the parties. Some common-law based parties may not have fully expressed their position in their initial written submissions to the ICC, in which case more clarification from such parties will be necessary, either in person or through written or telephonic communication.

The most simple approach may be to ask the parties to set out a brief summary of their respective positions themselves, or the Tribunal may simply copy, or summarise, the relevant portion of the parties' initial submissions as summaries of the parties' respective claims and relief sought. The ICC rules require the parties to state the relief they are

seeking in their Request for Arbitration (in the case of the claimant) or counterclaim, if any (in the case of the respondant), and these must be set out in the TOR. Of course it is always possible that, as the case develops, circumstances may arise which will necessitate a party to seek to revise the relief sought. Generally the parties will be bound by, and restricted to, the claims they have made in their Request for Arbitration and counterclaim, if any, as those are the instruments upon which the jurisdiction of the Tribunal is based. However, as long as no new claim is asserted, nor the basic nature of a claim altered, the Tribunal will have the discretion to allow certain adjustments by the parties, provided no breach of natural justice results (i.e. as long as the ability of the other party to present its case is not compromised.)

Issues

Normally the most contentious point to be included in the TOR is identifying the issues to be determined. In relatively simple cases this should be evident from the submissions. However in practice few arbitrations are so simple and it may be difficult for the arbitrators to determine everything that is in issue, or for the parties to agree thereon at the outset. Often, as the reference progresses, issues not initially anticipated may emerge. Or whether or not a point may be in issue may depend upon determination of another substantive, or even procedural, issue. Thus it is not always feasible to agree upon an exhaustive list of issues at the TOR stage. Furthermore, it is possible that having agreed upon a set list of issues to be decided, subsequent events in the conduct of the reference may make determination of one or more of those listed unnecessary. This will put the Tribunal in a dilemma. They will have agreed to determine one set of issues but, as a result of the progress of the

reference, the award will not cover all of these, and/or will determine others not specified in the TOR. Such a divergence could jeopardise the enforceability of the award if an objection were to be made pursuant to Article V of the New York Convention or Article 36 of the Model Law (where applicable) or an equivalent provision in the law of the place in which the award is sought to be enforced. These provisions allow a court to refuse enforcement of an award where the tribunal exceeds its mandate or fails to decide a matter which has been put before it.

In order to avoid the above situation, it may be more prudent, and certainly less contentious at that early stage, to mention only the very major issues that are certain to be at the heart of the controversy, with a notation allowing others to emerge. Such language as: ". . . and such other issues as may be raised by the parties in the course of the proceedings" might be inserted after a partial list. Or, in exceptionally complicated cases, the Tribunal may opt not to specify any issues at all, but simply to state that the Tribunal shall decide ". . . such issues as may arise in the course of the dispute as shall be set out in the submissions of the parties." Article 18 (1) (d) would seem to allow for such language, as its requirement is stated: ". . .*unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined*." Such flexibility can also be inferred from the fact that the previous version of the ICC rules made the listing of issues mandatory, and the new language, above, was inserted specifically to give the Tribunal some discretion as to whether, or to what extent, to bind themselves to a set list of issues for determination at the TOR stage. Again, this flexibility may sometimes be necessitated by the common-law tendency not to disclose all issues at the outset, but to utilise the element of surprise as a strategic tactic.

Does the TOR Replace the Agreement to Arbitrate?

As mentioned at the beginning of this paper, the practice of the ICC to require TOR emerged from the requirement in many civil law jurisdictions that an agreement to arbitrate may only be effective if entered into after the dispute has arisen. In such cases the TOR became the actual agreement to arbitrate which granted the jurisdiction to the Tribunal to resolve the dispute, thereby divesting the applicable courts of such jurisdiction.

Some parties have extended that reasoning and argue that, once executed, the TOR therefore supersedes and replaces the parties' original agreement to arbitrate, normally embodied in their underlying commercial contract. If we view the question logically we can see that the above is not at all a tenable position. The TOR is executed only after the Tribunal has been constituted and vested with jurisdiction to hear the dispute. If the TOR itself were the instrument granting such jurisdiction, the Tribunal could not be constituted until after the parties had executed the TOR. Nor would the ICC have the jurisdiction to administer the reference, as its jurisdiction derives from the original agreement of the parties to refer disputes to it, embodied in the underlying contract. Furthermore, if for some reason one of the arbitrators had subsequently to be replaced, the Tribunal, now being differently constituted, would no longer have jurisdiction over the dispute. Thus the correct way to consider the TOR today, is as an agreement among the parties and the Tribunal, clarifying the dispute and, in part, the conduct of its resolution, executed pursuant to the parties' agreement to arbitrate, which agreement remains in effect. It can a an excellent procedural tool for structuring the conduct of the proceedings and the eventual form of the award.

TOR Beyond ICC

Although, as mentioned earlier, the TOR is a requirement only for ICC arbitrations, there is nothing to prevent a tribunal from seeking to execute TOR or a similar agreement together with the parties to a non-ICC arbitral reference, provided neither the *lex arbitri* nor the applicable procedural rules would so prohibit. We might refer to this as *ad hoc* TOR, as opposed to the ICC TOR. For non-ICC arbitrations, the precise requirements of and controls on the ICC TOR would not need to be complied with and the tribunal might include whatever terms they deem appropriate to have agreed upon at the outset of the reference. In particular, using the vehicle of TOR to identify issues and set out other parameters for the conduct of the reference in the rare case where there are no pleadings, or in very simple "small claims" arbitrations may prove a most useful tool and aid for an efficient resolution of such dispute.

And, most importantly, sometimes the process of the parties and arbitrators reaching consensus on the matters to be included in the TOR may present an opportunity for the parties to get together and settle their differences entirely. In such circumstances, the TOR may even become a mechanism of ADR.

Karen Mills, *J.D., F.CIArb, FSIArb, FHKIArb*
Chartered Arbitrator
KarimSyah Law Firm, Jakarta
kmills@cbn.net.id
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