



Do's and don'ts during arbitration proceedings

Franco Brusa, attorney at law, Bolla Bonzanigo & Associati

GASI/ACC Conference 19.10.2017

Do's – Don'ts

- I. Before choosing arbitration proceedings
- II. Before starting arbitration proceedings
- III. When starting arbitration proceedings
- IV. During arbitration proceedings
- V. After the arbitral award

I. Before choosing arbitration proceedings

Choice between:

- Arbitrational jurisdiction
- State courts jurisdiction
- Mediation

I. Before choosing arbitration proceedings

Do ask yourself about:

- your expectations
- check/establish your internal policies
- advantages – disadvantages, both:
 - according to your internal policies
 - with reference to the precise case at hand(before drafting the arbitration clause / the arbitration agreement)

I. Before choosing arbitration proceedings

Do consider the type of arb. proc.:

- choice between:
 - *ad hoc* arb. proc.
 - *administered/institutional* arb. proc.
- if *administered* arb. proc.:
 - **do** check the governing rules (different rules on several issues)
 - type of arb. proc.:
 - ordinary
 - expedited

II. Before starting arbitration proceedings

Drafting an arb. clause / arb. agreement:

- *ad hoc* arb. proc.:
 - **do** refer to a lawyer practicing arb. proc.
 - keep the arb. clause as simple as possible but complete
 - **do** take as example the clauses proposed by the most known Arbitral Institutions

II. Before starting arbitration proceedings

Drafting an arb. clause / arb. agreement:

- *administered* arb. proc.:
 - **do** take the clause proposed by the corresponding Arbitral Institution
 - **do not** invent your own arb. clause

- **Swiss Rules Arbitration clause (model):**

“Any dispute, controversy, or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the **Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution** in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.

The number of arbitrators shall be ... (“one”, “three”, “one or three”);

The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country);

The arbitral proceedings shall be conducted in ... (insert desired language).”

- **ICC Arbitration clause (model):**

“All disputes arising out of or in connection with the present contract shall be finally settled under the **Rules of Arbitration of the International Chamber of Commerce** by one or more arbitrators appointed in accordance with the said Rules.”

II. Before starting arbitration proceedings

Drafting an arb. clause / arb. agreement:

- In all cases:
 - **do** fix:
 - the place of arbitration
 - the number of arbitrators
 - the language
 - **do** put the arb. clause in the contract itself [not (only) in the General Conditions]

II. Before starting arbitration proceedings

Drafting an arb. clause / arb. agreement:

- **do** remember the importance of the choice of the place of arbitration:
 - few procedural rules – possibility to challenge the award
 - not necessarily place of the hearings

II. Before starting arbitration proceedings

Drafting an arb. clause / arb. agreement:

- **do** remember to choose the applicable law to the merits of the dispute (usually separate clause)
 - **do not** leave this point open for the arbitrators' decision

III. When starting arbitration proceedings

Choice of the arbitrator:

- **do not** confuse the role of the arbitrator with the one of your counsel
- **do** remember to appoint an arbitrator who:
 - is accepted / recommended by your counsel
 - is “compatible” with the adverse party’s arbitrator
- **do** remember the qualities of your arbitrator and thus choose an arbitrator with:
 - experience in arb. proc./ in the matter itself
 - good reputation
 - respect

IV. During arbitration proceedings

Choice of procedural rules:

- **do not** request to apply a Civil Procedure Code
- **do** leave freedom to the arbitrators to “dictate” the procedure
- non-existence of a Code of Arbitration procedure
- existence of fundamental principles
(*right to be heard – right to equal treatment*)
- existence of best practices (for example IBA Rules on the Taking of Evidence in International Arbitration, IBA Guidelines on Conflicts of Interests in International Arbitration)

IV. During arbitration proceedings

Choice of procedural rules:

- **do** leave the arbitrators the task to propose light-short procedural rules
- **do** request to fix a few rules at the beginning of the arb. proc.
- **do not** get lost in re-writing complicated procedural rules
- **do** ask to set up a provisional timetable, at least up to the beginning of the taking of evidence

IV. During arbitration proceedings

Additional rules:

- **do** give the arbitrators the possibility to propose a settlement at any time (mainly upon request of the parties)
- **do** fix such rule in writing and complete it with a rule excluding the possibility of the parties to challenge the arbitrators because of a settlement proposal

IV. During arbitration proceedings

Additional rules – behaviour of the parties:

- **do not** try to influence your arbitrator
- **do** remember that “your” arbitrator is only a “preferred communication tool” for procedural necessities only but **do** remember that the rule is a direct communication with the chairman – **no** secret communications

IV. During arbitration proceedings

Additional rules – behaviour of the parties:

- **do** keep a collaborative behaviour with the arbitrators
- **do not** fight on all possible small procedural issues, but **do** challenge immediately any possible relevant procedural mistake of the arbitrators
- **do** keep a respectful behaviour with the adverse party
- **do** ask for realistic deadlines

IV. During arbitration proceedings

Taking of evidence:

- **do** give the arbitrators the freedom to propose how and where to take evidence
- **do** concentrate taking of evidence hearings in one or two sessions, if necessary even several days in a row
- if reasonable, **do** accept to take evidence not necessarily at the place of arbitration

IV. During arbitration proceedings

Taking of evidence:

- Parties' depositions:
 - **do** remember that parties have the right to be heard
- Witnesses' depositions:
 - **do** "prepare" your witnesses
 - **do not** refrain from asking for expert-witnesses
- Parties' expert opinions:
 - **do not** refrain from producing own expert opinions (on technical issues / on foreign law)

IV. During arbitration proceedings

Taking of evidence:

- Depositions:
 - **do** discuss and fix the method of deposition:
 - oral hearings only
 - written statements + oral hearing
 - full recording
 - dictation
 - written statements: **do not** submit statements prearranged by the counsel

IV. During arbitration proceedings

Taking of evidence:

- Documentary evidence:
 - **do** keep a perfect order with progressive numbering
 - in case of large documents, **do** indicate the relevant pages
 - **do** save the arbitrators from making copies

IV. During arbitration proceedings

Taking of evidence:

- Further recommendations:
 - **do not** take by surprise the arbitrators with new facts and new documents
 - **do not** produce documents during depositions

IV. During arbitration proceedings

After the taking of evidence:

- **do** file a final written brief
- final oral hearing:
 - only if requested
 - for responding to the final written briefs only
- **do not** request to file a written answer brief to the adverse party's final brief unless new serious grounds

IV. During arbitration proceedings

Recommendations to the arbitrators:

- **do not** steer the taking of evidence according to your first convictions deriving from the briefs and the documents
- **do** conduct the process of arbitration; **do** guarantee the right to equal treatment and the right to be heard
- **do not** take over the role of the parties' counsel

V. After the arbitral award

- **do** remember deadlines not only for appealing but also for requesting corrections and interpretations of the award
- **do** remember possible issues regarding confidentiality
- **do not** publish the award before having checked the confidentiality issue



Thank you